

SETTLEMENT AGREEMENT

1 INTRODUCTION

1.1 Parties

This Settlement Agreement is entered into by and between Whitney R. Leeman, Ph.D. (“Leeman”) and Kimpton Hotel & Restaurant Group, LLC (“Kimpton”), with Leeman and Kimpton collectively referred to as the “Parties.” Leeman is an individual residing in California who seeks to promote awareness of exposures to toxic chemicals and improve human health by reducing or eliminating hazardous substances contained in consumer products. Kimpton employs ten or more persons and is a person in the course of doing business for purposes of the Safe Drinking Water and Toxic Enforcement Act of 1986, Health and Safety Code § 25249.6 *et seq.* (“Proposition 65”).

1.2 General Allegations

Leeman alleges that Kimpton has sold in the State of California, without the requisite Proposition 65 warning, flame cooked ground beef burgers containing benz[a]anthracene, benzo[a]pyrene, benzo[b]fluoranthene, benzo[k]fluoranthene, and indeno[1,2,3-cd]pyrene, which are cancer-causing chemicals listed pursuant to Proposition 65. Benz[a]anthracene, benzo[a]pyrene, benzo[b]fluoranthene, benzo[k]fluoranthene, and indeno[1,2,3-cd]pyrene shall be referred to as the “Listed Chemicals.”

1.3 Product Description

The products covered by this Settlement Agreement are flame cooked ground beef products, including, but not limited to, *The Burger*, that are sold or offered for sale in California by Kimpton (collectively “Products”).

1.4 Notice of Violation

On or about August 16, 2012, Leeman served Kimpton and various public enforcement agencies with a “60-Day Notice of Violation” (“Notice”). In the Notice, Leeman alleged that Kimpton was in violation of Proposition 65 for failing to warn customers, consumers, and employees in California that certain flame cooked ground beef products containing the Listed

Chemicals sold by Kimpton exposed consumers to the Listed Chemicals. To the best of the Parties' knowledge, no public enforcer has commenced and is diligently prosecuting the allegations set forth in the Notice.

1.5 No Admission

Kimpton denies the material factual and legal allegations contained in the Notice and maintains that all of the products it has sold in California, including the Products, have been, and are, in compliance with all laws. Nothing in this Settlement Agreement shall be construed as an admission by Kimpton of any fact, finding, conclusion of law, issue of law, or violation of law; nor shall compliance with this Settlement Agreement constitute or be construed as an admission by Kimpton of any fact, finding, conclusion of law, issue of law, or violation of law, such being specifically denied by Kimpton. This Section shall not, however, diminish or otherwise affect Kimpton's obligations, responsibilities, and duties under this Settlement Agreement.

1.6 Effective Date

For purposes of this agreement, the term "Effective Date" shall mean the date upon which this Settlement Agreement is fully executed by the Parties.

2 INJUNCTIVE RELIEF: WARNINGS

2.1 Warning Language and Method

Commencing within 30 days of the Effective Date and continuing thereafter, Kimpton shall, for all Products that it sells or offers for sale in California, provide the following

Proposition 65 health hazard warning ("Warning"):¹

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¹ Kimpton may add the bracketed language appearing in the Warning and language regarding additional chemicals and/or products, only if Kimpton has knowledge—either based on testing conducted by a U.S.-based laboratory employing methods for detection and analysis of chemicals authorized by state or federal agencies, or ground in facts that are generally accepted by relevant regulatory agencies—that chemicals known to the State of California to cause cancer, birth defects, or other reproductive harm are present in food products it sells, offers for sale, serves, or distributes in California

WARNING: Chemicals known to the State of California to cause cancer [and birth defects or other reproductive harm] may be present in foods or beverages sold or served here.

For example, polycyclic aromatic hydrocarbons (PAHs), which are formed as byproducts of cooking, are found in certain grilled meats, such as flame-cooked beef [may add additional chemicals or products].

Items appearing in brackets are optional. The Warning shall be prominently placed with such conspicuousness as compared with other words, statements, designs, or devices so as to render it likely to be read and understood by an ordinary individual under customary conditions before purchase or consumption. Specifically, the Warning shall be provided through the posting of a sign that meets or substantially complies with the criteria set forth below.

The Warning will be displayed on a sign (“Warning Sign) that is eight and a half inches by eleven inches (8 1/2” by 11”), with the word “WARNING” centered from left to right margins in ITC Garamond bold condensed type face, or similar font, in all one-inch capital letters. Three sixteenths of an inch from the base of the word “WARNING” shall be a line extending from left to right across the width of the sign one sixteenth of an inch in thickness. Centered one half inch below the line shall be the body of the warning message. The Warning shall appear in ITC Garamond bold condensed type face or a similar font.

