

March 28, 2008

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Re: Proposition 65 Regulatory Update Project: Workshop on Warnings For Exposures To Listed Chemicals In Foods

Dear Ms. Kammerer:

These comments are submitted on behalf of the Grocery Manufacturers Association ("GMA"), a trade association whose members are companies that produce, process, and prepare foods consumed by virtually all Californians. GMA strongly supports the Office of Environmental Health Hazard Assessment ("OEHHA") in its efforts—explored in the recent workshop held on March 14, 2008—to develop new regulations governing safe harbor options for foods sold in retail settings.

OEHHA, its predecessor agency the Health & Welfare Agency ("HWA"), and the courts have long recognized that Proposition 65 chemicals are virtually ubiquitous in foods, and that applying the statute to food creates unique issues of fact and law that require special handling.¹ For example, unlike other consumer products:

- The purchase and consumption of food is universal and compulsory; assuring clear, consistent food messages is a matter of public health.
- Food is eaten daily, purchased frequently, and nearly always bought in a single retail setting—a grocery store.
- The level of exposure to a listed chemical in food is often unpredictable and beyond the control of the manufacturer; sometimes the chemical is created or increased by post-manufacturing activities, such as when consumers purchase raw or packaged foods and cook them at home.

¹ Hereinafter, OEHHA and HWA are sometimes referred to collectively as the "Agency."

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For these and other reasons, long-standing regulatory and judicial precedent exists for treating foods differently than other regulated products, including deviation from the standard safe harbor warning language. Recent developments in science and law make clear that the time has now come for the Agency to exercise its discretion to develop new mechanisms by which consumers obtain meaningful information about exposures to listed chemicals in foods.

Proposition 65 lawsuits filed over the past several years have affected numerous foods, including tuna, chocolate, vinegar, french fries, potato chips, meat, grilled beef, and grilled chicken. Each such case, whether resolved through settlement or by a judgment after trial, increases the likelihood that multiple inconsistent warnings—or a proliferation of one-sentence no-context safe harbor warnings—will appear on the thousands of food products sold in grocery stores. While similar problems can arise for other consumer products, ineffective or confusing food warnings create special concerns for public health that the original drafters of 12601 and several other Proposition 65 regulations addressing food-related issues specifically sought to avoid.

Conceptually, GMA believes that the best way to prevent such problems, and to achieve OEHHA's goals for this regulatory action, is to allow retailers and restaurants several options for providing consumers with a broad, general in-store statement that does two things:

- Provides useful information about Proposition 65 and its regulations, and their application to foods; and
- Directs consumers to other sources (e.g., one or more websites) for more detailed information about food-specific exposures and risks.

Whatever mechanism is chosen, a new regulation must create a comprehensive system that is flexible, practical, and easily implemented. It also must recognize that consumers are more sophisticated than ever, and increasingly rely on the internet and other sources to obtain information about diet and health. Moreover, the new safe harbor message must allow for more and better information to reach consumers than is provided in the current regulations.

A properly retooled safe harbor information delivery system would offer many potential advantages over what is possible under existing regulations. Specifically, it would 1) avoid overwhelming consumers with widespread and potentially inconsistent warnings; 2) provide a vehicle for more substantial information than can fit on a product package; 3) reduce the likelihood that purchasers of cooked and processed foods will mistakenly conclude that they can avoid the risks warned of by cooking foods at home; and 4) avoid potential conflicts with FDA labeling requirements.

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As discussed below, these important objectives are consistent with the purpose and past implementation of Proposition 65, and are well within the Agency's authority.

I. BACKGROUND

Proposition 65 requires that consumers be provided a "clear and reasonable" warning prior to being exposed to any of the over 800 chemicals listed as carcinogens or reproductive toxicants under the statute's implementing regulations.² In 1988, the Health & Welfare Agency adopted section 12601, which establishes safe harbor warning messages and methods that are deemed to satisfy the clear and reasonable standard. The purpose of 12601 is to reduce uncertainty by providing mechanisms by which businesses can assure that their conduct complies with the statute.³

The regulations were intended to be flexible and practical for businesses, and to provide them with numerous options for compliance.⁴ Thus, the Agency has steadfastly maintained that there were many ways in which businesses could provide clear and reasonable Proposition 65 warnings, and that the regulations were not intended to create a "hierarchy" of warning methods or to prefer one particular method over another.⁵

As discussed in more detail below, the safe harbor warning provisions and other Proposition 65 regulations also make clear that application of the statute and its regulations to foods sold in retail stores creates unique circumstances that justify special handling.

A. The Agency Has Authority to Adopt Special Regulations for Food.

While foods are expressly mentioned in Proposition 65, the Agency has always recognized that food is different. For, unlike other consumer products, people must regularly buy and consume food: "Food is a basic daily necessity of life on a par with the water that we drink and the air that we breathe."⁶

² Cal. Health & Saf. Code § 25249.6; Cal. Code Regs., tit. 22 § 12705.

³ Final Statement of Reasons, 22 California Code of Regulations Section 12601 ("12601 FSOR 1988"), at 7-8.

⁴ *Id.* at 5 ("The approach employed in these regulations is intended to provide the maximum flexibility, while assuring that warnings satisfy the intent of the voters who adopted the Act to receive warnings which will enable them to make informed choices.")

⁵ *Id.* at 11, 13.

⁶ Final Statement of Reasons, 22 California Code of Regulations Section 12501 ("12501 FSOR"), at 5.

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The Agency has also long known that Proposition 65 chemicals are near-ubiquitous in foods. As early as 1989, it was clear to the Agency that “most food products contain at least trace amounts of carcinogens and reproductive toxins which appear on the Governor's list.”⁷ Intervening developments have only served to confirm the Agency's early conclusions.

In 1989, there were only 279 listed chemicals.⁸ Currently, there are over 800.⁹ We now know that just one such chemical—acrylamide—is present as the result of cooking in foods that account for *approximately 40% of the energy consumed in the typical diet*.¹⁰ Dozens of other listed chemicals are also known or believed to be created in food as the result of cooking.¹¹

Therefore, the Agency has adopted several provisions addressing the unique food-related issues. These provisions, as recognized by the California Appellate Court, fall well within the Agency's authority to promulgate regulations that allow for uncertainty and provide meaningful information to consumers while avoiding a proliferation of warnings that would confuse, rather than enlighten.¹²

1. The “naturally occurring” exemption.

Section 12501 of the regulations exempts chemicals that are “naturally occurring” in foods from the definition of “exposure” under the statute.¹³ In part, this provision was adopted out

⁷ *Nicolle-Wagner v. Deukmejian*, 230 Cal. App. 3d 652, 655, 660 (1991) (discussing the record before the Agency when it adopted the “naturally occurring” exemption to Proposition 65.)

⁸ 12501 FSOR at 1.

⁹ The complete list of chemicals and their associated safe harbor levels is available for downloading in spreadsheet form at the OEHHA website, at http://www.oehha.ca.gov/prop65/prop65_list/Newlist.html.

¹⁰ FDA Food Advisory Committee Meeting on Acrylamide, Feb. 24-25, 2003, transcript available at <http://www.cfsan.fda.gov/~dms/acrytra2.html>.

¹¹ A few examples include: benzo(a)pyrene, benzo(a)anthracene, dibenz(a,h)anthracene, benzo(b)fluoranthene, and indeno(1,2,3-cd)pyrene created during smoking; benzo(a)pyrenes produced during the broiling of meat, and, along with benzo(a)anthracene, in dark roasted coffee; polynuclear (or polycyclic) aromatic hydrocarbons (PAHs) in cooked or processed potatoes, spinach and tea; canned chicken and beef broth, crackers, corn flakes, rice cereals, and cooked garlic and onion all have demonstrated mutagenic effects in the laboratory; and furans are formed during cooking from some of the same types of precursors as acrylamide.

