

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES



DATE: 06/25/15

HONORABLE ELIHU M. BERLE

JUDGE B. BURNS-TUCKER

DEPT. 3

DEPUTY CLERK

HONORABLE
ADD-ON

JUDGE PRO TEM

ELECTRONIC RECORDING MONITOR

M. MOLINAR, C.A.

Deputy Sheriff

NONE

Reporter

11:30 am

BC435759

Plaintiff

Counsel

NO APPEARANCES

COUNCIL FOR EDUCATION AND RESEA
ON TOXICS

Defendant

VS

Counsel

STARBUCK CORP ET AL

NATURE OF PROCEEDINGS:

RULING ON SUBMITTED MATTER; .

The Court files today the Proposed Statment of Decision on Trial (Phase One).

The Parties may have until July 16, 2015 within which to file objections to the Proposed Statement of Decision. If no objections are filed, the Proposed Statement shall become the final Statement of Decision.

Counsel for Plaintiff is to give notice and post via electronic service.

CLERK'S CERTIFICATE OF MAILING

I, the below-named Executive Officer/Clerk of the above-entitled court, do hereby certify that I am not a party to the cause herein, and that on this date I served the Minute Order/ Proposed Statement of Decision upon each party or counsel named below by placing the document for collection and mailing so as to cause it to be deposited in the United States mail at the courthouse in Los Angeles, California, one copy of the original filed/entered herein in a separate sealed envelope to each address as shown below with the postage thereon fully prepaid,

<p align="center">MINUTES ENTERED 06/25/15 COUNTY CLERK</p>
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SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE: 06/25/15

DEPT. 323

HONORABLE ELIHU M. BERLE

JUDGE

B. BURNS-TUCKER

DEPUTY CLERK

HONORABLE
ADD-ON

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COUNCIL FOR EDUCATION AND RESEA
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VS
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NO APPEARANCES

Defendant
Counsel

NATURE OF PROCEEDINGS:

in accordance with standard court practices.

Dated: June 25, 2015

Sherri R. Carter, Executive Officer/Clerk

B. BURNS TUCKER

By:

B. Burns-Tucker

METZGER LAW GROUP APLC
Raphael Metzger
401 East Ocean Boulevard, #800
Long Beach, CA 90802

MINUTES ENTERED
06/25/15
COUNTY CLERK

JUN 25 2015

Sherril R. Carter, Executive Officer/Clerk
By: B. Burns Tucker, Deputy

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

COUNCIL FOR EDUCATION AND
RESEARCH ON TOXICS, a California
corporation, acting as a private attorney
general in the public interest;

Plaintiff,

vs.

STARBUCKS CORPORATION, a
Washington corporation; et al.,

Defendants.

CASE NO. BC435759

PROPOSED STATEMENT OF
DECISION ON TRIAL (PHASE
ONE)

(Defendants' No Significant Risk
Level and Constitutional Affirmative
Defenses)

COUNCIL FOR EDUCATION AND
RESEARCH ON TOXICS, a California
corporation, acting as a private attorney
general in the public interest,

Plaintiff,

vs.

BRAD BARRY COMPANY, LTD., a
California corporation, et al.,

Defendants.

Trial on Phase I of this case concerning Defendants' affirmative defenses of "no significant risk level," First Amendment, and federal preemption proceeded on September 8, 2014. Testimony was presented, documentary evidence introduced, and

1 argument by counsel heard on September 8, 9, 10, 11, 12, 17, 18, 22, 29, 30; October 1,
2 6, 7, 8, 14, 20, 21, 22, 23, 27, 28; November 3 and 4, 2014. Final oral argument was
3 presented on April 9, 2015, at which time the matter was taken under submission.
4

5 Having considered all the testimonial and documentary evidence, as well as the
6 written briefs and argument of counsel, and being fully advised in the premises, the Court
7 now renders its Proposed Statement of Decision.
8