A Warning Sign must be placed so that it is clearly visible to consumers in each of the following locations, if such location exists now or in the future: (1) at the hostess station or, if there is no hostess station, at any other place where the sign is reasonably likely to be seen and read by customers entering to the restaurant area, (2) at each take-away or to-go doorway or window, (3) at each counter where food is purchased, and (4) in the bar area next to the posted business licenses.

2.2 Compliance Review

Beginning on the date that is 30 days following the Effective Date, and continuing at least once a year for three years thereafter, Kimpton shall perform a compliance review, as to each of its restaurants in California selling any Products, to assess and ensure that each location is in

compliance with all of the requirements of Section 2.1. The compliance review shall be documented in writing, noting with specificity, at a minimum: any deficiencies regarding compliance, the date those deficiencies were discovered, and the date by which the deficiencies were corrected. All documentation regarding this compliance review shall be retained by Kimpton for at least one year from the date produced, and shall be promptly shared with Leeman, upon Leeman's written request. Kimpton shall, within 14 days of the compliance inspection or notification of noncompliance by any other means, correct any deficiencies, including replacing damaged or missing Warning Signs.

3 MONETARY PAYMENTS

3.1 Civil Penalties

In settlement of all the claims referred to in this Settlement Agreement, within 30 days of the Effective Date Kimpton shall pay a total of \$3,300 in civil penalties, allocated in accordance with California Health & Safety Code § 25249.12 (c)(1) & (d), with 75% of the funds remitted to the California Office of Environmental Health Hazard Assessment ("OEHHA"), in the form of a check issued to "OEHHA," and the remaining 25% of the penalty remitted to Leeman, in the form of a check made payable to "The Chanler Group in Trust for Whitney R. Leeman." All penalty payments shall be delivered to the addresses listed in Section 3.3 below.

3.2 Reimbursement of Fees and Costs

The Parties reached an accord on the compensation due Leeman and her counsel under general contract principles and the private attorney general doctrine codified at Code of Civil Procedure § 1021.5 for all work performed in this matter. Under these legal principles Kimpton shall pay \$25,000 for all fees and costs incurred investigating, bringing this matter to its attention, and negotiating a settlement in the public interest. Kimpton shall deliver payment, in the form of a check payable to "The Chanler Group," within 30 days of the Effective Date, at the address provided in Section 3.3.1(a).

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3.3 Payment Procedures

3.3.1 Issuance of Payments

(a) All payments owed to Leeman, pursuant to Sections 3.1 and 3.2, shall be delivered to the following address:

The Chanler Group
Attn: Proposition 65 Controller
2560 Ninth Street
Parker Plaza, Suite 214
Berkeley, CA 94710

(b) All payments owed to OEHHA pursuant to Sections 3.1, shall be delivered directly to OEHHA (Memo line “Prop 65 Penalties”) at one of the following addresses, as appropriate:

For United States Postal Service Delivery:

Mike Gyrics
Fiscal Operations Branch Chief
Office of Environmental Health Hazard Assessment
P.O. Box 4010
Sacramento, CA 95812-4010

For Non-United States Postal Service Delivery:

Mike Gyrics
Fiscal Operations Branch Chief
Office of Environmental Health Hazard Assessment
1001 I Street
Sacramento, CA 95814

3.3.2 Proof of Payment

A copy of each check payable to OEHHA shall be mailed, simultaneous with payment, to The Chanler Group at the address set forth above in 3.3.1(a), as proof of payment to OEHHA.

3.3.3 Tax Documentation

Upon each payment required by this Section 3, Kimpton shall issue separate 1099 forms as follows: For penalty payment to OEHHA, a 1099 shall be issued to the Office of Environmental Health Hazard Assessment, 1001 I Street, Sacramento, CA 95814 (EIN: 68-0284486); for penalty payment to Whitney Leeman, a 1099 shall be issued to “Whitney R. Leeman” whose address and tax identification number shall be furnished upon request after this

Settlement Agreement is fully executed by the Parties; for payment in reimbursement of fees and costs, Kimpton shall issue a separate 1099 form to “The Chanler Group” (EIN: 94-3171522).

4 RELEASES

4.1 Leeman’s Release of Kimpton

Leeman on behalf of herself, her past and current agents, representatives, attorneys, successors, and/or assignees, hereby waives all rights to institute or participate in, directly or indirectly, any form of legal action, and discharges and releases (a) Kimpton and its parent, subsidiaries, affiliates, and divisions (collectively, the “Kimpton Entities”); (b) the past, present and future operators, owners, managers, licensors, licensees, joint venturers, and partners of each of the locations in California where Kimpton sells or offers for sale any Products; (c) each of the distributors, wholesalers, retailers, users, packagers, retail customers and all other entities in the chain of distribution down to the consumer of any Product of the persons and entities described in (a) and (b) above; (d) each of the respective officers, directors, shareholders, employees, agents, predecessors, successors and assigns of the persons and entities described in (a) through (c) above (the persons identified in (a), (b), (c), and (d) above are collectively referred to as the “Released Parties”), from any and all claims, actions, causes of action, suits, demands, liabilities, damages, penalties, fees (including but not limited to investigation fees, attorney’s fees and expert fees), costs and expenses (collectively, “Claims”) as to any alleged violation of Proposition 65, or any other statute or common law, based on or arising from any alleged exposure to any of the Listed Chemicals concerning the Products sold before the Effective Date.

