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8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 COUNTY OF ALAMEDA
10 UNLIMITED CIVIL JURISDICTION

11
12 WHITNEY R. LEEMAN, PH.D.,

13 Plaintiff,

14 v.

15 PACIFIC HOSPITALITY GROUP, LLC,
16 ESTANCIA HOTEL, LLC; and DOES 1-150,
inclusive,

17 Defendants.

Case No. RG12656269

[PROPOSED] CONSENT JUDGMENT

(Health & Safety Code § 25249.6 *et seq.*)

1 **1. INTRODUCTION**

2 **1.1. Whitney R. Leeman and Estancia Hotel, LLC**

3 This Consent Judgment is entered into by and between Whitney R. Leeman, Ph.D.
4 (“Leeman” or “Plaintiff”) and Estancia Hotel, LLC (“Estancia” or “Defendant”) on the other
5 hand, with Leeman and Estancia collectively referred to as the “Parties,” and each individually
6 referred to as a “Party.”

7 **1.2. Plaintiff**

8 Leeman is an individual residing in California who seeks to promote awareness of
9 exposures to toxic chemicals and to improve human health by reducing or eliminating hazardous
10 substances contained in consumer and commercial products.

11 **1.3. Defendant**

12 Estancia employs ten or more persons. Estancia is a person in the course of doing
13 business for purposes of the Safe Drinking Water and Toxic Enforcement Act of 1986, Health and
14 Safety Code § 25249.6 et seq. (“Proposition 65”). Estancia owns the Estancia La Jolla Hotel and
15 Spa in the City of La Jolla, California (sometimes, the “Hotel”).

16 **1.4. General Allegations**

17 Leeman alleges that Defendant has sold in the state of California, without the requisite
18 Proposition 65 health hazard warning, flame-cooked ground beef burgers containing
19 benz[a]anthracene, benzo[a]pyrene, benzo[k]fluoranthene, and indeno[1,2,3-cd]pyrene, which are
20 cancer-causing chemicals listed pursuant to Proposition 65. Benz[a]anthracene, benzo[a]pyrene,
21 benzo[k]fluoranthene, and indeno[1,2,3-cd]pyrene shall be referred to as the “Listed Chemicals”
22 or “PAHs.”

23 **1.5. Product Description**

24 The products covered by this Consent Judgment are flame-cooked ground beef burgers,
25 including, but not limited to, the *Natural Burger*, containing the Listed Chemicals, that are sold or
26 offered for sale in California by Defendant (“Products”).

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1.6. Notice of Violation

On or about August 16, 2012, Leeman served Defendant and various public prosecutors with a “60-Day Notice of Violation” (“Notice”), alleging that Defendant was in violation of Proposition 65 for failing to warn customers and/or consumers that flame-cooked ground beef burgers containing the Listed Chemicals sold by Defendant in California expose 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.

1.7. Complaint

On November 15, 2012, Leeman filed a complaint in Alameda County Superior Court against Defendant, Pacific Hospitality Group, LLC, and Does 1 through 150 (the “Complaint” or “Action”), alleging violations of Proposition 65, based on the alleged exposures to the Listed Chemicals contained in the Products sold to consumers in California.

1.8. No Admission

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

1.9. Consent to Jurisdiction

For purposes of this Consent Judgment only, the Parties stipulate that this Court has jurisdiction over Defendant as to the allegations contained in the Complaint, that venue is proper in Alameda County, and that this Court has jurisdiction to enter and enforce the provisions of this Consent Judgment, pursuant to California Code of Civil Procedure § 664.6, as a full and binding

1 resolution of all claims that were or could have been raised in the Complaint against Defendant
2 based on the facts alleged therein and in the Notice.

3 **1.10. Effective Date**

4 For purposes of this Consent Judgment, the term “Effective Date” shall mean March 22,
5 2013.

6 **2. INJUNCTIVE RELIEF**

7 **2.1. Product Warnings**

8 Commencing upon execution of this agreement and continuing thereafter, Defendant shall,
9 for all Products sold in California, provide the warning (“Warning”) set forth in this Section.

10 The Warning shall be prominently placed with such conspicuousness as compared with
11 other words, statements, designs, or devices so as to render it likely to be read and understood by
12 an ordinary individual under customary conditions before purchase or consumption.