9 I. PROCEDURAL BACKGROUND
10

11 1. On April 13, 2010, Plaintiff Council for Education and Research on Toxics
12 (referred to herein as “Plaintiff” or “CERT”), a California corporation, acting as a private
13 attorney general in the public interest, instituted Los Angeles Superior Court Case No.
14 BC435759 against nineteen (19) defendants allegedly selling ready-to-drink coffee to
15 millions of customers throughout the State of California.
16

17 2. On April 22, 2010, Plaintiff filed a First Amended Complaint alleging causes of
18 action for (1) violations of Proposition 65 (Health & Safety Code, section 25249.6)^{1/} and
19 (2) declaratory relief.
20

21 3. On May 9, 2011, Plaintiff filed Los Angeles Superior Court Case No. BC461182
22 against forty-six (46) additional defendants, alleging causes of action for violation of
23 Proposition 65 and declaratory relief.
24

25 4. With the addition of more defendants, a total of ninety-one (91) defendants
26 appeared in both actions.
27

28 _____
^{1/} Unless otherwise indicated, all code sections refer to the Health & Safety Code.

1 5. In essence, Plaintiff claimed in the two actions that, in violation of Proposition 65
2 (the “Safe Drinking Water and Toxic Enforcement Act of 1986”), Defendants, sellers of
3 ready-to-drink coffee, failed to provide warnings to consumers that the coffee sold
4 contained high levels of acrylamide, a toxic and carcinogenic chemical.

5
6 6. Defendants filed answers to the complaints, denying the material allegations
7 thereof and asserting various affirmative defenses, including: a) the statutory defense of
8 “no significant risk level”; b) violation of the First Amendment to the Constitution (right
9 of free speech); and c) federal preemption (Supremacy Clause).

10
11 7. On May 1, 2013, the Court ordered that Case Nos. BC 435759 and BC 461182 be
12 consolidated for all purposes.

13
14 8. The parties have stipulated that:

- 15
16 a) trial in the matter be bifurcated;
17 b) Phase I of the trial cover Defendants’ affirmative defenses of (1) “no
18 significant risk level”; (2) First Amendment; and (3) federal preemption;
19 c) Phase I of trial be litigated by Defendants Green Mountain Coffee
20 Roasters, Inc., The J.M. Smucker Company, Kraft Foods Global, and
21 Starbucks Corporation; and
22 d) all other Defendants be bound by the Court’s final rulings regarding
23 the issues decided in Phase I of the trial.

24
25 **II. STATUTORY AND REGULATORY FRAMEWORK**

26
27 9. Proposition 65 “was enacted by a citizen initiative” in 1986.
28

1 10. In enacting Proposition 65, the People of California found “that hazardous
2 chemicals pose a serious potential threat to their health and well-being, that state
3 government agencies have failed to provide them with adequate protection, and that these
4 failures have been serious enough to lead to investigations by federal agencies of the
5 administration of California’s toxic protection programs.”
6

7 11. By approving Proposition 65, the People of California also declared their rights
8 “[t]o be informed about exposures to chemicals that cause cancer, birth defects, or other
9 reproductive harm. . . . [and] [t]o secure strict enforcement of the laws controlling
10 hazardous chemicals and deter actions that threaten public health and safety. . . .”
11

12 12. Proposition 65 (Health & Safety Code, section 25249.6) provides:
13

14 **“Required warning before exposure to chemicals known to cause cancer**
15 **or reproductive toxicity.**
16

17 No person in the course of doing business shall knowingly and intentionally
18 expose any individual to a chemical known to the state to cause cancer or
19 reproductive toxicity without first giving clear and reasonable warning to
20 such individual, except as provided in Section 25249.10.”
21

22 13. Proposition 65 is “a remedial statute” that is to be construed broadly to accomplish
23 its protective purposes. (*People ex rel. Lungren v. Superior Court* (1996) 14 Cal.4th 294,
24 314.)
25