¹² *Nicolle-Wagner*, 230 Cal. App. 3d at 660-61.

¹³ Cal. Code Regs., tit. 22, § 12501.

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of the concern that “warnings could appear on a large number of food products, and consequently, diminish the overall significance of food warnings.”¹⁴

Warnings for naturally occurring chemicals in food would not significantly enlighten the consumer about his or her options, and are more likely to cause confusion for the consumer who would be unable to differentiate between risks inherent in a food and those from added chemicals.¹⁵

The California Court of Appeals agreed with the Agency. Specifically, the court shared the Agency’s concern that grocers and other businesses would have difficulty marshaling evidence that their products posed no significant risk because “such evidence largely does not exist.”¹⁶ Section 12501 thus furthered the purpose of Proposition 65 by avoiding the blanket defensive warnings that would result:

Since one of the principal purposes of the statutes in question is to provide “clear and reasonable warning” of exposure to carcinogens and reproductive toxins, such warnings would be diluted to the point of meaninglessness if they were to be found on most or all food products.¹⁷

For these and other reasons, the Court held that the exemption “reasonably promotes the statutory purposes of Proposition 65,” and was within the Agency’s authority.¹⁸

2. The “cooking” exception.

Similar thinking gave rise to the “cooking exception,” which allows for an alternative to the 10^{-5} risk threshold that would ordinarily be used to determine whether a product poses a

¹⁴ FSOR 12501 at 3.

¹⁵ *Id.* at 5.

¹⁶ *Nicolle-Wagner*, 230 Cal. App. 3d at 660-61. The compliance challenges foreseen by the Agency and Court in *Nicolle-Wagner* have not diminished. Of the over 800 chemicals now listed, more than 500 have no safe harbor warning thresholds. See note 9, *supra*. Moreover, even where a safe harbor level is available, determining compliance is neither simple nor straightforward; it requires both product-specific concentration data and a complicated analysis of the average daily intake by average consumers of the entire product category. Cal. Code Regs., tit. 22, § 12721(d)(4). Indeed, the proper method for conducting each step of an exposure analysis is a hotly disputed issue in the current acrylamide litigation.

¹⁷ *Nicolle-Wagner*, 230 Cal. App. 3d at 660-61; Cal. Code Regs., tit. 22, § 12501.

¹⁸ *Nicolle-Wagner*, 230 Cal. App. 3d at 661-62.

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“significant risk of cancer” under the statute. The exception applies “where chemicals in food are produced by cooking necessary to render the food palatable or to avoid microbiological contamination”¹⁹

As with section 12501, the cooking exception was adopted, in part, to avoid overwarning that can result in the face of uncertainty.²⁰ Because the inherent variability in chemical compounds produced as a result of cooking (between products and even between samples of the same food) creates a great deal of unpredictability, the Agency was concerned that businesses would respond by providing widespread defensive warnings:

Businesses may have considerable difficulty determining in any particular case whether cooking has resulted in the concentrations of listed chemicals which meet the 10^{-5} standard. Thus, businesses may feel compelled to provide a warning to protect them from liability in the event the level of risk does exceed 10^{-5} .²¹

As with the naturally occurring exemption, the Agency concluded that such warnings were uninformative and counterproductive: “[C]onfusion which would result if all purveyors of cooked or heat-processed foods provide a warning with their product, to avoid any potential liability, could be enormous.”²²

3. Special warning language for bulk produce.

Even where warnings are required for foods, the Agency has acknowledged that certain circumstances create sufficient uncertainty that they justify deviation from the ordinary safe harbor language that would otherwise apply. For example:

Situations may exist in which a business cannot know whether in fact there is an exposure from each item sold, as in the case

¹⁹ Cal. Code Regs., tit. 22, § 12703(b)(1).

²⁰ Final Statement of Reasons, 22 California Code of Regulations Section 12703, at 5.

²¹ *Id.* Of the over 800 the chemicals listed under Proposition 65, only 279 have safe harbor warning thresholds. This uncertainty is exacerbated by the fact that manufacturers have no control over how much of a chemical is created when people buy fresh, frozen, or packaged foods and cook them at home, and consumers may be completely unaware that they are creating chemicals by cooking.

²² *Id.* The potential for confusion is exacerbated by the fact that manufacturers have no control over how much of a chemical is created when people buy fresh, frozen, or packaged foods and cook them at home, and consumers may be completely unaware that they are creating chemicals by cooking. *Id.* at 4-5.

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of bulk produce. Those situations may warrant special treatment under these regulations.²³

To address this situation, the Agency adopted a special safe harbor provision allowing sign warnings for fresh nuts, fruits, and vegetables to say that such products “may contain” a listed chemical.²⁴ This represented a departure from the Agency’s general view that the use of the word “may” is to be avoided in safe harbor warnings.²⁵ The basis for the provision was the potential variability in levels of exposure in individual units of produce that were grown in different areas or purchased from different sources but sold in the same bin.²⁶

B. Current Warning Regulations Do Not Offer Sufficient Options for Providing Meaningful Information to Consumers in the Retail Setting.

Proposition 65 and its implementing regulations seek to limit potential impacts that the statute’s warning requirements could have on retailers.²⁷ However, while the regulations establish that manufacturers and distributors of consumer products should shoulder a greater share of the warning obligation, they do not dictate how that burden is to be divided, and do not prefer one method over another.²⁸ Rather, the Agency’s emphasis was on flexibility and practicality.²⁹ As currently configured, section 12601 does not provide practical options for grocers *or* manufacturers because it does not account for certain practical realities that apply to the sale of food in a retail setting.

1. Compliance determinations and providing warnings for foods are uniquely difficult.

Unlike other consumer products, analyzing any given food to determine whether a warning is required is a complex process fraught with uncertainties for retailers *and* manufacturers. Many chemicals that are present in foods are created through cooking and are subject to

²³ 12601 FSOR 1988 at 4.

²⁴ Cal. Code Regs., tit. 22, § 12601(b)(4)(D).

²⁵ 12601 FSOR 1988 at 4.

²⁶ *Id.* at 28 (“This is made necessary by the fact that cases of produce from different, wide-ranging and even international sources, some of which may require a warning and others not, are frequently mixed at the point of sale.”).

²⁷ *See, e.g.*, Cal. Health & Saf. Code § 25249.11(f); Cal. Code Regs., tit. 22, § 12601(b)(2).

²⁸ 12601 FSOR 1988 at 11-13.

²⁹ *Id.* at 13.

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different risk assessment rules.³⁰ Some chemicals in foods may be partly or completely naturally occurring.³¹ Determining the existence and extent of naturally occurring chemicals is often a difficult, complicated, and costly process requiring the assistance of experts.

As the primary source of foods for consumers, grocery stores face particular challenges. Most sell a widely diverse and ever-changing inventory of products. Products are grouped together based on factors aimed at consumer convenience, not by ingredients (let alone chemical composition). Providing signs or shelf warnings for individual products under such circumstances is cumbersome and difficult to maintain. Many types of foods on a single shelf could result in multiple warnings or “generic” safe harbor warnings with no specific information helpful to the consumer. Reorganizing aisles or adding new products in response to consumer needs could require a completely new analysis to assure that the sign matches the exposure for each product on the aisle.

