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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE CITY OF SACRAMENTO

UNLIMITED CIVIL JURISDICTION

WHITNEY R. LEEMAN, Ph.D., Plaintiff, v. BURGER KING CORPORATION; CKE RESTAURANTS, INC., et al. Defendants.	Case No. 06AS02168 **REPLY TO ATTORNEY GENERAL'S OBJECTIONS TO REASONABLENESS OF SETTLEMENT** Date: September 17, 2007 Time: 9:00 a.m. Dept.: 54 Judge: Hon. Shelleyanne Chang

Plaintiff, Dr. Whitney Leeman, hereby replies to the objections filed by the Attorney General's Office as to the reasonableness of the settlement reached by the parties, currently pending an approval hearing before the Court.

I. INTRODUCTION

The Attorney General's objections seek to re-define the discussion of the reasonableness of attorneys' fees and costs agreed to by the settling parties, but without offering a coherent view on what is reasonable or how settling parties should go about substantiating fees and costs under that view. Plaintiff has provided a detailed view of her attorneys' activities as well as of her own, and has supplemented this accounting with a further breakdown of activities and explanation of cost structure in a letter to the responsible Supervising Deputy Attorney General. There is little more by way of supporting summary plaintiff can provide short of time records, which she is prepared to supply to the Court *in camera* should the Court wish to proceed in this manner. Short of turning the settlement approval process into a full-blown C.C.P. §1021.5 fee application, plaintiff has fully substantiated in its pending submissions the requested payments and reimbursements envisioned by the arms-length settlement. Under the permissive reasonableness standard applicable to settlements – and especially as to a case in which the plaintiff has cut its billed fees and costs nearly in half in the interest of settlement -- the parties reaffirm their request to approve the settlement as written.

II. PROCEDURAL POSTURE

On July 30, 2007, the parties reached settlement in the above-referenced case, the highlights of which provide for Burger King to warn about the presence of, and carcinogenic risks associated with a range of polycyclic aromatic hydrocarbons (PAHs), notably benzo[a]pyrene and benzo[a]anthracene, in its food; to install and use new, PAH-reducing, charbroil grills in its California restaurants; and to pay a minimum of $80,000 and a maximum of $980,000 in civil penalties (the difference to be forgiven upon adherence to a staggered schedule of compliance with the injunctive terms), an additional $20,000 to plaintiff for her expert-level work beyond that ordinarily performed by a Proposition 65 citizen-enforcer, and $200,000 to reimburse plaintiff's attorneys for attorneys' fees and costs. On August 2, 2007, the parties filed a joint motion to approve the settlement, in which the monetary and injunctive terms were explained and

substantiated in the standard manner by way of declarations and summary charts. On August 21, 2007, the Attorney General's Office inquired of the parties by electronic mail as to the reasonableness of three aspects of the parties' settlement. On August 30, 2007, plaintiff sent a detailed letter to the Attorney General's Office in response. On September 4, 2007, the Attorney General's Office, apparently not satisfied with the response received from plaintiff, filed objections to the settlement, urging the Court not to approve it because, in its view, the sum agreed upon to reimburse attorneys' fees and costs, as well as the payment to the plaintiff to cover her expert-level services and costs, are not reasonable – even though what constitutes "reasonableness", and how to support reasonableness beyond what the parties have already submitted, are left unstated.[1] The motion is currently pending hearing on September 17, 2007. Trial is set for November 27, 2007.

III. ARGUMENT

A. Pertinent Law

In some cases, despite an otherwise comprehensive settlement reached by the parties, attorneys' fees and costs remain contested between the parties and are left for the court to adjudicate pursuant to the multiple provisions of the private attorney general statute, CCP §1021.5, as interpreted by *Serrano v. Priest* (1977) 20 Cal.3d 25, 49 and *Serrano v. Unruh* (1982) 32 Cal.3d 621, 634-39 (fee award should include "compensation for all hours reasonably spent, including those relating solely to the fee"). In many, even most, settlements, the parties, in the interest of closure, succeed in reaching agreement as to all settlement provisions, including attorneys' fees and costs and other monetary provisions. In this event, judgment is to be entered, if at all, not according to §1021.5, but pursuant to other statute, or, failing that, according to principles of contractual law. CCP §1033.5(a)(10). When the jurisdictional basis for attorneys' fees recovery is contractual, such recovery should be approved if it is, simply put, "reasonable under California law". 11 CCR §3201.