13 The Warning will be displayed on a sign (“Warning Sign”) of substantially the same
14 presentation (dimensions, text font and size, and colors) as that attached as Exhibit 1, and will be
15 posted so that it is clearly visible to consumers in each of the following locations, if such location
16 exists now or in the future: (1) at all restaurant entrances; (2) at or adjacent to or clearly visible
17 from any counter where food is purchased; (3) on any menu provided to customers for in-room
18 service that offers any Product for sale.

19 The language of the Warning shall consist of the following:

20 **WARNING:** Chemicals known to the State of California to cause cancer, or
21 birth defects or other reproductive harm may be present in foods or
22 beverages sold or served here. A brochure with more information
on specific exposures is available at the host’s station or from your
server.

23 At all times, Defendant shall have available, and promptly produce for any customer or
24 consumer who requests one, the brochure attached hereto as Exhibit 2 (“Proposition 65
25 Brochure”). The Proposition 65 Brochure will be provided to each in-room customer.
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2.2. Compliance Review

Beginning on the date that is thirty (30) days following the Effective Date and continuing at least once every year for 5 years thereafter, Estancia shall perform a compliance review, as to each location in California selling any Products, to assess and ensure that each such location is in compliance with all of the requirements of this Section 2. 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 Defendant for at least one year from the date produced, and shall be promptly shared with Leeman upon Leeman’s written request. Defendant shall, within 14 days of the compliance review or notification of noncompliance by any other means, correct any deficiencies, including replacing damaged or missing Warning Signs and ensuring the availability of the Proposition 65 Brochure.

2.3. Cooking Modification

Defendant agrees to investigate methods of cooking or equipment modifications that may substantially reduce or eliminate the Listed Chemicals from the Products. All documentation regarding methods implemented or modifications made shall be retained by Defendant for at least one year, and shall be promptly shared with Leeman, upon Leeman’s written request.

Warnings consistent with Section 2.1 must be provided if consumption of a single serving of one flame-cooked ground beef menu item, of normal size and lipid content for that item, cooked to well done, results in an exposure of equal to or greater than 0.033 µg benz(a)anthracene or 0.06 µg benzo(a)pyrene (or at such other “No Significant Risk Levels” as may in the future be established by regulation of the Office of Environmental Health Hazard Assessment (“OEHHA”) at 27 C.C.R. § 25705 for the Listed Chemicals), in a test performed by a laboratory located within the United States that is agreed upon by the parties (“Warning Threshold”). A Warning must be provided if one or more menu items contain PAHs in excess of the Warning Threshold.

1 **3. MONETARY TERMS**

2 **3.1. Civil Penalties**

3 In settlement of all the claims referred to in this Consent Judgment, Defendant shall pay a
4 total of \$8,000 in civil penalties in accordance with this Section. Each penalty payment will be
5 allocated in accordance with Health and Safety Code § 25249.12(c)(1) and (d), with 75% of the
6 funds remitted to the California Office of Environmental Health Hazard Assessment (“OEHHA”),
7 in the form of a check issued to “OEHHA,” and the remaining 25% of the penalty remitted to
8 Leeman, in the form of a check made payable to “The Chanler Group in Trust for Whitney R.
9 Leeman.” Any payment made to Dr. Leeman shall be held in trust by counsel for Dr. Leeman
10 until entry of the Consent Judgment.

11 **3.1.1. Initial Civil Penalty**

12 Defendant shall pay an initial civil penalty in the amount of \$4,000 within ten days of the
13 Effective Date. The amount of the initial civil penalty shall be reduced by fifty percent (to
14 \$2,000), if Defendant certifies in writing, received by Leeman within thirty days of the Effective
15 Date, that it shall, within forty-five (45) days thereafter, modify its cooking equipment or method
16 to reduce or eliminate consumer exposure to the Listed Chemicals. This certification in lieu of a
17 portion of the initial civil penalty payment is a material term, and time is of the essence.

18 **3.1.2. Final Civil Penalty**

19 Defendant shall pay a final civil penalty of \$4,000 by August 15, 2013, or within 30 days
20 after the Court enters this Consent Judgment, whichever date is the later. The final civil penalty
21 shall be waived in its entirety upon receipt by Leeman, by August 15, 2013 or 30 days after the
22 Court enters this Consent Judgment, whichever date is the later, of written certification from
23 Defendant of (1) compliance with Section 2, and (2) that Defendant has modified its cooking
24 methods such that none of their flame-cooked ground beef menu items exceeds the Warning
25 Threshold, as defined in Section 2.3. This certification in lieu of a final civil penalty payment
26 provided by this Section is a material term, and time is of the essence.