2. On-product labels are not the solution.

Package labels do not provide a workable solution to this problem. Manufacturers face problems with distribution chains because it is impossible to sufficiently segregate products destined for the California market. As a result, to avoid liability, assuring that all California-bound products are properly labeled requires companies to place Proposition 65 warnings on products sold in other states. Consumers in states outside California, who do not have the proper context to evaluate these messages, find them confusing.

In addition, food manufacturers generally have very limited label space to devote to Proposition 65 information. This necessarily constrains the amount of useful information that may be placed on the product. As a result, even California consumers familiar with Proposition 65 may have difficulty discerning anything useful from the very brief messages that may be conveyed on a label. For similar reasons, requiring manufacturers to provide on-product symbols is not a workable solution. Without the comprehensive program proposed here, a symbol would provide even less information than the existing one-line safe harbor warning. Finally, if there were room on the label for a proper warning, such labeling may put manufacturers in conflict with requirements imposed on foods through regulations enforced by FDA, USDA, or other federal or state regulatory agencies.³²

³⁰ Cal. Code Regs., tit. 22, § 12703(b)(1).

³¹ Cal. Code Regs., tit. 22, § 12501.

³² See, e.g., *Dowhal v. SmithKline Beecham Consumer Health Care*, 32 Cal. 4th 910 (2004); see also Letter from Lester M. Crawford, DVM, Ph.D., Deputy Commissioner of FDA to Joan E. Denton, M.S., Ph.D., Director of OEHHHA (July 14, 2003), available at

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As the Agency recognized when adopting the various special food provisions, the likely outcome in these circumstances – regardless of the mechanism used – is a proliferation of short, context-free, safe harbor warnings. Such warnings may protect the seller or manufacturer from liability under existing regulations, but they will provide little in the way of nuanced, meaningful information to consumers.

II. CONCEPTUAL PROPOSAL

As my colleague Robin Stafford indicated at the March 14, 2004 workshop, we believe that the most appropriate goal at this stage is to develop an agreement on a conceptual approach to the issues OEHHA has identified. Disagreements about specific details should be ironed out in future proceedings. Our conceptual proposal is as follows.

A. Retailer Obligations.

It is important that any requirements adopted in this rulemaking procedure apply only to retail outlets above a minimum size. This is consistent with language in the statute and in existing regulations, neither of which requires that warnings be provided separately to each exposed individual.³³

In recent settlements with restaurant defendants resolving claims concerning acrylamide, the Attorney General utilized this reasoning. Those settlements allow warnings to be presented on nutritional posters hung in visible locations inside the restaurant. No separate warnings are required at drive-through windows, based on the assumption that drive-through customers also sometimes go inside the restaurant and will view the warning.³⁴

1. Information about Proposition 65 and Foods.

Retailers would have some mechanism—such as a sign, a poster, brochure, register receipt, or otherwise—to provide shoppers with information about Proposition 65 and its regulations

http://www.oehha.ca.gov/prop65/docs_state/pdf/acrylbrief.pdf (citing potential conflicts in the context warnings for acrylamide).

³³ Cal. Health & Saf. Code § 25249.11(f) (“‘Warning’ within the meaning of Section 25249.6 need not be provided separately to each exposed individual and may be provided by general methods”); Cal. Code Regs., tit. 22, § 12601(a) (“Nothing in this section shall be construed to preclude a person from providing warnings other than those specified in subsections (b), (c), and (d) which satisfy the requirements of this subsection, or to require that warnings be provided separately to each exposed individual.”).

³⁴ See, e.g., Consent Judgment between Burger King Corporation and the People of the State of California, attached hereto as Exhibit A, at § 2.3.

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and how they apply to foods. At a minimum, the message would make the following general points:

- Proposition 65 chemicals are present in many foods sold in grocery stores and restaurants.
- Some of these chemicals are naturally occurring; some are added to foods. Some chemicals are created when a food is cooked – whether the cooking is done in a food processing facility, in a restaurant, or by a consumer at home.
- There is wide variation in the amount of chemicals present in any given food, and in the amount of risks associated with such exposures.

While general, such information would be more meaningful to consumers than the current one-sentence safe harbor warning, which only informs the consumer – without context or specifics – that some carcinogen or reproductive toxicant is present in the product.³⁵

Whatever the form and content, the message would be delivered in a central location in the store where it is likely to be seen by customers before their purchases are complete. The ubiquitous nature of potentially affected products assures that consumers will see the warning as often as they do their regular shopping. As the warning is not limited to food sold in a particular establishment, consumers will understand the warning applies to the same food products wherever they are sold.

2. Reference to additional materials.

a. Pre-purchase warnings are not required.

Shoppers would be directed to more detailed food- and/or chemical-specific information, presumably on the internet. At the workshop, Deputy Attorney General Susan Fiering expressed concerns about a warning system that would require a consumer to follow up outside the grocery store. However, nothing in the statute or its implementing regulations requires that warnings be provided prior to purchase. Rather, warnings on consumer goods are required to be provided in such a way “as to render it likely to be read and understood by an ordinary individual under customary conditions of *purchase or use*.”³⁶ This phrasing was amended to clarify that pre-purchase label warnings were not required.³⁷

³⁵ Cal. Code Regs., tit. 22, § 12601(a), (b)(4).

³⁶ Cal. Code Regs., tit. 22, § 12601(b)(3); *see also* Cal. Health & Saf. Code § 25249.6 (“No person in the course of doing business shall knowingly and intentionally expose any individual to a chemical known to the state to cause cancer or reproductive toxicity *without first giving clear and reasonable*

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In fact, the Agency anticipated that some detailed information about products and chemicals may best be delivered after the initial warning was provided. For example, after confirming that information about the particular chemical present in a product is not required for a Proposition 65 warning to be clear, the Final Statement of Reasons for section 12601 allowed that a certain amount of follow-up by consumers who want more information is acceptable:

If the exposed individual desires information about the chemical, it appears preferable that the information be obtained from the party responsible for the exposure *after the warning, rather than through the warning*. Otherwise, the warnings may become visually too congested and cumbersome to read and understand.³⁸

This language suggests that warnings may be utilized to trigger interested consumers to pursue more detailed information from a trusted and highly utilized source.

b. Consumers are accustomed to accessing diet and health information on the internet.

Consumers today are increasingly sophisticated and increasingly reliant on the internet as a source for information about diet and health.³⁹ A recent survey of over 4,000 California

warning . . .) (emphasis added); 12501 FSOR at 1 (“The requirement of *warning prior to exposure* to a listed chemical becomes effective twelve months after it has been listed.”) (emphasis added.)

³⁷ 12601 FSOR 1988, at 24 (explaining the change from “purchase and use” to “purchase or use” to clarify that warning labels are not required.) The Agency also indicated that warnings provided on register receipts – which are not generated until after purchase – may satisfy the statute. *Id.* at 13.

³⁸ 12601 FSOR 1988, at 4.

³⁹ See, e.g., John B. Horrigan, Pew Internet & American Life Project, *Home Broadband Adoption 2007* at 2 (July 7, 2007), available at http://www.pewinternet.org/pdfs/PIP_Broadband%202007.pdf (“Currently, 71% of adults use the internet at least occasionally from any location; of these, 94% have an internet connection at home. Among adults with a home internet connection, 70% go online using a high-speed connection, versus 23% who use dialup.”); Susannah Fox, Pew Internet & American Life Project Report, *Health Information Online* (May 17, 2005), available at http://www.pewinternet.org/pdfs/PIP_Healthtopics_May05.pdf (“Eight in ten internet users have looked for health information online, with increased interest in diet, fitness, drugs, health insurance, experimental treatments, and particular doctors and hospitals.”) California is in line with this trend. See Public Policy Institute of California, *California’s Digital Divide* (September 2007) (“PPIC Report”), available at http://www.ppic.org/content/pubs/jtf/JTF_DigitalDivideJTF.pdf (“Today, Californians (78%) are about as likely as adults nationwide (75%) to use a computer at home, work, or school and to say that they use the Internet (73% each).”).