Thus, the standard for approval of a Proposition 65 fees and costs reimbursement reached by

[1] Strangely, the Attorney General's Office claims that it has seen nothing from the parties to support that PAH levels in Burger King's burgers exceeded the legal limit. *Objections* at 2. Under law, a private enforcer is required in advance of filing a case to present to the Attorney General a Certificate of Merit supporting a belief in a "reasonable and meritorious case," and, with it, "documentation of exposure to a listed chemical," including "facts, studies, or other data regarding the exposure to the listed chemical that is the subject of the action." 11 CCR §3101. Pursuant to this regulation, plaintiff invariably provides its test results revealing a *prima facie* violation to the Attorney General's Office before filing any Proposition 65 case, and did so here as to the high PAH levels in Burger King's meat.

arms-length contractual settlement is relaxed relative to a petition for a fee award brought under CCP §1021.5. The reviewing standard remains one of "reasonableness," but [t]he fact that the fee award is part of a settlement . . . may justify applying a somewhat less exacting review of each element of the fee claim than would be applied in a contested fee application." 11 CCR §3201. While an agreement to pay attorneys' fees does not in itself render those fees, without more, reasonable, the agreement constitutes a large step toward that goal, as made clear by the Attorney General's own guideline on the matter. *Id.*

Declarations relying on contemporaneously-kept time records generally describing "the nature of the work performed" are the normal manner of supporting an application for attorneys' fees and should ordinarily suffice unless an issue about the accuracy of the time records arises. 11 C.C.R. §3201(e). "There is no special requirement that a party establish that its opponent was guilty of obdurate behavior in order to receive attorney's fees under the private attorney general theory." *Save El Toro Assn. v. Days* (1979) 98 Cal.App.3d 544, 555. Approval of fees to private enforcers of Proposition 65 is also in line with the Supreme Court's pronouncement "encourag[ing] suits effectuating a strong [public] policy by awarding substantial attorneys' fees, regardless of defendants' conduct, to those who successfully bring such suits and thereby bring about benefits to a broad class of citizens." *D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, 27. "[W]ithout some mechanism authorizing the award of attorney's fees, private actions to enforce ... important public policies will as a practical matter frequently be infeasible." *Woodland Hills Residents Assn. v. City Council* (1979) 23 Cal.3d 917, 933.

The Attorney General's guidelines also offer some, though not complete or squarely on-point, guidance as to the propriety of a separate payment to a plaintiff:

> Where a settlement provides additional payments to an entity in lieu of a civil penalty . . . such payments may be a proper 'offset' to the penalty amount or *cy pres* remedy . . . [and] are proper if . . .:
>
> (1) The funded activities have a nexus to the basis for the litigation, i.e. the funds should address the same public harm as that allegedly caused by the defendant(s) in the particular case

(2) The recipient should be an entity that is accountable, i.e., is able to demonstrate how the funds will be spent and can assure that the funds are being spent for the proper, designated purpose.

. . . .

11 CCR §3203(b). There is no specific guidance as to payment to a plaintiff for her use of specialized skills, beyond those ordinarily contributed by a citizen enforcer, to bring about the successful outcome of a case. Ensuring ongoing compliance with a settlement agreement whose injunctive terms require staggered adherence over more than two years and which are otherwise wholly consistent with the purposes and objectives of Proposition 65 would seem to be a natural extension of the above guideline – and certainly would fall within the broad range of permissible settlement agreements which do not offend public policy. *See, e.g., California State Auto Assn. v. Superior Court* (1990) 50 Cal.3d 658, 664 (examining the outer boundaries of the broad range of permissible settlement agreements in holding that under the settlement review authority granted by CCP §664.6, a court "may reject a stipulation that is contrary to public policy [] or one that interprets an erroneous rule of law") (internal citations omitted; case citation mistaken in Attorney General's brief). *See also Rick Vision Centers v. Board of Medical Examiners* (1983) 144 Cal.App.3d 110, 115-16 (settlement funds permissibly put toward activities carrying out purpose of the litigation, including costs of litigation and prospective enforcement). Nowhere does the law bar a disclosed payment to a plaintiff – whether in the Proposition 65 arena or elsewhere – who contributes specialized skills to resolving a case beyond the case management activities generally carried out by plaintiffs everywhere.