26 14. Section 25249.8(a) states:
27

28 **“List of chemicals known to cause cancer or reproductive toxicity.**

1 “On or before March 1, 1987, the Governor shall cause to be published a
2 list of those chemicals **known to the state to cause cancer** or reproductive
3 toxicity within the meaning of this chapter, and he shall cause such list to
4 be revised and republished in light of additional knowledge at least once
5 per year thereafter .” (Emphasis added)
6

7 15. Subsection (b) of section 25249.8 states:
8

9 “**A chemical is known to the state to cause cancer . . .** if in the opinion of
10 the state's qualified experts it has been clearly shown through scientifically
11 valid testing according to generally accepted principles to cause cancer . . .
12 or if a body considered to be authoritative by such experts has formally
13 identified it as causing cancer. . . or if an agency of the state or federal
14 government has formally required it to be labeled or identified as causing
15 cancer. . . .” (Emphasis added)
16

17 16. Title 27, California Code of Regulations (“CCR”),^{2/} section 25102 provides
18 the following definitions:
19

20 “The ‘Act’ means the Safe Drinking Water and Toxic Enforcement Act of
21 1986 (Health and Safety Code Sections 25249.5 et seq.) which was
22 originally adopted by California voters as Proposition 65 on November 4,
23 1986.”
24

25 ‘Lead agency’ means the Office of Environmental Health Hazard
26 Assessment”
27

28

^{2/} All references to CCR are references to Title 27 of the California Code of Regulations.

1 'Listed chemical' means a chemical listed pursuant to Section 25249.8(a)
2 of the Act."

3
4 17. CCR 25305 provides for the powers and duties of the Carcinogen
5 Identification Committee as follows:

6
7 "(a) As an advisory body to the Governor and the lead agency, the
8 Carcinogen Identification Committee may undertake the following
9 activities:

10
11 (1) Render an opinion . . . as to whether specific chemicals have
12 been clearly shown, through scientifically valid testing according to
13 generally accepted principles, to cause cancer.

14 (2) Identify bodies which are considered to be authoritative and
15 which have formally identified chemicals as causing cancer.

16 (3) Identify specific chemicals that are required by state or federal
17 law to have been tested for potential to cause cancer but which have not
18 been adequately tested.

19 (4) Review or propose standards and procedures for determining
20 carcinogenicity of chemicals.

21 (5) Review or propose standards, procedures and definitions related
22 to the implementation, administration or interpretation of the Act

23 (6) Review the scientific basis for proposed **No Significant Risk**
24 **Levels (NSRLs)** and other regulations proposed for Sections 25701
25 through 25721 (No Significant Risk Levels)." (Emphasis added)
26
27
28

1 18. CCR 25306 provides:
2

3 **“Chemicals Formally Identified by Authoritative Bodies**

4 (a) Pursuant to Section 25249.8(b) of the Act, a chemical is known
5 to the state to cause cancer or reproductive toxicity if the lead agency
6 determines that an authoritative body has formally identified the chemical
7 as causing cancer or reproductive toxicity, as specified in this section.

8 (b) A "body considered to be authoritative" is an agency or formally
9 organized program or group which utilizes one of the methods set forth in
10 subsection (d), for the identification of chemicals, and which the
11 Carcinogen Identification Committee has identified as having expertise in
12 the identification of chemicals as causing cancer For purposes of this
13 section, "authoritative body" means either a "body considered to be
14 authoritative" in the identification of chemicals as causing cancer by the
15 Carcinogen Identification Committee

16 (c) The lead agency shall determine which chemicals have been
17 formally identified by an authoritative body as causing cancer . . .

18 (d) For purposes of this section a chemical is "formally identified"
19 by an authoritative body when the lead agency determines that:

20 (1) the chemical has been included on a list of chemicals causing
21 cancer or reproductive toxicity issued by the authoritative body; or is the
22 subject of a report which is published by the authoritative body and which
23 concludes that the chemical causes cancer or reproductive toxicity . . .