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residents indicates that over 80% of English-speaking Californians (the only consumers who would be reached by warnings in any event) report using the internet.⁴⁰

The evolution in the way that people get and use information distinguishes the conceptual framework proposed here from the system rejected by the court in *Ingredient Communication Council, Inc. v. Lungren*, 2 Cal. App. 4th 1480 (1992) (“ICC”). In that case, data gathered by the proponents of a system of warnings designed to utilize newspaper ads, in-store signs, and references to a toll-free number, established that consumers did not use the system.⁴¹ This is unsurprising, since the system was uninformative and unwieldy.

Unlike the informative contextual in-store message contemplated in the proposed conceptual framework, the small sign in the *ICC* case failed to identify even a category of “consumer products” to which Proposition 65 applied, provided no information about how consumers would be exposed, and did not indicate whether such products were even sold in the store posting the sign.⁴² The toll-free calling system was cumbersome and navigation required multiple interactions with operators.⁴³ Most important, the pre-recorded messages which callers eventually received provided nothing more than the general safe harbor language from section 12601(b).⁴⁴ Callers wanting more specific information were instructed to telephone product manufacturers.⁴⁵

By contrast, GMA is proposing a conceptual framework designed to improve on the safe harbor warnings by delivering *better* information in a *more accessible* manner. Consumers would not be required to make multiple telephone calls.

While there are many potential websites that may provide helpful information, the primary sources provided would be a website maintained specifically for the purpose of providing information about exposures to Proposition 65 chemicals in foods. Regulated entities could work with OEHHA, individually or through trade groups, to create a “clearinghouse” website for information on food warnings.

⁴⁰ PPIC Report at 2.

⁴¹ *Ingredient Communication Council, Inc. v. Lungren*, 2 Cal. App. 4th 1480, 1487-88 (1992) (“ICC”).

⁴² *Id.* The sign in that case said “Proposition 65 requires that California consumers be warned about products containing chemicals known to the State to cause cancer or other reproductive harm or birth defects.” Consumers were then referred to a toll-free telephone number to “obtain this information on consumer products sold in California.” *Id.*

⁴³ *Id.* at 1488.

⁴⁴ *Id.*

⁴⁵ *Id.*

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This central website could also contain links to other sites similar to those maintained by the U.S. FDA containing information on lead and acrylamide. Additional links could be provided to relevant studies and risk assessments conducted and maintained for individual chemicals by agencies such as the International Agency for Research on Cancer (“IARC”) and the National Toxicology Program (“NTP”).

The major benefit of this system is that it would assure that consumers get meaningful information, not just stark, one-sentence warnings designed to avoid litigation.⁴⁶ OEHHA, rather than manufacturers, could control the content and links to outside information. Consumers—with just a few mouse clicks – could navigate the system unassisted, controlling how much or little information they received. For these reasons alone, the proposed system would be far superior to the cumbersome toll-free number system in *ICC*.⁴⁷

III. CONCLUSION.

For all of these reasons, GMA is confident that OEHHA has the authority it needs to craft a useful and pragmatic set of regulations that will provide consumers with the information they want while minimizing confusion and overwarning. We look forward to working with you on such a proposal.

Sincerely,



Michele B. Corash

⁴⁶ See *Nicolle-Wagner*, 230 Cal. App. 3d at 660-61 (affirming naturally occurring regulation based on sound policy of avoiding a proliferation of meaningless food warnings to avoid liability).

⁴⁷ *ICC*, 2 Cal. App. 4th at 1487-88.

Exhibit A

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15 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
16 FOR THE COUNTY OF LOS ANGELES

17
18 COUNCIL FOR EDUCATION AND
RESEARCH ON TOXICS
19 Plaintiff,
20
21 v.
22 McDONALD'S CORPORATION; BURGER
KING CORPORATION
23
24 Defendants.

Case No.: BC 338956
CONSENT JUDGMENT BETWEEN
PLAINTIFFS PEOPLE OF THE
STATE OF CALIFORNIA,
COUNCIL FOR EDUCATION AND
RESEARCH ON TOXICS, AND
DEFENDANT BURGER KING
CORPORATION
Dept: 307
Judge: Hon. Wendell Mortimer, Jr.
Trial Date: January 15, 2008
Action Filed: August 26, 2005

1 PEOPLE OF THE STATE OF CALIFORNIA,
2 ex rel. EDMUND G. BROWN JR., Attorney
3 General of the State of California,

4 Plaintiff,

5 v.

6 FRITO-LAY, INC., PEPSICO, INC., H.J.
7 HEINZ, COMPANY, KETTLE FOODS, INC.,
8 KFC CORPORATION, LANCE, INC., THE
9 PROCTER & GAMBLE DISTRIBUTING
10 COMPANY, THE PROCTER & GAMBLE
11 MANUFACTURING COMPANY, WENDY'S
INTERNATIONAL, INC., MCDONALD'S
CORPORATION, BURGER KING
CORPORATION and DOES 1 through 100,

Defendants.

12 **1. INTRODUCTION**

13 1.1. On September 3, 2002, plaintiff Council for Education and Research on Toxics,
14 "CERT" filed a complaint for civil penalties and injunctive relief for violations of Proposition 65
15 and unlawful business practices in the Superior Court for the County of Los Angeles. On August
16 26, 2005, the People of the State of California ("People"), filed a complaint for civil penalties
17 and injunctive relief for violations of Proposition 65 and unlawful business practices in the
18 Superior Court for the County of Los Angeles. CERT's and the People's Complaints allege that
19 the Defendants failed to provide clear and reasonable warnings that ingestion of the Covered
20 Products (as defined in Paragraph 2.1), would result in exposure to acrylamide, a chemical
21 known to the State of California to cause cancer. The Complaints further allege that under the
22 Safe Drinking Water and Toxic Enforcement Act of 1986, Health and Safety Code section
23 25249.6, also known as "Proposition 65," businesses must provide persons with a "clear and
24 reasonable warning" before exposing individuals to these chemicals, and that the Defendants
25 failed to do so. The People's Complaint also alleges that these acts constitute unlawful acts in
26 violation of the Unfair Competition Law, pursuant to Business and Professions Code sections
27
28

1 17200 *et seq.* The two cases were ordered related and assigned to the Honorable Wendell
2 Mortimer, Jr., although they were not consolidated. This judgment shall be entered in each of
3 the two related cases and shall serve as the judgment as to defendant Burger King Corporation in
4 each case.

5
6 1.2. Burger King Corporation ("Burger King") or, the "Settling Defendant" is among the
7 defendants named in both complaints.

8 1.3. The Settling Defendant is a corporation that employs more than 10 persons, or
9 employed ten or more persons at some time relevant to the allegations of the complaint, and
10 which manufactures, distributes and/or sells Covered Products in the State of California or has
11 done so in the past.

12 1.4. For purposes of this Consent Judgment only, the parties stipulate that this Court has
13 jurisdiction over the allegations of violations contained in the People's and CERT's Complaints
14 and personal jurisdiction over Settling Defendant as to the acts alleged in the People's
15 Complaint, that venue is proper in the County of Los Angeles, and that this Court has jurisdiction
16 to enter this Consent Judgment as a full and final resolution of all claims which were or could
17 have been raised in the Complaint based on the facts alleged therein.

