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10 SUPERIOR COURT OF CALIFORNIA

11 COUNTY OF SACRAMENTO, UNLIMITED JURISDICTION

13 WHITNEY R. LEEMAN, Ph.D.,

14 Plaintiff,

15 v.

16 BURGER KING CORPORATION; CKE
17 RESTAURANTS, INC., et al.,

18 Defendants.

Case No. 06AS02168

**ATTORNEY GENERAL'S
OBJECTIONS TO JOINT MOTION
FOR APPROVAL OF
PROPOSITION 65 SETTLEMENT
AND [PROPOSED] CONSENT
JUDGMENT**

Date: Sept. 17, 2007

Time: 9:00 a.m.

Dept.: 54

Judge: Hon. Shelleyanne Chang

Action Filed: May 27, 2006

Trial Date: none set

22 **I. INTRODUCTION**

23 In 2001, the Legislature amended Proposition 65 to assure that settlements of private
24 Proposition 65 meet certain criteria, including that the attorneys fees, even though agreed to by
25 the defendant, are "reasonable under California law." (Health & Saf. Code, § 25249.7, subd.
26 (f)(4)(B).) The Courts of Appeal have applied the statute to assure that the requirements of the
27 statute are met, and to require that, even where the statutory criteria are met, the settlements also
28 are just and serve the public interest. (*Consumer Advocacy Group, Inc. v. Kintetsu Enterprises of*

1 *America* (2006) 141 Cal.App.4th 46, 59, *Consumer Defense Group v. Rental Housing Industry*
2 *Members* (2006) 137 Cal.App.4th 1185, 1207-1208.)

3 On this record, the settlement cannot be approved, because the plaintiff has not shown
4 that the attorney fees are reasonable, but instead has submitted a long-winded, yet ultimately fact-
5 bereft, explanation of her attorney fees. The settlement provides that, in addition to the
6 plaintiff's statutory 25% share of civil penalties, Dr. Leeman will receive \$20,000 as
7 compensation for her time and effort (past and future) in this matter. Any such payment must be
8 justified as if it were an expert fee, or as an activity reasonably related to achieving the purposes
9 of the law, and plaintiff has done neither. Thus, at least on the record provided as of this writing,
10 the motion to approve the settlement must be denied.

11 In addition, the proposed settlement provides that Burger King will install new "flame-
12 broilers" that will reduce the levels of certain carcinogens—called PAHs—in their hamburgers,
13 after which no consumer warnings will be provided, and large penalties (up to \$900,000), will be
14 forgiven. Even this seemingly sound provision requires somewhat more documentation. The
15 settlement provides that, with the new broilers, the levels of these chemicals must be below 1
16 part per billion, but no information has been provided showing that the levels of these chemicals
17 currently *exceed* 1 part per billion. The Attorney General believes that plaintiff can in fact
18 provide that information.

19 This brief is not a comment on the merit of any of the allegations in this case.

20 **II. STATUTORY BACKGROUND**

21 **A. Settlement Approval Requirements**

22 As plaintiff has set out, "Proposition 65" requires clear and reasonable warnings for
23 exposures to certain chemicals that cause cancer or reproductive toxicity, and these requirements
24 may be enforced, under certain circumstances, by private parties.

25 Responding to a growing concern with private Proposition 65 enforcement actions that
26 did "not provide any real protection to the public in the event of a violation, but does provide
27 compensation to the plaintiff's attorneys," the Legislature adopted the settlement approval
28 requirements. (*Consumer Advocacy Group, supra*, 141 Cal.App.4th at p. 49.) The requirements

1 provide that settlements in private Proposition 65 cases must be submitted to the court by noticed
2 motion, and may be approved only if the court makes the following findings:

- 3 (A) Any warning that is required by the settlement complies with this
chapter.
- 4 (B) Any award of attorney's fees is reasonable under California law.
- 5 (C) Any penalty amount is reasonable based on the criteria set forth [in
the penalty provision].