B. Plaintiff Has Provided Abundant Support for the Fees and Costs Incurred

For all of its grandstanding that more detail is required to support the attorney fees and cost reimbursement agreed to after months of negotiation by the parties, the Attorney General's Office fails to present any guidance as to *what more is required* to substantiate the agreed-to fee award. The only guidance provided comes through its regulations, which anticipate that attorneys' fees will be proven up in just the way plaintiff has done: by submitting declarations describing "the nature of the work performed." *See* 11 CCR §3201(e). While the Attorney General may have wished that

this regulation was more demanding, i.e. by requiring a line-by-line recounting of each activity performed, no such detail is required. Were such detail required, the effect would be both to stymie the parties' settlement efforts, as many defendants, including Burger King, have indicated that they do not want to leave consideration of proper attorneys' fees reimbursement to the §1021.5 application process for fear that the amount approved would be based on a multiplier or otherwise be substantially higher than the amount agreed to between the parties; and to bog down the courts in hundreds of pages of specific activity descriptions and time fractions, even when the courts, through an assessment of the credibility of the requesting parties and a common-sense assessment of the time required to bring the case to term and to achieve the result obtained, have no reason to doubt the time and cost summaries presented. Indeed, even the Attorney General concedes that a break-down of time into categories with work descriptions and necessary steps within each category "could be acceptable." *Objections* at 5. Why not here? Pursuant to its regulations, the Attorney General's Office has seen countless settlements with attorney fee award requests supported in this way cross its desks – some seeking considerably more fees than sought here -- with nary a word in opposition. Its objections do not speak to why this case should receive different treatment.

In an effort to make the attorney fee and cost summary provided to the Court, as further broken down in the four-page letter to the Attorney General's Office attached to its objections, more transparent and easier to digest, plaintiff has attached as an exhibit to the Declaration of David Lavine ("*Lavine Decl.*") filed in support of this reply a further break-down of each of the five work categories discussed in the motion to approve, complete with descriptions of the "nature of the work" performed and the amount of time dedicated to each activity. (*Lavine Decl., ¶3, Exh. A*).

By way of illustration: the investigation, notice and pre-filing activities constituting category I are broken out, with the majority of the time generated, not surprisingly, from the identification, purchases, preservation, testing and lay and expert review of beef products and their level of harmful PAH chemicals. Similarly, the pleadings, discovery and case management activities constituting category II are broken out, with the majority of time dedicated to the drafting of the complaint and discovery requests, drafting of a motion to compel and confidentiality agreement, research and evaluation of potential preemption and no-significant-risk-level defenses, consultations

with the client and defense counsel, and review and assessment of the growing body of evidence with the experts. Likewise, the settlement activities constituting category III are broken out, with the majority of time devoted to continuing settlement discussions, and consent judgment and testing protocol design and revisions, over more than a year with defense counsel and defendant, by correspondence, on the phone, and in person in multiple meetings on both the east and west coasts. Category IV captures the time committed to preparing the motion to approve the settlement and to informally respond to the Attorney General's concerns – though not the time utilized to formally respond to the Attorney General via this filing, and not the time required to appear at the approval hearing, as this time has not yet been tallied and included in the total. Finally, Category V projects, imperfectly though reasonably, the time anticipated to be spent monitoring compliance with the staggered injunctive terms, including ensuring timely installation of the new, PAH-reducing grills, and having to re-test defendant's burgers or to revisit the testing protocol requirements should the new grills fail the testing standard provided by the protocol.