24 ***

25 (e) For purposes of this section, "as causing cancer" means that
26 either of the following criteria has been satisfied:

27 (1) Sufficient evidence of carcinogenicity exists from studies in
28 humans

1 (2) Sufficient evidence of carcinogenicity exists from studies in
2 experimental animals

3 (f) The lead agency shall find that a chemical does not satisfy the
4 definition of "as causing cancer" if scientifically valid data which were not
5 considered by the authoritative body clearly establish that the chemical
6 does not satisfy the criteria of subsection (e), paragraph (1) or subsection
7 (e), paragraph (2).

8 ***

9 (m) The following have been identified as authoritative bodies for
10 the identification of chemicals as causing cancer:

- 11 (1) International Agency for Research on Cancer
- 12 (2) National Institute for Occupational Safety and Health
- 13 (3) National Toxicology Program
- 14 (4) U.S. Environmental Protection Agency
- 15 (5) U.S. Food and Drug Administration" (Emphasis added)

16
17 19. Health & Safety Code, Section 25249.10 provides:

18
19 **"Exemption from warning requirement**

20
21 Section 25249.6 shall not apply to any of the following:

22
23 (a) An exposure for which federal law governs warning in a manner that
24 preempts state authority.

25 ***

26 (c) An exposure for which the person responsible can show that the
27 exposure poses **no significant risk** assuming **lifetime exposure** at the level
28 **in question** for substances known to the state to cause cancer, . . . **based on**

1 **evidence and standards of comparable scientific validity to the evidence**
2 **and standards which form the scientific basis for the listing of such**
3 **chemical** pursuant to subdivision (a) of Section 25249.8. In any action
4 brought to enforce Section 25249.6, the **burden of showing that an**
5 **exposure meets the criteria of this subdivision shall be on the**
6 **defendant.**” (Emphasis added)
7

8 20. As to the “**no significant risk level**” exemption, CCR 25701 provides:
9

10 “(a) The determination of whether a level of exposure to a chemical known
11 to the state to cause cancer poses **no significant risk for purposes of**
12 **Section 25249.10(c) of the Act shall be based on evidence and standards**
13 **of comparable scientific validity to the evidence and standards which**
14 **form the scientific basis for the listing of the chemical as known to the**
15 **state to cause cancer.** Nothing in this article shall preclude a person from
16 using evidence, standards, risk assessment methodologies, principles,
17 assumptions or levels not described in this article to establish that a level of
18 exposure to a listed chemical poses no significant risk.” (Emphasis added)
19

20 21. CCR 25703, regarding **Quantitative Risk Assessment**, states:
21

22 “(a) A quantitative risk assessment which conforms to this section shall be
23 deemed to determine the **level of exposure** to a listed chemical which,
24 assuming daily exposure at that level, poses no significant risk. The
25 **assessment shall be based on evidence and standards of comparable**
26 **scientific validity to the evidence and standards which form the**
27 **scientific basis for listing the chemical as known to the state to cause**
28 **cancer . . .** (Emphasis added)

1 ***

2 “(b) For chemicals assessed in accordance with this section, the risk level
3 which represents no significant risk shall be one which is calculated to
4 result in one excess case of cancer in an exposed population of 100,000,
5 assuming **lifetime exposure** at the **level in question**, except where sound
6 considerations of public health support an alternative level. . . .”

7 (Emphasis added)

8
9 22. In reference to the **level of exposure to chemicals causing cancer**, CCR 25721(a)
10 provides:

11
12 “For the purposes of the Act, “**level in question**” means the chemical
13 concentration of a listed chemical for the exposure in question. The
14 exposure in question includes the exposure for which the person in the
15 course of doing business is responsible and does not include exposure to a
16 listed chemical from any other source or product.” (Emphasis added)

17
18 23. As to “**lifetime exposure**” CCR 25721(b) provides:

19
20 “For purposes of the Act, “**lifetime exposure**” means the reasonably
21 anticipated rate of exposure for an individual to a given medium of
22 exposure measured over a lifetime of seventy years.” (Emphasis added)