6 (Health & Saf. Code, § 25249.7, subd. (f)(4).) The plaintiff must produce the evidence necessary
7 to sustain the findings. (*Id.*) The Attorney General must be served with all moving supporting
8 papers, and is permitted to appear in the matter without intervening. (*Id.*)

9 Or course, while settlements are to be encouraged, courts always have had authority to
10 reject settlements that contain provisions that violate law or public policy. The court "may reject
11 a stipulation that is contrary to public policy ...or one that incorporates an erroneous rule of
12 law[.]" (*California State Auto Assn. Inter-Ins. Bureau v. Superior Court* (1990) 50 Cal.3d 658,
13 683, *Mary R. v. B & R Corp.* (1983) 149 Cal.App.3d 308, 316-317.) Thus, both *Consumer*
14 *Defense Group* and *Consumer Advocacy Group* found that the settlement also must be consistent
15 with the public interest. (*Consumer Defense Group, supra*, 137 Cal. App.4th at pp. 1207-1208,
16 *Consumer Advocacy Group, supra*, 141 Cal.App.4th at p. 59.)

17 The Attorney General has adopted Settlement Guidelines, which advise litigants and the
18 courts of the Attorney General's views and policies in reviewing proposed settlements. (See
19 Cal.Code Regs., tit. 11, § 3000-3203.) The Settlement Guidelines address a number of issues
20 that arise frequently in settlements, including appropriate penalties and "payments in lieu of
21 penalties," policies concerning reasonable attorney's fees, and specific guidance concerning
22 compliance with existing regulations concerning clear and reasonable warnings. (See Cal. Code
23 Regs., tit. 11, § 3200 et seq.¹²

24
25 1. The Attorney General's regulations governing Certificates of Merit, reporting of
26 settlements, and guidelines for review of settlements were adopted through a public rulemaking. The
27 Settlement Guidelines portion of the regulation, Chapter 3, sections 3200-3204, do not have the force
28 and effect of law, "but provide the Attorney General's view as to the legality and appropriateness
of various types of settlement provisions, and the type of evidence sufficient for the private plaintiff
to sustain its burden of supporting the proposed settlement." (Cal. Code Regs., tit. 11, § 3200.)
They are intended to "assist the parties in fashioning a settlement to which the Attorney General is

1 III. FACTS

2 On August 3, 2007, the Attorney General received the moving papers setting out the
3 terms of the settlement and providing supporting documentation. (Weil Declaration, Par.2.)

4 The settlement provides for a payment of \$80,000 in civil penalties (Proposed Consent
5 Judgment, Par. 3.1(a), p. 9, line 26), of which the plaintiff is entitled to keep 25%, i.e., \$20,000.
6 Additional penalties totaling as much as \$900,000 more could be paid, if Burger King does not
7 actually install new flame-broilers that are intended to reduce the creation of "PAH's," which are
8 the type of carcinogen giving rise to the case. (*Id.*, Par. 3.1 (b), (c).)

9 The settlement includes a payment of \$20,000 to the plaintiff, in addition to her statutory
10 entitlement to 25% of the penalties collected. This is because "Dr. Leeman has brought, and
11 continues to bring, her considerable scientific expertise to bear on this case." (*Id.*, Par. 3.2, p. 10,
12 lines 26-27.) This represents the value of her out-of-pocket costs to date, her time and expense in
13 the future "to review and verify the testing results" concerning future compliance. (*Id.*, p. 11,
14 lines 1-3.)

15 The settlement also provides that plaintiff's counsel will receive \$200,000 in attorney fees
16 and costs. (Proposed Consent Judgment, Par. 4.1, p. 11.)

17 Finally, the proposed consent judgment describes new flame-broilers that will reduce
18 PAH content to less than 1 part per billion. (Par. 1.7, p. 3, lines 18-28.) If Burger King installs
19 these broilers, and they meet a test standard in which PAHs are reduced to 1.20 parts per billion
20 (CJ, Ex. A, p. 2) , over \$900,000 in penalties will be forgiven and there will be no further duty to
21 provide warnings. (Consent Judgment, par. 2.2, p. 5, line 10-p. 6, line 16; Par. 3.1, p. 9, line 21 -
22 p. 10, line19.) No documentation provided in the moving papers, however, establishes the
23 current level of PAHs in the product.