18
19 1.5 The People, CERT, and Settling Defendant enter into this Consent Judgment as a
20 full and final settlement of all claims that were raised in the Complaint (except as specified in
21 Paragraph 7.1), arising out of the facts or conduct alleged therein. By execution of this Consent
22 Judgment and agreeing to provide the relief and remedies specified herein, Settling Defendant
23 does not admit any violations of Proposition 65 or Business and Professions Code sections 17200
24 *et seq.*, or any other law or legal duty. Except as expressly set forth herein, nothing in this
25 Consent Judgment shall prejudice, waive or impair any right, remedy, or defense the Attorney
26 General, CERT, and Settling Defendant may have in any other or in future legal proceedings
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1 unrelated to these proceedings. However, this paragraph shall not diminish or otherwise affect
2 the obligations, responsibilities, and duties of the parties under this Consent Judgment.

3 **2. INJUNCTIVE RELIEF; CLEAR AND REASONABLE WARNINGS**

4 2.1. Settling Defendant shall provide warnings in the manner required by this Consent
5 Judgment for all Covered Products sold at its restaurants located in the State of California.

6 "Covered Products" means all potato products containing acrylamide, including fried or baked
7 potato products, sold in restaurants owned and operated by Settling Defendant ("Company
8 Restaurants") or restaurants owned and operated by third parties pursuant to franchise or license
9 agreements with Settling Defendant ("Franchise Restaurants"), whether commonly called french
10 fries, curly fries, or potato wedges.

11 2.2 Warning message. The warning message provided, under any of the permitted
12 warning methods, shall be any one of the following:

13 a.

14 **WARNING:**

15
16
17 Chemicals known to the State of California to cause cancer, or birth defects or other
18 reproductive harm may be present in foods or beverages sold or served here. Cooked
19 potatoes that have been browned, such as french fries, hash browns, and cheesy tots,
20 contain acrylamide, a chemical known to the State of California to cause cancer.

21 This chemical is not added to our foods, but is created when certain foods are browned.

22 Other foods sold here, such as hamburger buns, biscuits, croissants, and coffee
23 also contain acrylamide, but generally in lower concentrations than fried potatoes.
24 Your personal cancer risk is affected by a wide variety of factors. The FDA has
25 not advised people to stop eating baked or fried potatoes. For more information
26 see www.fda.gov.

27 [The following language is optional.] Some other chemicals that may be present
28 in foods or beverages served here and known to the State of California to cause
cancer and birth defects or other reproductive harm are, like acrylamide, by-
products of cooking. [Settling Defendant may, but need not, identify specific
chemicals such as Polycyclic Aromatic Hydrocarbons and PhIP (2-Amino-1-
methyl-6-phenylimidazol[4,5-b]pyridine)].

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b.

WARNING

Cooked potatoes that have been browned, such as french fries, hash browns, and cheesy tots, contain acrylamide, a chemical known to the State of California to cause cancer.

This chemical is not added to our foods, but is created when certain foods are browned.

Your personal cancer risk is affected by a wide variety of factors.

The FDA has not advised people to stop eating baked or fried potatoes. For more information see www.fda.gov.

[The following language is optional.] Some other chemicals that may be present in foods or beverages served here and known to the State of California to cause cancer and birth defects or other reproductive harm are, like acrylamide, by-products of cooking. [Settling Defendant may, but need not, identify specific chemicals such as Polycyclic Aromatic Hydrocarbons and PhiP (2-Amino-1-methyl-6-phenylimidazol[4,5-b]pyridine)].

c.

WARNING:

Chemicals known to cause cancer, or birth defects or other reproductive harm may be present in foods or beverages sold or served here.

Cooked potatoes that have been browned, such as french fries, hash browns, and cheesy tots, contain acrylamide, a chemical known to the State of California to cause cancer.

This chemical is not added to our foods, but is created when certain foods are browned.

Your personal cancer risk is affected by a wide variety of factors.

The FDA has not advised people to stop eating baked or fried potatoes. For more information see www.fda.gov.

d. Wherever any warning language in this Consent Judgment uses the phrase "chemical known to the State of California to cause cancer," Settling Defendant, at its option, may use either the phrase "chemical known to cause cancer" or chemical that causes cancer."

1 2.3. Warning Method. The warning shall be provided through any of the three
2 methods set forth in paragraphs 2.3.1, 2.3.2, or 2.3.3. Whichever warning method is
3 used, any sign must be:

4 (a) located at or on the counter where food is purchased, on a wall either
5 adjacent and parallel to or clearly visible to consumers standing at the counter where food
6 is purchased; or

7 (b) located or at any other place that is reasonably likely to be seen and
8 read by customers entering the restaurant to order food;

9 (c) not located at any of the following locations: On an entrance or exit
10 door, on a window, on a restroom door, in a restroom, in a hallway that leads only to
11 restrooms, on a refuse container.

12 2.3.1. Sign Warning: A warning set forth on a sign at least 10 inches high by 10
13 inches wide, with the word "WARNING" centered three-quarters of an inch from the top
14 of the sign in ITC Garamond bold condensed type fact all in one-inch capital letters.
15 Three-sixteenths of an inch from the base of the word "warning" shall be a line extending
16 from left to right across the width of the sign one-sixteenth of an inch in thickness.
17 Centered one-half inch below the line shall be the body of the warning message in ITC
18 Garamond bold condensed type face. For the body of the warning message, left and right
19 margins of at least one-half of an inch, and a bottom margin of at least one-half inch shall
20 be observed. Larger signs shall bear substantially the same proportions of type size and
21 spacing to sign dimension as the sign 10 inches high by 10 inches wide.

22 2.3.2. Sign and Brochure Combination: A combination of a sign and brochure
23 meeting the following requirements:

24 2.3.2.1. The sign is at least 10 inches by 10 inches, with the word "WARNING"
25 centered three-quarters of an inch from the top of the sign in ITC Garamond bold
26
27
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1 condensed type face all in one-inch capital letters. Three-sixteenths of an inch from the
2 base of the word "warning" shall be a line extending from left to right across the width of
3 the sign one-sixteenth of an inch in thickness. Centered one-half inch below the line shall
4 be the body of the warning message in ITC Garamond bold condensed type face. For the
5 body of the warning message, left and right margins of at least one-half of an inch, and a
6 bottom margin of at least one-half inch shall be observed. Larger signs shall bear
7 substantially the same proportions of type size and spacing to 10 inches high by 10 inches
8 wide.
9

10 2.3.2.2. The sign contains the following text:

11 **WARNING**

12 **Chemicals known to the State of California to cause cancer, or birth defects or**
13 **other reproductive harm may be present in foods or beverages sold or served here.**
14 **For more specific information, see the brochure [located at the cashier] [next to**
15 **this sign]**

16 2.3.2.3. The brochure:

17 The brochure or handout must meet the following requirements:

- 18 (a) It must be at least 8 inches by 3 2/3 inches.
- 19 (b) It must contain the text set forth in Paragraph 2.2.
- 20 (c) If it contains warnings about acrylamide in fried potatoes only, then the
21 text shall be at least 12 points in size. If it contains warnings about other
22 foods, the text may be smaller than 12 points in size but must be equal for
23 each warning, and may be no smaller than necessary to be readable.
- 24 (d) If Settling Defendant chooses to provide additional Proposition 65
25 warnings not required by this Consent Judgment in the brochure, such
26 additional warnings may not be on the same page or more prominent than
27 the required acrylamide warning without the prior approval of the
28 Attorney General.