23
24 24. The methodology for determining **level of exposure** is set forth in CCR 25721(c):

25
26 “For purposes of Section 25249.10(c) of the Act, the **level of exposure** to a
27 chemical listed as causing cancer, assuming **lifetime exposure** at the **level in**
28 **question**, shall be determined by multiplying the **level in question** (stated in terms

1 of a concentration of a chemical in a given medium) times the reasonably
2 anticipated rate of exposure for an individual to the given medium of exposure
3 measured over a lifetime of seventy years.” (Emphasis added)
4

5 25. With respect to exposures to consumer products, such as coffee, CCR 25721(d)4
6 states:

7
8 “For exposures to consumer products, lifetime exposure shall be calculated
9 using the average rate of intake or exposure for average users of the consumer
10 product, and not on a per capita basis for the general population . . .”
11

12 III. ACRYLAMIDE
13

14 26. The Office of Environmental Health Hazard Assessment (OEHHA) of the
15 California Environmental Protection Agency has listed acrylamide as a chemical known to
16 the state to cause cancer since 1990, pursuant to the authoritative body method set forth in
17 the California Code of Regulations.
18

19 27. Acrylamide was listed as a chemical known to the State of California to cause
20 cancer based on formal identification of acrylamide as a carcinogen by the International
21 Agency for Research on Cancer and the U.S. Environmental Protection Agency.
22

23 28. The parties do not dispute that acrylamide is listed by the State of California as a
24 chemical causing cancer.
25

26 IV. ACRYLAMIDE IN COFFEE
27

28 29. When coffee beans are roasted, a chemical reaction occurs (the Maillard reaction)

1 causing the asparagine and sugars in green coffee beans to produce the chemical
2 acrylamide. As coffee is brewed, the acrylamide in the ground roasted coffee beans
3 dissolves in water, resulting in acrylamide being present in brewed coffee.
4

5 30. The parties do not dispute that roasting coffee causes the release of the chemical
6 acrylamide and that brewed coffee contains acrylamide.
7

8 V. THE “NO SIGNIFICANT RISK LEVEL” DEFENSE
9

10 31. The “no significant risk level” defense in a Proposition 65 case is a statutory
11 defense that provides an exemption to the cancer hazard warning requirement of Health
12 & Safety Code § 25249.6 for “[a]n exposure for which the person responsible can show
13 that the exposure poses no significant risk assuming lifetime exposure at the level in
14 question for substances known to the state to cause cancer . . . , based on evidence and
15 standards of comparable scientific validity to the evidence and standards which form the
16 scientific basis for the listing of such chemical pursuant to subdivision (a) of Section
17 25249.8.” (Section 25249.10)
18

19 32. The “no significant risk level” defense must be analyzed in terms of “an exposure
20 for which . . . there is no significant risk . . . **for substances known to the state to cause**
21 **cancer . . .**” (Emphasis added) (Health & Safety Code, § 25249.10) In this case, the
22 substance in question is acrylamide.
23

24 33. “Risk assessment” is a systematic scientific approach used to characterize the
25 nature of an adverse effect, and the probability that such adverse effect would occur in
26 exposed individuals or populations.
27

28 34. Risk assessments are undertaken to provide the information necessary for

1 governmental agencies to make risk management decisions regarding the extent to which
2 human exposure should be limited or controlled for an agent which has an identifiable
3 adverse effect on segments of the population.

4
5 35. Risk assessments are undertaken to assess both cancer and non-cancer risks to
6 humans.

7
8 36. There are two types of cancer risk assessments: qualitative and quantitative.

9
10 37. Qualitative cancer risk assessments are performed to determine whether a
11 chemical or other substance (an "agent") is a carcinogen, i.e., can cause cancer.

12
13 38. Quantitative cancer risk assessments are undertaken to determine the level of risk
14 of cancer from exposure to a carcinogen.

15
16 39. A quantitative cancer risk assessment is necessary to quantify the level or degree
17 of risk of cancer from exposure to a carcinogen.