24 On August 21, 2007, the Attorney General's Office sent an informal electronic mail
25 asking questions about some aspects of the settlement, including the attorney fees and the funds
26 for Dr. Leeman. (Weil Dec., Ex. A.) After exchanging non-substantive messages (Weil Dec.
27 Par. 4), on August 30, plaintiff's counsel provided a substantive response, making a variety of
28

unlikely to object, and assist the courts in determining whether to approve settlements."

1 statements concerning the fees and payments. (Weil Dec., Ex B.) The Attorney General's office
2 advised plaintiffs counsel that the response was not sufficient to justify the requested fees, and
3 should not be approved by the Court. (Weil Dec., Ex. C.)

4 IV. ARGUMENT

5 A. The Attorney Fees are Not Reasonable, Based on the Information Provided.

6 As described in the Attorney General's published Settlement Guidelines:

7 Since the Legislature has mandated that the court must determine that the
8 attorney's fees in all settlements of Private Proposition 65 actions must be
9 "reasonable under California law," the fact that the defendant agreed to pay the
10 fee does not automatically render the fee reasonable. The fact that the fee award
is part of a settlement, however, 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 (Cal. Code Regs., tit. 11, § 3201.) Plaintiff seeks \$200,000 in attorney fees in this matter, and
12 asserts that the actual fees and costs are \$361,000. While this would seem to leave quite a bit of
13 room for error, plaintiff's documentation is inadequate even given that circumstance.

14 In order to determine that the fees are reasonable, the moving party should base the fees
15 on "contemporaneously kept records of actual time spent, which describe the nature of the work
16 performed." (Cal. Code Regs., tit. 11, § 3201, subd. (e).) While those records need not be
17 provided to the court, in this instance the summary provided simply does not allow any
18 reasonable determination of the basis for the requested fee.

19 The plaintiff has provided a long narrative description, but with time broken only into
20 five very general categories. While this could be acceptable in some cases, particularly small
21 ones, the descriptions here are inadequate. The primary documentation provided is contained in
22 the narrative description set forth in the declaration of Clifford Chanler at Paragraphs 13 and 14.
23 Paragraph 13, the categories are broken into four categories: notice and investigation; litigation;
24 settlement negotiation; and motion to approve. In paragraph 14, a specific breakdown of the four
25 categories, plus hard costs is provided. But the narrative description reads like a template
26 description of the steps necessary to bring and prosecute a Proposition 65 matter, rather than a
27 description of what happened in this case. For example, the first category consists of "activities
28 leading to the issuance of a 60-Day Notice of violation," including a variety of consultations,

1 with 14 separate steps. At no point does it actually describe what was done with respect to the
2 one particular notice issued that gave rise to this claim, i.e., the notice to Burger King.
3 Moreover, given the fact that there is one notice, one narrow set of products, and one alleged
4 violator, the total of 231.7 hours is difficult to accept without greater specificity. Similarly,
5 subparagraph (b) details 39 different steps, some of which may have been substantial in this case,
6 but others of which are quick ministerial steps (“(2) adding the mater to the firm’s calendar”),
7 would not appear to be substantial (“(5) researching the applicable statute of limitations”), or
8 may not have happened at all ((24)-(34) concerning various discovery procedures).
9 Subparagraphs c (228.7 hours) and d (37 hours) are similarly flawed.

10 In response, the Attorney General requested greater information from plaintiff’s counsel.
11 (Weil Dec., Ex. A.) The result was a letter, not received until August 30th that provided no
12 greater specificity. (August 30, 2007 letter from David S. Lavine, Ex. B to Weil Dec., pp. 2-3.)
13 The letter refers generally to a “steep learning curve” and the case being the “first of its type,” but
14 in fact this case is one of literally hundreds brought by these counsel, whose hourly rates already
15 reflect their expertise. With respect to the categories of work, the letter simply sets out the
16 categories again, e.g., time associated with discovery, without providing any specific examples of
17 what actually was done in this case. The letter refers to a “complicated November trial.” (*Id.*,
18 at p. 4.) With a trial set for November, plaintiff should be able to provide a clear statement of
19 what fact discovery, expert discovery, motions, and other efforts actually took place.