In the final analysis, as noted in the letter to the Attorney General's Office, two factors stand above all others to render the reimbursement request reasonable. First, the case is the first of its kind to be brought and resolved. While the case certainly incorporated aspects common to all Proposition 65 cases – e.g., drafting a notice, complaint, discovery, consent judgment and motion to approve – these tasks were not routine in this case and required working through issues not encountered before as a matter of first impression. The notice and complaint stage entailed locating the first of what would become several experts knowledgeable about PAHs in food for her scientific opinion supporting the Certificate of Merit accompanying the notice; educating attorneys assigned to the case on the properties, dangers and prevalence of PAHs in meat; and finding a laboratory capable of quantifying the PAH content of the meat samples to be sent in and developing collection, preservation, and testing protocols to ensure the integrity of the testing results. The discovery stage entailed drafting technical questions about the design and function of defendant's grills; the manner in which defendant's burgers were cooked and came into contact with flames; and the process of PAH generation in and on the burgers following fat dripping from the burgers onto the heat source, which, in turn, created PAH-laden smoke rising from the heat source to leave PAH deposits in the

char of the burgers. Discovery also sought inroads into understanding two complicated affirmative defenses preserved by defendant in its answer: the possible interplay of federal preemption of meat regulation and warning signage, and the possible advancement of a no-significant-risk-level defense given that the frequency of ingestion was an open question requiring additional experts to support. Settlement discussions were of marathon length, beginning in the summer of 2006 and continuing through the summer of 2007, and, at intervals, focused at length on burger testing in California and in pilot restaurants in which the new grills were installed in Florida; designing a suitable testing protocol to evaluate the PAH-related safety of the new grills; the breadth of the release; the amount of monetary payments; and the crafting of warning language consistent with language to be used as a result of another case concerned with the generation of acrylamide, another toxic chemical, in food served by defendant. The motion to approve did not entail an extraordinary consumption of time – that is, until the Attorney General objected to the settlement and forced a series of detailed responses. Without question, the novelty of this case, apparent on so many levels, has led to the billing of more hours to this case than in the "standard" case – to the extent such a case even exists.

Just as telling to the reasonableness inquiry: the accumulated attorneys' charges have been cut nearly in half – from nearly $400,000 to $200,000 -- in the interest of reaching settlement. Doing so creates a sizeable cushion in the event that particular billing entries or expenses raise an issue of inefficiency and will often render such an issue immaterial. While plaintiff has endeavored to be cost-conscious at every stage of the case and to provide an accurate activity description and rendering of all time spent, there is no doubt that, on the current record as a whole, that a $200,000 attorney fee reimbursement in a complicated scientific case lasting 18 months is reasonable – indeed, even a bargain.

C. Plaintiff Has Provided Abundant Support for the Separate Payment to Her

Another unusual feature of this case was the time and effort spent by the plaintiff herself in bringing about the result now pending approval before the court. As an environmental toxicologist with a Ph.D. from the University of California at Davis, Dr. Leeman was in a position to work substantively on the case, in addition to the normal pleading review, case guidance, written discovery certification, oral deposition, and settlement approval functions she carried out pursuant

to the duties of all plaintiffs. She devoted her non-traditional time on the case to: (1) designing in conjunction with an expert and in-house investigators a method of meat sample collection, preservation and dispatch to a chemical laboratory in a manner that would keep constant, as much as possible, the amount of PAHs present at the time of service to the customer – and carrying out the earlier rounds of purchases per the prescribed method until perfected; (2) adapting in conjunction with the chemical laboratory an approved testing method to test the burger samples; (3) reviewing and interpreting the laboratory results; (4) inquiring into defendant's pilot program featuring new, PAH-reducing grills; (5) helping to create a testing protocol in order to test approximately 100 burgers off of two new grill models; (6) analyzing the results as to each grill; (7) in the event either of the grills should fail testing, suggesting appropriate adjustments to the testing protocol, the grills or the cooking procedure, or other corrective measure(s); and (8) monitoring grill installation on the two-year staggered schedule set by the consent judgment.