18
19 40. When attempting to determine the risk of cancer from a chemical mixture,
20 scientific expert risk assessors identify the carcinogen(s) in the mixture and quantify the
21 risk of human cancer presented by the carcinogen(s) in the mixture, unless the mixture
22 itself has been deemed to be carcinogenic.

23
24 41. Since the level of exposure to a chemical listed as causing cancer (e.g., acrylamide)
25 must be determined by multiplying the level in question (stated in terms of a concentration
26 of a chemical in a given medium) times the reasonably anticipated rate of exposure for an
27 individual to the given medium of exposure measured over a lifetime of seventy years
28 (CCR 25721(c)), the focus on the level of risk in this case must be based on the

1 concentration of acrylamide in coffee.

2
3 42. Defendants did not present sufficient credible evidence of the degree of risk posed
4 by acrylamide in coffee pursuant to a quantitative risk assessment (the only type of risk
5 assessment utilized by the relevant credible scientific community to assess the risk of a
6 carcinogen in a mixture), to determine by a preponderance of evidence the level of risk of
7 cancer from exposure to acrylamide in coffee.

8
9 43. Defendants' evidence of risk assessment was based largely on epidemiology
10 studies that were inadequate to evaluate risks of cancer from exposure to acrylamide in
11 coffee.

12
13 44. To establish the "no significant risk level" defense, Defendants must prove the
14 absence of significant risk of cancer at the "level in question" for the chemical "known to
15 the state to cause cancer."

16
17 45. Defendants' risk assessment was not based on the "level in question," meaning the
18 chemical concentration of acrylamide in the medium of coffee. Defendants' risk
19 assessment therefore failed to satisfy the statutory requirement.

20
21 46. The "no significant risk level" defense must also be "based on evidence and
22 standards of comparable scientific validity to the evidence and standards which form the
23 scientific basis for the listing of such chemical pursuant to subdivision (a) of Section
24 25249.8." (Section 25249.10)

25
26 47. Defendants presented evidence of an assessment of the mixture of coffee, rather
27 than an assessment of the chemical acrylamide, as such, in the medium of coffee.
28 However, coffee was not a "substance[s] known to the state to cause cancer."

1 Defendants' risk assessment was therefore insufficient to satisfy the statutory requirement
2 that the risk assessment be for the chemical "known to the state to cause cancer."

3
4 48. The foundation of Defendants' risk assessment was an evaluation of coffee as a
5 mixture. However, the basis for the State of California listing acrylamide as a chemical
6 known to the state to cause cancer was an evaluation of the chemical acrylamide and its
7 carcinogenicity. As a consequence, the evaluation performed by Defendants was not
8 comparable to the required analyses undertaken for the listing of acrylamide as a
9 carcinogen by the state.

10
11 49. Defendants' argument that other constituents or ingredients in coffee eliminate or
12 reduce the cancer risk of acrylamide in coffee lacked evidentiary scientific support, and
13 was based largely on speculation and conjecture.

14
15 50. In sum, Defendants have failed to prove their "no significant risk level" defense.
16 Accordingly, this defense is adjudicated against Defendants.

17
18 VI. FIRST AMENDMENT DEFENSE

19
20 51. Defendants argue that a required warning by Proposition 65 for acrylamide in coffee
21 would violate their freedom of speech rights under the First Amendment to the United
22 States Constitution.

23
24 52. The speech subject to Defendants' First Amended defense is commercial speech
25 since it arises from Defendants' commercial activities in selling coffee.

26
27 53. Commercial speech is entitled to only "limited" and "subordinate" First
28 Amendment protection.