20 Most of the time in this case has been devoted to settlement negotiations. The detailed
21 investigation consists of purchasing hamburgers, having them tested, and having scientific
22 experts--not lawyers--analyze the results. The sixty-day notices are similar in form and content
23 to literally hundreds filed by this plaintiff’s law firm. The complaint is similar to other
24 Proposition 65 complaints, differing only in the names of the chemicals, products, and
25 defendants.

26 **B. The Funds provided to the plaintiff, Whitney Leeman, are not properly justified.**

27 Under the statute, the plaintiff is entitled to keep 25% of the penalty awarded, no
28 questions asked. (Health & Saf. Code, § 25249.7.12, subd. (d).) Thus, Dr. Leeman will receive a

1 minimum of \$20,000 (based on the initial penalty payment of \$80,000), and theoretically could
2 receive additional payments of as much of \$225,000.

3 The settlement also provides that she will be compensated \$20,000 for various efforts in
4 this case. The statute does not directly provide for this type of compensation. In settlements,
5 however, funds are often provided for activities that further the purposes of the statute. The
6 Settlement Guidelines note that “payments in lieu of penalties” may be used for certain activities
7 that “address the same public harm as that allegedly caused by the defendant.” (Cal. Code Regs.,
8 tit. 11, § 3203, subd. (b)(1).) (See also *Rich Vision Centers v. Board of Medical Examiners*
9 (1983) 144 Cal.App.3d 110, 115-116 [funds provided in settlement could be spent for activities
10 furthering the purpose of the litigation, including litigation costs and future enforcement].) In
11 this instance, however, the funds are neither justified appropriately as a form of compensation for
12 the costs of suit, or as a specified activity for which Dr. Leeman will be accountable. (See
13 Settlement Guidelines at § 3203, subd. (b)(2) [the recipient should “demonstrate how the funds
14 will be spent and can assure that the funds are being spent for the proper, designated purpose.”])
15 These payments do not appear to qualify in that respect, either, since they are compensation.

16 If viewed as compensable costs, plaintiff has failed to properly document the expenses.
17 As described in the Declaration of Clifford Chanler, Dr. Leeman holds a Ph.D. in Environmental
18 Engineering (and is employed by the Air Resources Board). (Chanler Dec., par. 8(a), p. 3.) The
19 declaration goes on to provide a very general description of her activities in the case, e.g.,
20 “developed protocols for the testing and analysis of flame-broiled ground beef products,” (par. 8
21 (c), and “included multiple trips to Burger King locations.” The total number of hours she spent
22 is not set forth. Nor would one think that Dr. Leeman herself actually developed the test
23 protocol for the chemicals in question, as opposed to relying on a qualified laboratory to conduct
24 tests using established methods.

25 The declaration sets forth an hourly rate for her time of \$300 per hour, but does not justify
26 that rate through reference to any other work that Dr. Leeman performs. It describes various
27 activities fitting for an investigator, e.g., picking up samples of hamburgers and taking them to a
28 laboratory, that should be compensated at investigator rates, not at expert consultant rates of

1 \$300 per hour. Thus, on this record, the funds cannot be approved.

2 Again, the written response provided by Dr. Leeman's counsel provides little help. It
3 asserts that she has spent 55 hours in a variety of activities, which, again, include things such as
4 "properly collecting, preserving and dispatching the meat samples," i.e., buying them at Burger
5 King and taking them to a laboratory. At \$300 per hour, this would account for \$16,500.
6 Clearly, not all of the time is compensable at \$300 per hour, however. Moreover, since the work
7 may involve the other defendant in this case, some allocation of her time must be made. The
8 only other work Dr. Leeman has done at similar rates is in another Proposition 65 case, in which
9 the Attorney General did not object to her reimbursement—largely so that the Attorney General's
10 own settlement in the matter could go forward. Finally, the letter states that Dr. Leeman seeks
11 reimbursement for "her actual and projected post-settlement time and costs" for various
12 activities. (Ex. B to Weil Dec., p. 2.)

13 Alternatively, if the funds are viewed as future funds for enforcement of the agreement,
14 no method of accounting for the use of the funds has been provided.