This Settlement Agreement is a full, final, and binding resolution as to the Claims released in this Paragraph 4.1. Leeman further acknowledges that compliance with the terms of Section 2 of this Settlement Agreement shall constitute compliance with Proposition 65 with respect to Listed Chemicals regarding the Products.

4.2 Kimpton’s Release of Leeman

Kimpton on behalf of itself, its past and current agents, representatives, attorneys, successors, and/or assignees, hereby waives any and all claims against Leeman and her attorneys

and other representatives, for any and all actions taken or statements made (or those that could have been taken or made) by Leeman and her attorneys and other representatives, whether in the course of investigating claims, otherwise seeking to enforce Proposition 65 against it in this matter, or with respect to the Products.

4.3 Reservation of Rights

Nothing in Section 4 limits or affects any Party's right to seek to enforce the terms of this Settlement Agreement.

5 SEVERABILITY

If, subsequent to the execution of this Settlement Agreement, any provision is held by a court to be unenforceable, the validity of the enforceable provisions remaining shall not be adversely affected.

6 GOVERNING LAW

The terms of this Settlement Agreement shall be governed by the laws of the State of California.

7 NOTICES

Unless specified herein, all correspondence and notices required to be provided pursuant to this Settlement Agreement shall be sent by: (i) personal delivery; (ii) first-class, registered or certified mail, return receipt requested; or (iii) overnight courier on any party by the other party at the following addresses:

For Kimpton:

General Counsel
Kimpton Hotel & Restaurant Group, LLC
222 Kearny Street
Suite 200
San Francisco, California 94108

For Leeman:

Proposition 65 Coordinator
The Chanler Group
2560 Ninth Street
Parker Plaza, Suite 214
Berkeley, CA 94710-2565

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With a copy to:

Sarah Esmaili
Arnold & Porter LLP
Three Embarcadero Center, 7th Floor
San Francisco, CA 94111

Any party may, from time to time, specify in writing to the other party a change of address to which all notices and other communications shall be sent.

8 COUNTERPARTS; FACSIMILE SIGNATURES

This Settlement Agreement may be executed in counterparts and by facsimile or portable document format (PDF) signature, each of which shall be deemed an original, and all of which, when taken together, shall constitute one and the same document.

9 POST-EXECUTION ACTIVITIES

Leeman agrees to comply with the reporting form requirements referenced in Health and Safety Code § 25249.7(f).

10 CONVERSION TO CONSENT JUDGMENT

After the Effective Date, Kimpton at its sole option, may send Leeman a written request to draft and file a complaint based on the allegation in the Notice, to incorporate the terms of this Settlement Agreement into a proposed consent judgment providing a release for the Products in the public interest, and to seek the court's approval of the consent judgment pursuant to Health and Safety Code § 25249.7, or as may be otherwise allowed by law. If so requested, Leeman and Kimpton agree to reasonably cooperate and to use their best efforts, and that of their counsel, to support the entry of the terms of this Settlement Agreement as a consent judgment by a superior court in California in a timely manner.

Pursuant to Code of Civil Procedure §§ 1021 and 1021.5, Kimpton will reimburse Leeman and her counsel for their reasonable fees and costs incurred drafting and filing the complaint, converting the terms of the Settlement Agreement pertaining to the Listed Chemicals in the Products into a proposed consent judgment, and seeking judicial approval of the consent judgment, in an amount not to exceed \$18,000, exclusive of fees and costs incurred on appeal, if

any. Kimpton will remit payment to The Chanler Group, at the address provided in Section 3.3.1(a). Such additional fees shall be paid by Kimpton within 10 days after its receipt of monthly invoices from Leeman's counsel for work performed under this Section.

11 MODIFICATION

This Settlement Agreement may be modified only by a written agreement of the Parties.

12 AUTHORIZATION

The undersigned are authorized to execute this Settlement Agreement and have read, understood and agree to all of the terms and conditions of this Settlement Agreement.

AGREED TO:

Date: 3/4/13

By: 
Whitney R. Leeman

AGREED TO:

Date: 3/25/13

By: 
Print Name: Danielle Merida
Kimpton Hotel & Restaurant Group, LLC