2.3.3. Combination with Nutrition Information: If Settling Defendant provides "nutrition

1 facts", i.e., information concerning the nutritional contents of the foods served in its restaurants,
2 the warning may be provided within that sign or poster and accompanying materials, if all of the
3 following requirements are satisfied:

- 4 (a) The sign or poster indicates that it describes the nutritional content of
5 foods served in the restaurant either by a title or heading using words such
6 as "nutrition facts", "nutrition information," or similar heading or title.
- 7 (b) The Proposition 65 warning is clearly visible to anyone reading the sign or
8 poster. It will be set off by a distinctive border, and the word "Warning"
9 shall be in print no smaller than other sectional headings in the sign or
10 poster.
- 11 (c) If the specific nutritional information about individual products is
12 provided on the sign itself, then the section 2.2 Proposition 65 warning
13 shall be provided on the sign unless there also is a brochure with specific
14 nutritional information, in which event, the Settling Defendant has the
15 option to place the section 2.3.2.2 warning on the sign or poster and a
16 section 2.2 warning in the brochure, provided, however, that if the Settling
17 Defendant elects to place the section 2.2 warning on the poster, if the
18 brochure includes specific nutritional information, the brochure also must
19 include the section 2.2 warning. If the specific nutritional information
20 about individual products is only provided in a brochure, then the section
21 2.2 Proposition 65 warning set forth above may be provided in the
22 brochure only.
- 23 (d) Subject to subsection (c) above, the section 2.2 warning may be provided
24 in the brochure if (1) the brochure indicates that it describes the nutritional
25 content of foods served in the restaurant either by a title or heading using
26 words such as "nutrition facts", "nutrition information," or similar heading
27 or title; and (2) the Proposition 65 warning is set forth in type of at least
28 the same size and visibility as the nutritional information.

1 2.4 Settling Defendant may, but are not required to, submit signs and/or brochures for a
2 determination that it satisfies the requirements of this Consent Judgment. The sign
3 attached as Exhibit A to this Consent Judgment are deemed to satisfy the terms of
4 this Judgment regarding the content and appearance of warnings. No sign shall be
5 deemed to comply with this Consent Judgment unless it has been submitted to and
6 approved by the Attorney General.

7 2.5 Periodic Modification of Warning Message

8 2.5.1. The warning message may be modified, with the approval of the Attorney
9 General, to include other foods or beverages.

10 2.6 Implementation of Warning

11 2.6.1. Settling Defendant shall provide its own stores and all franchisees with sufficient
12 supply of signs, and, if that method of warning is selected, brochures, to meet the requirements
13 of this Consent Judgment.

14 2.6.2. Company Restaurants. Burger King currently does not own any restaurants in the
15 State of California. If it acquires any restaurants in the State of California, within 60 days of
16 entry of this Consent Judgment, Settling Defendant shall send a letter to its Company
17 Restaurants within the State of California, directing them to post the warning in the manner
18 described above. In addition, Settling Defendant shall include inspection for compliance with
19 these requirements in its existing inspection programs. Settling Defendant will maintain
20 inspection, reporting and follow up programs that result in inspection of each of its Company
21 Restaurants in California at least every 6 months. Where inspection shows that a Company
22 Restaurant has not complied, Settling Defendant shall take all reasonably available steps to
23 assure compliance within 75 days.

24 2.6.3. Franchise Restaurants. Within 60 days of entry of this Consent Judgment, Settling
25 Defendant shall send a letter, in substantially the form and content set forth in Exhibit B, to its
26 Franchise Restaurants within the State of California, instructing them to post the warning in the
27 manner described above. This letter shall state that the franchisee is released from liability for
28 past violations and it is in compliance with future requirements with respect to sale of the

1 Covered Products only if the franchisee complies with the warning requirements. In addition,
2 Settling Defendant shall include inspection for compliance with these requirements in its existing
3 inspection, reporting and follow-up programs.

4 2.7. Nothing in this Consent Judgment requires that warnings be given for Covered
5 Products sold outside the State of California.

6 3. PAYMENTS

7 3.1.(a) Settling Defendant shall pay the following total amount of \$1,250,000, within
8 thirty days of entry of this Consent Judgment, as follows:

9 1. \$350,000 in civil penalties pursuant to Health and Safety Code section
10 25249.7(b). The 25% plaintiff's share of the penalty (\$87,000) shall be apportioned \$60,000 to
11 CERT and \$17,000 to the Attorney General.

12 2. \$200,000 to be used by the Attorney General for the enforcement of
13 Proposition 65, as further set forth in Paragraph 3.1.(b).

14 3. \$700,000 in attorney fee and cost reimbursement to CERT.

15 (b) Funds paid pursuant to paragraphs (a)(3) shall be placed in an interest-bearing
16 Special Deposit Fund established by the Attorney General. These funds, including any interest,
17 shall be used by the Attorney General, until all funds are exhausted, for the costs and expenses
18 associated with the enforcement and implementation of the Safe Drinking Water and Toxic
19 Enforcement Act of 1986 ("Proposition 65"), including investigations, enforcement actions,
20 other litigation or activities as determined by the Attorney General to be reasonably necessary to
21 carry out his duties and authority under Proposition 65. Such funding may be used for the costs
22 of the Attorney General's investigation, filing fees and other court costs, payment to expert
23 witnesses and technical consultants, purchase of equipment, travel, purchase of written materials,
24 laboratory testing, sample collection, or any other cost associated with the Attorney General's
25 duties or authority under Proposition 65. Funding placed in the Special Deposit Fund pursuant to
26 this paragraph, and any interest derived therefrom, shall solely and exclusively augment the
27 budget of the Attorney General's Office and in no manner shall supplant or cause any reduction
28 of any portion of the Attorney General's budget.

1 3.2. Each payment to the Attorney General required by this consent judgment shall be
2 made through the delivery of separate checks payable to "California Department of Justice," to
3 the attention of Edward G. Weil, Supervising Deputy Attorney General, Department of Justice,
4 1515 Clay Street, 20th Floor, Oakland, CA, 94612.

5 3.3. Payment of CERT's share of the civil penalties shall be made by check payable to
6 "Council for Education and Research on Toxics." Payment of CERT's attorney's fees and costs
7 shall be made payable to "Metzger Law Group Attorney-Client Trust Account." Both checks
8 shall be delivered to Raphael Metzger, Metzger Law Group, 401 E. Ocean Blvd., Suite 800,
9 Long Beach, CA 90802.

10 **4. MODIFICATION OF CONSENT JUDGMENT**

11 4.1. This Consent Judgment may be modified by written agreement of the Attorney
12 General, CERT, and Settling Defendant, after noticed motion, and upon entry of a modified
13 consent judgment by the court thereon, or upon motion of the Attorney General or Settling
14 Defendant as provided by law and upon entry of a modified consent judgment by the court.
15 Before filing an application with the court for a modification to this Consent Judgment, CERT,
16 and Settling Defendant may meet and confer with the Attorney General to determine whether the
17 Attorney General will consent to the proposed modification. If a proposed modification is
18 agreed, then Settling Defendant, CERT, and the Attorney General will present the modification
19 to the court by means of a stipulated modification to the Consent Judgment.

20 4.2 If the Attorney General or CERT subsequently agrees in a settlement or judicially
21 entered injunction or consent judgment that the Covered Products (as sold by other companies)
22 do not require a warning under Proposition 65 (based on the presence of acrylamide), or that
23 imposes an injunctive relief warning for Covered Products different from that imposed under this
24 Consent Judgment; or if a court of competent jurisdiction renders a final judgment, and the
25 judgment becomes final, in a case brought by the Attorney General, that Covered Products do
26 not require a warning under Proposition 65, or otherwise imposes an injunctive relief warning
27 different from that imposed by this Consent Judgment, then Settling Defendant shall be entitled
28 to seek to modify this Consent Judgment to eliminate or modify the injunctive relief set forth in

1 Paragraph 2, consistent with the Attorney General's or CERT's agreement or with the court
2 judgment as described herein. Settling Defendant shall not be entitled to and may not seek a
3 modification of the judgment simply because a court orders another company to use any "safe
4 harbor" warning methods set out in California Code of Regulations, title 22, section 12601,
5 subdivision (b).