15 Accordingly, while it may be possible, in a settlement, for Dr. Leeman to obtain some
16 reimbursement, the amounts here have not been justified. The statute provides that Dr. Leeman
17 is entitled to 25% of the penalties in this matter. This is not contested. Additional funding to the
18 plaintiff must be carefully scrutinized in order to assure that it does not simply become a means
19 by which a plaintiff may obtain, in effect, 40 of the penalties. The records submitted to date do
20 not withstand that scrutiny.

21 **C. Further Documentation Concerning PAH reduction Is Needed.**

22 The Attorney General does not oppose the use of new broilers to reduce PAH
23 concentrations in broiled beef. In order to justify the substantial forgiveness of penalties,
24 however, it must be shown that there is an actual *reduction* in PAHs. The settlement sets forth
25 that the new equipment should result in PAH concentrations below 1 part per billion, and that the
26 testing standard will be 1.2 parts per billion (with a statistical confidence of 95%).
27 Unfortunately, the record before the Court does not document the current PAH levels, and
28 therefore does not allow the Court to determine that there is an actual benefit being obtained. We

1 believe that plaintiff can provide this in the reply brief, and will not be a barrier to approving the
2 settlement. (This matter was not mentioned in the correspondence between the Attorney General
3 and the plaintiff.)

4 **V. CONCLUSION**

5 The Attorney General does not contend that the Court has the unilateral authority to
6 modify the settlement. The Court does have the authority (indeed a duty), to deny the motion to
7 approve the settlement, pointing out the reasons for that denial. At that point, the parties may
8 choose how to proceed, i.e., by amending the settlement in some form, or proceeding with the
9 case. In this instance, it may even be the case that the fees sought can be justified by further
10 documentation. But on the current record, the motion to approve the settlement should be
11 denied.^{2/}

12 Dated: September 4, 2007

13 Respectfully submitted,

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17 Chief Assistant Attorney General
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26 2. Initially, the Attorney General was concerned that the requirement that Burger King use
27 "commercially reasonable" efforts to convert to new flame-broilers was too vague to be enforceable.
28 We note, however, that Burger King has committed to give warnings within 30 days after July 30,
2007, i.e., August 20, 2007. (CJ, Pars. 1.10, 2.3.) Thus, whether it converts to new flame-broilers
quickly or not, the posting of warnings should constitute compliance with the law.

DECLARATION OF SERVICE

Case Name: *Leeman v. Burger King Corporation; CKE Restaurants, inc., et al.*

Case No.: Sacramento Superior Court Case No.: 06AS02168

I declare:

I am employed in the County of Alameda, California. I am over the age of 18 years and not a party to the within entitled cause; my business address is 1515 Clay Street, 20th Floor, Oakland, California 94612-1413. On September 4, 2007, I served the following document(s):

ATTORNEY GENERAL'S OBJECTIONS TO JOINT MOTION FOR APPROVAL OF PROPOSITION 65 SETTLEMENT AND [PROPOSED] CONSENT JUDGMENT

on the parties through their attorneys of record, by placing true copies thereof in sealed envelopes addressed as shown below for service as designated below:

- (A) **By First Class Mail:** I caused each such envelope to be placed in the internal mail collection system at the Office of the Attorney General with first-class postage thereon fully prepaid in a sealed envelope, for deposit in the United States Postal Service that same day in the ordinary course of business.
- (B) **By Overnight Mail:** I caused each such envelope to be placed in a box or other facility regularly maintained by the express service carrier, or delivered to an authorized courier or driver authorized by the express service carrier to receive documents, in an envelope or package designated by the express service carrier with delivery fees paid or provided for.
- (C) **By Messenger Service:** I caused each such envelope to be delivered by a courier, with whom we have a direct billing account, who personally delivered each such envelope to the office of the address on the date last written below.
- (D) **By Facsimile:** I caused each such document to be served via facsimile electronic equipment transmission (fax) on the parties in this action by transmitting a true copy to the following fax numbers listed under each addressee below.

SERVICE LIST

TYPE OF SERVICE

ADDRESSEE

B

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I declare under penalty of perjury the foregoing is true and correct and that this declaration was executed on September 4, 2007, at Oakland, California.



Christine Soo