1 54. Where a business is required to disclose information about its products or services
2 to the public under state law, a more lenient test as to the constitutionality of mandated
3 product information is appropriate under the First Amendment, because a company's
4 interest in not providing factual information about its products is "minimal." A
5 proponent for enforcement of a state law affecting the right of free speech in a
6 commercial context need only establish that the commercial product disclosure or
7 warning requirement is "reasonably related" to an underlying state interest. (*Zauderer v.*
8 *Office of Disciplinary Counsel* (1985) 471 U.S. 620, 651.)
9

10 55. A Proposition 65 warning requirement for the presence of acrylamide passes this
11 "reasonably related" test for several reasons:
12

13 a) The warning fulfills a legitimate state interest of informing the public of
14 "exposure to chemicals that cause cancer, birth defects, or other reproductive harm."
15

16 b) The warning requirement is reasonably related to the state's interest in
17 providing critical health and safety information to the public. The law requires
18 businesses to provide the warnings directly, which is reasonable because a business is
19 more likely to know, or be able to ascertain, the contents of its own products.
20

21 c) The warning that a chemical known to the state may cause cancer is not false or
22 misleading.
23

24 56. Defendants' First Amendment defense is also dependent on the success of their
25 "no significant risk level" defense. Since the Court finds that Defendants failed to prove
26 their "no significant risk level" defense by a preponderance of the evidence, the Court
27 finds that Defendants' First Amendment defense likewise fails.
28

57. Defendants have failed to establish their First Amendment affirmative defense.
Accordingly, the defense is adjudicated against Defendants.

1 VII. PREEMPTION DEFENSE

2
3 58. The United States Supreme Court has held that under the Supremacy Clause (U.S.
4 Const. Art. VI, cl.2), the federal government may preempt state law under three
5 circumstances: (1) express preemption, where Congress explicitly defines the extent to
6 which federal law preempts state law; (2) field preemption, where Congress intends
7 federal law to exclusively occupy an area of law, and the federal law is so pervasive as to
8 leave no room for the states to supplement the area; and (3) conflict preemption, where
9 there is an actual conflict between federal and state law. (*English v. General Electric*
10 (1990) 496 U.S. 72, 78-79.)

11
12 59. No federal statute or regulation expressly preempts Proposition 65.

13
14 60. Defendants have not asserted, and no evidence has been presented, that field
15 preemption exists in this case.

16
17 61. There is no conflict between a Proposition 65 warning for acrylamide in coffee
18 and the Federal Food, Drug and Cosmetic Act, or any other federal statute or regulation.
19 The Federal Drug Administration has not mandated any warnings for acrylamide in food,
20 and there is no other federal statute, or regulation requiring warnings for acrylamide in
21 coffee. Defendants have not presented any evidence of a conflicting federal regulation or
22 statute.

23
24 62. Defendants' argument that a Proposition 65 warning would violate the Federal
25 Food, Drug and Cosmetic Act's misbranding provisions lacks merit. Acrylamide was
26 placed on the Governor of California's list of chemicals known to cause cancer on
27 January 1, 1990. (CCR 27001) Defendants do not dispute that acrylamide is present in
28 their coffee. A Proposition 65 warning for acrylamide in coffee is therefore truthful and

1 can be provided in a manner that is neither false nor misleading, consistent with federal
2 law.

3
4 63. Defendants' preemption defense is also dependent upon the success of their "no
5 significant risk level" defense. Because Defendants failed to prove their "no significant
6 risk level" defense by a preponderance of the evidence, the Court finds that their
7 preemption defense likewise fails.

8
9 64. Defendants have failed to establish their federal preemption defense, which is
10 therefore adjudicated against Defendants.

11
12 **VIII. CONCLUSION**

13
14 65. Defendants have the burden of proof to establish their defenses by preponderance
15 of the evidence.

16
17 66. Defendants have failed to meet their burden of proof on their affirmative defenses
18 of "no significant risk level"; First Amendment; and federal preemption.

19
20 67. Accordingly, the Court rules in favor of Plaintiff and against Defendants on the
21 affirmative defenses of "no significant risk level"; First Amendment; and federal
22 preemption.

23
24
25 DATED: June 25, 2015

ELIHU M. BERLE

HONORABLE ELIHU M. BERLE
JUDGE OF THE SUPERIOR COURT