As can quickly be gleaned from this list of tasks, these are not ordinary elements of a plaintiff's role. Indeed, it was defendant's counsel's idea to pay Dr. Leeman for her extra work and skill applied to this case. (*Lavine Decl.*, ¶2) Plaintiff's counsel initially resisted the suggestion, but was ultimately won over when defendant's counsel reported to plaintiff's counsel that she had run the idea of a separate payment to Dr. Leeman in the range of $15,000 - $20,000 by Supervising Deputy Attorney General Weil, who expressed his view that the 25% retention of civil penalties is generally adequate compensation to a private enforcer for bringing a case, but that he has accepted, and would again, a payment to a private enforcer so long as the reasons for reimbursement were documented. Per defendant's counsel, Mr. Weil did not then, or since, insist on any particular type or level of documentation. (*Lavine Decl.*, ¶2). Pursuant to that guidance, and urging by defendant's counsel, plaintiff and her counsel agreed to a separate payment of $20,000. Plaintiff's work has since been documented, in detail, in the motion to approve, in the responsive letter to the Attorney General's Office, and again here. Plaintiff is not seeking reimbursement for her pre-settlement time devoted to this case or for her scholarly review of, and other earlier work concerning, PAHs generally, but only for her pre-settlement out-of-pocket costs, valued at several thousand dollars, as well as for her post-settlement time to complete (6)-(8) from the above task list, estimated at 50-75

hours at the market rate of $300 per hour, plus her out-of-pocket costs, projected to be between $1,500 and $2,500. The total of Dr. Leeman's out-of-pocket costs and her post-settlement time is expected to exceed $20,000, but she has agreed to accept $20,000 in the interest of settlement and of providing certainty and finality to Burger King.

While this arrangement is perhaps unusual, it is not unprecedented, as indicated by Mr. Weil's experience with and reaction to the idea – and clearly falls within the broad range of reasonable settlement components. The fact that the idea of such a separate payment was spawned by defendant's counsel, and vetted, favorably in principle, through the Attorney General's Office, adds to its acceptability. It is consistent with the regulation, whether it be governing or of lesser guidance, as to payments in lieu of civil penalties, in that the separate payment would be put toward "activities [with] a nexus to the basis for the litigation" which "address the same public harm as that allegedly caused by the defendant in the particular case" – namely, monitoring intended to ensure compliance with the injunctive terms of the settlement promoting public health – and the "recipient would be . . . accountable", in that Dr. Leeman, a scientist of unimpeachable credentials, has identified a specific objective for use of the funds, and could ultimately be questioned as to how she spent the money. *See* 11 CCR §3203(b). In short, given the motivation, explanation and substantiation provided, and the controls available to police the use of the money, the separate payment to Dr. Leeman should be approved.

D. Plaintiff is Prepared to Provide *In Camera* Attorney Time Records and/or an Accounting of Her Case-Related Time and Costs Following Completion of the Compliance Schedule Should the Court Require Pinpoint Substantiation

While plaintiff does not believe that the law requires it, she is prepared to provide either or both of (1) her attorneys' time records, and (2) a post-compliance accounting of her case-related time spent and costs incurred. By this offer, plaintiff hopes to convey both her serious regard for the accuracy and necessity of the substantial time dedicated to bringing about the successful outcome of this case, and the fact that both she and her attorneys have significantly compromised their actual time and expense charged to this case in the interest of a settlement which amply promotes the public interest in healthful food and vindicates the right to be warned when facing health risks.

IV. CONCLUSION

"Settlement negotiations involve give and take, and the final agreement is a compromise" to avoid an often unpredictable and expensive trial. *Rick Vision Centers*, 144 Cal.App.3d at 115. The Attorney General's office appears to be chasing an imaginary reasonableness standard in reviewing this settlement, which is neither defined in its objections nor found anywhere in the law. Rather than join the chase, the Court should measure the work descriptions and time apportionments laid out in the parties' joint motion to approve, in plaintiff's letter response to the Attorney General, and in this filing, against the general "nature of the work" performed standard found in the Attorney General's own regulations, and thereby conclude, especially under the "less exacting" review standard applicable to settlements, that plaintiff has adequately supported its request for attorneys' fees and costs reimbursement and for separate payment to the plaintiff for contribution of her specialized skills to resolution of this case. Accordingly, plaintiff respectfully requests that the Court approve the parties' settlement, including its payment components, based on the support previously and currently supplied.

Dated: September 10, 2007

Respectfully submitted,

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