6 4.3 If a court of competent jurisdiction renders a final judgment, and the judgment
7 become final, in a case brought by the Attorney General or against the State of California, that
8 federal law precludes the Settling Defendant from providing the warnings set forth in this
9 Consent Judgment, Settling Defendant may seek to modify this Consent Judgment to bring the
10 injunctive relief imposed herein into compliance with federal law.

11 4.4 If an agency of the federal government, including, but not limited to the U.S.
12 Food and Drug Administration, states through any communication, regulation, or legally binding
13 act, that federal law precludes the Settling Defendant from providing all of the warnings set forth
14 in this Consent Judgment or the manner in which the warnings are given, Settling Defendant may
15 seek to modify this Consent Judgment to bring the warnings into compliance with federal law,
16 but the modification shall not be granted unless this Court concludes, in a final judgment or
17 order, that federal law precludes the Settling Defendant from providing the warnings set forth in
18 this Consent Judgment. A determination that the provision of some, but not all, forms of
19 warning described in section 2 above (e.g., warnings in conjunction with provision of nutritional
20 information) is not permitted shall not relieve Settling Defendant of the duty to provide one of
21 the other warnings described under this judgment for which such determination has not been
22 made.

23 4.5 If Proposition 65 or its implementing regulations are changed from their terms as
24 they exist on the date of entry of judgment, the parties may seek modifications in the Consent
25 Judgment as follows:

26 a. If the change establishes that warnings for acrylamide in the Covered Products are not
27 required, Settling Defendant may seek a modification of this Consent Judgment to relieve it of
28 the duty to warn.

1 b. If the change establishes that the warnings provided by this Consent Judgment would
2 not comply with the law, either party may seek a modification of the Consent Judgment to
3 conform the judgment to the change in law.

4 c. If the change would provide a new form or manner of an optional or safe-harbor
5 warning, a Settling Defendant may seek a modification to provide a warning in the newly
6 permitted form, but the modification shall not be granted unless the court finds that the new
7 warning would not be materially less informative or likely to be seen, read, and understood than
8 the warnings provided under this Consent Judgment.

9 4.6 If a Settling Defendant corresponds in writing to an agency or branch of the
10 United States Government in connection with the application of Proposition 65 to Acrylamide in
11 fried or baked potato products, then, so long as such correspondence is not confidential and
12 would be retrievable by the Attorney General under the Freedom of Information Act, Settling
13 Defendant originating such communication shall provide the Attorney General with a copy of
14 such communication as soon as practicable, but not more than 10 days after sending or receiving
15 the correspondence; provided, however, that this section shall not apply to correspondence to or
16 from trade associations or other groups of which Settling Defendant is a member.

17 5. ENFORCEMENT

18 5.1. The People or CERT may, by motion or application for an order to show cause
19 before this Court, enforce the terms and conditions contained in this Consent Judgment. In any
20 such proceeding, the People may seek whatever fines, costs, penalties, or remedies are provided
21 by law for failure to comply with the Consent Judgment and where said violations of this
22 Consent Judgment constitute subsequent violations of Proposition 65 or other laws independent
23 of the Consent Judgment and/or those alleged in the Complaint, the People or CERT are not
24 limited to enforcement of the Consent Judgment, but may seek in another action, whatever fines,
25 costs, penalties, or remedies are provided for by law for failure to comply with Proposition 65 or
26 other laws. In any action brought by the People alleging subsequent violations of Proposition 65
27 or other laws, Settling Defendant may assert any and all defenses that are available.
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6. AUTHORITY TO STIPULATE TO CONSENT JUDGMENT

6.1. Each signatory to this Consent Judgment certifies that he or she is fully authorized by the party he or she represents to stipulate to this Consent Judgment and to enter into and execute the Consent Judgment on behalf of the party represented and legally to bind that party.

7. CLAIMS COVERED

7.1. This Consent Judgment is a full, final, and binding resolution between the People, CERT, and Settling Defendant, of any violation of Proposition 65, Business & Professions Code sections 17200 *et seq.*, or any other statutory or common law claims that have been or could have been asserted in the complaint against Settling Defendant for failure to provide clear and reasonable warnings of exposure to acrylamide from the use of the Covered Products, or any other claim based on the facts or conduct alleged in the Complaint, whether based on actions committed by Settling Defendant or by any entity to whom it distributes or sells Covered Products, and for any franchisee who sells or has sold Covered Products in the State of California, if that franchisee complies with Paragraph 2.6.3. As to Covered Products, compliance with the terms of this Consent Judgment resolves any issue now, in the past, and in the future concerning compliance by Settling Defendant, their parents, shareholders, divisions, subdivisions, subsidiaries, sister companies, affiliates, franchisees, cooperative members, and licensees; their distributors, wholesalers, and retailers who sell Covered Products; and the predecessors, successors, and assigns of any of them; with the requirements of Proposition 65.

8. RETENTION OF JURISDICTION

8.1. This Court shall retain jurisdiction of this matter to implement the Consent Judgment.

9. PROVISION OF NOTICE

9.1. When any party is entitled to receive any notice under this Consent Judgment, the notice shall be sent by overnight courier service to the person and address set forth in this Paragraph. Any party may modify the person and address to whom the notice is to be sent by sending each other party notice by certified mail, return receipt requested. Said change shall take

1 effect for any notice mailed at least five days after the date the return receipt is signed by the
2 party receiving the change.

3 9.2. Notices shall be sent to the following when required:

4 For the Attorney General:

5 Edward G. Weil, Supervising Deputy Attorney General
6 1515 Clay St., 20th Flr.
7 Oakland, CA 94612
8 Telephone: (510) 622-2149
9 Facsimile: (510) 622-2270

10 For CERT:

11 Raphael Metzger
12 Metzger Law Group
13 401 East Ocean Blvd., Suite 800
14 Long Beach, CA 90802

15 9.3 Notices for the Settling Defendant shall be sent to:

16 For Burger King:

17 Michele Corash
18 Robin Stafford
19 Morrison & Foerster
20 425 Market Street
21 San Francisco, CA 94105-2482
22 Telephone: 415 268-7124
23 Facsimile: 415 268-7522

24 **10. COURT APPROVAL**

25 10.1. This Consent Judgment shall be submitted to the Court for entry by noticed motion.
26 If this Consent Judgment is not approved by the Court, it shall be of no force or effect and may
27 not be used by the Attorney General or Settling Defendant for any purpose.

28 **11. ENTIRE AGREEMENT**

11.1 This Consent Judgment contains the sole and entire agreement and understanding
of the Parties with respect to the entire subject matter hereof, and any and all prior discussions,
negotiations, commitments and understandings related hereto. No representations, oral or
otherwise, express or implied, other than those contained herein have been made by any party
hereto. No other agreements not specifically referred to herein, oral or otherwise, shall be
deemed to exist or to bind any of the parties.

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12. EXECUTION IN COUNTERPARTS

12.1. The stipulations to this Consent Judgment may be executed in counterparts and by means of facsimile, which taken together shall be deemed to constitute one document.