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1 **3.2. Reimbursement of Leeman’s Fees and Costs**

2 The Parties acknowledge that Leeman and her counsel offered to resolve this dispute
3 without reaching terms on the amount of fees and costs to be reimbursed to them, thereby leaving
4 this fee issue to be resolved after the material terms of the agreement had been settled. Leeman
5 expressed a desire to resolve the fee and cost issue shortly after the other settlement terms had
6 been finalized. The Parties then attempted to (and did) reach an accord on the compensation due
7 to Leeman and her counsel under general contract principles and the private attorney general
8 doctrine, codified at Code of Civil Procedure § 1021.5, for all work performed through the mutual
9 execution of this agreement, except fees that may be incurred on appeal brought by Defendant.
10 Defendant shall pay \$36,200 for fees and costs incurred as a result of investigating, bringing this
11 matter to Defendant’s attention, and negotiating a settlement in the public interest. Defendant
12 shall provide payment of fees and costs within one week of the filing of the motion described in
13 Section 10, to be held in trust by Leeman’s counsel until entry of this Consent Judgment, in the
14 form of a check payable to “The Chanler Group.” Except as provided herein the parties shall
15 otherwise be responsible for their own costs, expenses, and attorney’s fees.

16 **3.3. Payment Procedures**

17 **3.3.1. Issuance of Payments**

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

20 The Chanler Group
21 Attn: Proposition 65 Controller
22 2560 Ninth Street
23 Parker Plaza, Suite 214
24 Berkeley, CA 94710

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

4 For United States Postal Service:

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

10 For delivery by other than the United States Postal Service:

11 Mike Gyrics
12 Fiscal Operations Branch Chief
13 Office of Environmental Health Hazard Assessment
14 1001 I Street
15 Sacramento, CA 95814

16 **3.3.2. Proof of Payment**

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

20 **3.3.3. Tax Documentation**

21 Upon making each payment required by this Section 3, Defendant shall issue separate
22 1099 forms as follows: For each penalty payment to OEHHA, a 1099 shall be issued to the
23 Office of Environmental Health Hazard Assessment, 1001 I Street, Sacramento, CA 95814
24 (EIN: 68-0284486); for each penalty payment to Whitney Leeman, a 1099 shall be issued to
25 “Whitney R. Leeman,” whose address and tax identification number shall be furnished upon
26 request after this Settlement Agreement is fully executed by the Parties; for each payment in
27 reimbursement of fees and costs, Defendant shall issue a separate 1099 form to “The Chanler
28 Group” (EIN: 94-3171522).

1 **4. CLAIMS COVERED AND RELEASED**

2 **4.1. Plaintiff’s Public Release of Proposition 65 Claims**

3 This Consent Judgment is a final and binding resolution between the Plaintiff and
4 Defendant, satisfying and releasing Defendant and its past and present parents, subsidiaries,
5 affiliates, divisions, predecessors, successors, officers, directors, employees, suppliers,
6 distributors, licensees, and customers (Collectively, “Defendant’s Releasees”) from any and all
7 causes of action, damages, costs, penalties, attorneys’ fees and claims of any kind that were made
8 or could have been made in the Complaint, based upon alleged violations of Proposition 65 or
9 exposure to Listed Chemicals in the Products for which Defendant or Defendant’s Releasees are
10 responsible. Compliance with this Consent Judgment in the future by Defendant shall be deemed
11 compliance by Defendant with its respective obligations under Proposition 65, with respect to
12 claims made in the Notice and/or the Complaint.

13 In further consideration of the representations, warranties, and commitments herein
14 contained, and for the payments to be made pursuant to this Consent Judgment, Plaintiff, acting
15 on behalf of herself, her past and current agents, representatives, attorneys, successors, assigns, or
16 any person or entity who may now or in the future claim through her in a derivative manner, and
17 in the public interest, hereby waives and releases Defendant from all claims, known or unknown,
18 for violations of Proposition 65 up through and including the Effective Date based on exposure to
19 the Listed Chemicals from the Products as set forth in the Notice. Compliance with the terms of
20 this Consent Judgment constitutes compliance with Proposition 65 with respect to exposures to
21 the Listed Chemicals from the Products as set forth in the Notice.