IT IS SO STIPULATED:

Dated: July 30, 2007
EDMUND G. BROWN JR.
Attorney General
TOM GREENE
Chief Assistant Attorney General
THEODORA BERGER
Assistant Attorney General
LAURA ZUCKERMAN
Deputy Attorney General
By: Edward G. Weil
Edward G. Weil
Deputy Attorney General
For Plaintiffs People of the State of California

Dated: _____
MORRISON & FOERSTER
Michele Corash
Robin Stafford
Brooks Beard
By: _____
Michele Corash
Attorney for Defendant Burger King Corporation

Dated: _____
By: _____
for Defendant Burger King Corporation
Dated: _____
By: _____
Raphael Metzger
Metzger Law Group
Attorney for Plaintiff CERT

Dated: _____
By: _____
For Plaintiff CERT

IT IS SO ORDERED, ADJUDGED, AND DECREED:

Hon. Wendell Mortimer, Jr.
Judge of the Superior Court

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IT IS SO STIPULATED:

Dated: EDMUND G. BROWN JR.
Attorney General
TOM GREENE
Chief Assistant Attorney General
THEODORA BERGER
Assistant Attorney General
LAURA ZUCKERMAN
Deputy Attorney General

By: _____
Edward G. Weil
Deputy Attorney General
For Plaintiff's People of the State of California

Dated: MORRISON & FOERSTER
Michele Corash
Robin Stafford
Brooks Beard

By: _____
Michele Corash
Attorney for Defendant Burger King Corporation

Dated: By: _____
for Defendant Burger King Corporation

Dated: 7/23/07 By: _____
Raphael Metzger
Metzger Law Group
Attorney for Plaintiff CERT

Dated: 7/23/2007 By: _____
C. [Signature]
For Plaintiff CERT

IT IS SO ORDERED, ADJUDGED, AND DECREED:

Hon. Wendell Mortimer, Jr.
Judge of the Superior Court

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IT IS SO STIPULATED:

Dated: EDMUND G. BROWN JR.
Attorney General
TOM GREENE
Chief Assistant Attorney General
THEODORA BERGER
Assistant Attorney General
LAURA ZUCKERMAN
Deputy Attorney General

By: _____
Edward G. Weil
Deputy Attorney General
For Plaintiffs People of the State of California

Dated: *July 30, 2007*
MORRISON & FOERSTER
Michele Corash
Robin Stafford
Brooks Beard

By: *Brooks Beard*

Brooks Beard
Attorney for Defendant Burger King Corporation

Dated: By: _____
for Defendant Burger King Corporation.

Dated: By: _____
Raphael Metzger
Metzger Law Group
Attorney for Plaintiff CERT

Dated: By: _____
For Plaintiff CERT

IT IS SO ORDERED, ADJUDGED, AND DECREED:

Hon. Wendell Mortimer, Jr.
Judge of the Superior Court

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12. EXECUTION IN COUNTERPARTS

12.1. The stipulations to this Consent Judgment may be executed in counterparts and by means of facsimile, which taken together shall be deemed to constitute one document.

IT IS SO STIPULATED:

Dated: EDMUND G. BROWN JR.
Attorney General
TOM GREENE
Chief Assistant Attorney General
THEODORA BERGER
Assistant Attorney General
LAURA ZUCKERMAN
Deputy Attorney General

By: _____
Edward G. Weil
Deputy Attorney General
For Plaintiffs People of the State of California

Dated: MORRISON & FOERSTER
Michele Corash
Robin Stafford
Brooks Beard

By: _____
Michele Corash
Attorney for Defendant Burger King Corporation

Dated: By: *[Signature]*
for Defendant Burger King Corporation

Dated: By: _____
Raphael Metzger
Metzger Law Group
Attorney for Plaintiff CERT

Dated: By: _____
For Plaintiff CERT

IT IS SO ORDERED, ADJUDGED, AND DECREED:

Hon. Wendell Mortimer, Jr.
Judge of the Superior Court

EXHIBIT A



HAVE IT YOUR WAY



Nutritional Information

Table with columns for item name, calories, total fat, total carbs, total protein, sodium, and % Daily Value. Includes items like Whopper, Big Mac, and various sides.

What's Your Eating Strategy? Stay calorie conscious and eat like a king!

HAVE IT YOUR WAY® Eating Strategies with great-tasting, fire-grilled food at BURGER KING® restaurants.

Try these menu ideas!

- WHOPPER® Sandwich without sauce
BIG MAC® Sandwich with Special Sauce and Cheese
WHOPPER® Sandwich with Special Sauce and Cheese

Table showing nutritional values for various menu items, including calories, fat, carbs, protein, and sodium.

- Suggested Sides
Star Fruit with 1/2 packet of KETCHUP
HOT 'N' Spicy French Fries

- Suggested Beverages
MILKSHAKE Apple Juice
MILKSHAKE Orange Juice

- Quick-Service Sides
Apple Sauce
Side of Potatoes

Calorie information for items, including notes on how calories are calculated and rounding.

Large table with columns for item name, calories, total fat, total carbs, total protein, sodium, and % Daily Value. Includes items like Whopper, Big Mac, and various sides.

Ingredients

Text detailing the ingredients used in the products, including allergen information and specific ingredient lists for various items.

Product Contents

Text detailing the product contents, including allergen information and specific product descriptions.

Warnings

Warnings section containing important safety information, including a large 'WARNING' box with instructions on how to use the product safely.

Actual size 2' x 3'

EXHIBIT B



**ATTENTION REQUIRED: THIS COMMUNICATION APPLIES TO
RESTAURANTS LOCATED IN CALIFORNIA ONLY.**

TO: All California BURGER KING® Franchisees
FROM: Lisa Giles-Klein, VP, Assistant General Counsel, BKC
DATE: _____, 2007
SUBJECT: Final Nutrition Poster – Proposition 65 Warning

Burger King Corporation ("BKC") has entered into a consent judgment with the Attorney General for the State of California and a private plaintiff regarding the presence of acrylamide in french fries sold at BURGER KING® restaurants in California. To benefit from the terms of this consent judgment, all BURGER KING® restaurants in California are required to post a new nutrition poster that has been approved by the Attorney General.

BKC will be sending to your restaurants in California, at no charge to you, the approved nutrition poster. Your restaurants should receive the new posters by _____, 2007. Please immediately replace the existing nutrition poster with this poster. The poster must be located as follows:

- The poster must be located at or on the counter where food is purchased, on a wall either adjacent and parallel to the counter or clearly visible to consumers standing at the counter to order food. It may also be placed on a wall reasonably likely to be seen and read by customers entering the restaurant to order food.
- The poster may not be located at any of the following locations: On an entrance or exit door, on a window, on a restroom door, in a restroom, in a hallway that leads only to restrooms, or on a refuse container.

Please follow-up with your Restaurant Manager(s) to ensure that the new nutrition posters are located in accordance with this instruction. If you cannot comply with this instruction due to lack of a suitable location for the poster, contact your Franchise Business Leader to discuss alternatives.

Your compliance with this instruction is mandatory if you are to benefit from the protections in the consent judgment and will be checked as part of the Operation Excellence Review process. If you need a new poster or have any questions, please contact your Franchise Business Leader immediately.

IMPORTANT: ALTHOUGH YOU WERE NOT SUED BY THE ATTORNEY GENERAL OR THE PRIVATE PLAINTIFF, BURGER KING CORPORATION HAS OBTAINED A CONDITIONAL RELEASE ON YOUR BEHALF. FOR THAT RELEASE TO BE EFFECTIVE, YOU MUST COMPLY WITH THE TERMS OF THIS COMMUNICATION. IF YOU DO NOT, YOU RISK BEING SUED BY THE CALIFORNIA ATTORNEY GENERAL OR BY PRIVATE PARTIES IN CALIFORNIA ACTING IN HIS STEAD.