22 **4.2. Plaintiff’s Individual Release of Claims**

23 Plaintiff also, in her individual capacity only and *not* in her representative capacity,
24 provides a release herein which shall be effective as a full and final accord and satisfaction, as a
25 bar to all actions, causes of action, obligations, costs, expenses, attorneys’ fees, damages, losses,
26 claims, liabilities and demands of Plaintiff of any nature, character or kind, whether known or
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1 unknown, suspected or unsuspected, limited to and arising out of alleged or actual exposures to
2 the Listed Chemicals in the Products sold by Defendant.

3 **4.3. Defendant's Release of Plaintiff**

4 Defendant, on behalf of itself, and on behalf of each of its past and current agents,
5 representatives, attorneys, successors, and/or assignees, hereby waive any and all claims against
6 Plaintiff and her attorneys and other representatives, for any and all actions taken or statements
7 made (or those that could have been taken or made) by Plaintiff and her attorneys and other
8 representatives, whether in the course of investigating claims or otherwise seeking to enforce
9 Proposition 65 against it in this matter with respect to the Products.

10 **5. COURT APPROVAL**

11 This Consent Judgment is not effective until it is approved and entered by the Court and
12 shall be null and void if, for any reason, it is not approved and entered by the Court within
13 one year after it has been fully executed by the Parties, in which event any monies that have been
14 paid to Leeman or her counsel pursuant to Section 3 above shall be refunded within fifteen
15 (15) days after Leeman's receipt of written notice from Defendant that the one-year period has
16 expired.

17 **6. SEVERABILITY**

18 If, subsequent to the execution of this Consent Judgment, any of the provisions of this
19 Consent Judgment are held by a court to be unenforceable, the validity of the enforceable
20 provisions remaining shall not be adversely affected.

21 **7. GOVERNING LAW**

22 The terms of this Consent Judgment shall be governed by the laws of the State of
23 California.

24 **8. NOTICES**

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

3 For Defendant:

4 Michael T. Hornak, Esq.
5 Rutan & Tucker, LLP
6 611 Anton Boulevard, Suite 1400
7 Costa Mesa, CA 92626-1931

8 *Attorneys for Defendant*

9 For Leeman:

10 Proposition 65 Coordinator
11 The Chanler Group
12 2560 Ninth Street
13 Parker Plaza, Suite 214
14 Berkeley, CA 94710

15 *Attorneys for Dr. Whitney R. Leeman*

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

18 **9. COUNTERPARTS; FACSIMILE SIGNATURES**

19 This Consent Judgment may be executed in counterparts and by facsimile or PDF
20 signature, each of which shall be deemed an original, and all of which, when taken together, shall
21 constitute one and the same document.

22 **10. POST-EXECUTION ACTIVITIES**

23 Leeman agrees to comply with the reporting form requirements referenced in Health and
24 Safety Code § 25249.7(f). In addition, the Parties acknowledge that, pursuant to Health and
25 Safety Code § 25249.7, a noticed motion is required to obtain judicial approval of this Consent
26 Judgment. Leeman shall prepare and file such motion to approve this Consent Judgment, and
27 Defendant shall not oppose such motion. In furtherance of obtaining such approval, Leeman and
28 Defendant and their respective counsel agree to mutually employ their best efforts to support the
entry of this agreement as a Consent Judgment and obtain approval of the Consent Judgment by
the Court in a timely manner.

1 **11. MODIFICATION**

2 This Consent Judgment may be modified only by written agreement of the Parties.

3 **12. AUTHORIZATION**

4 The undersigned are authorized to execute this Consent Judgment on behalf of their
5 respective Parties, and have read, understood, and agree to all of the terms and conditions of this
6 Consent Judgment.

7
8 **AGREED TO:**

9
10 By: Whitney R. Leeman
Whitney R. Leeman, Ph.D.

11
12 ESTANCIA HOTEL, LLC

13
14 By: _____
Steven Arnold,
15 Member of the Board of Managers

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Whitney R. Leeman, Ph.D.

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12 ESTANCIA HOTEL, LLC

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14 By:  _____
Steven Arnold,
15 Member of the Board of Managers

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