

1 Parker A. Smith, Esq. (CSB #290311)
2 SY AND SMITH, PC.
3 11622 El Camino Real, Suite 100
4 Del Mar, CA 92130
5 Phone: (858) 746-9554
6 Fax: (858) 746-5199

7 *Attorney for Plaintiff, Kingpun Cheng*

FILED
SAN DIEGO SUPERIOR COURT
APR - 4 2016
CLERK OF THE SUPERIOR COURT
BY: T. RAY

8
9 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
10 **COUNTY OF SAN DIEGO**
11 **UNLIMITED CIVIL JURISDICTION**
12

13			
14	KINGPUN CHENG ,	)	CASE NO.:37-2014-00036774-CU-PO-CTL
15)	
16	Plaintiff,	)	"IMAGED FILE"
17		)	[PROPOSED]
18	and	)	JUDGMENT APPROVING
19	THE DIXIELINE LUMBER CO., et al	)	PROP 65 STIPULATION AND
20		)	CONSENT JUDGMENT
21	Defendant.	)	<i>(Cal. Health & Safety Code § 25249.6 et seq.)</i>
22		)	Date: April 1, 2016
		)	Time: 10:00 AM
		)	Dept. C-71
		)	Judge: Hon. Ronald S. Prager
		)	Action Filed: October 28, 2014

23 In the above entitled action, Plaintiff, Kingpun Cheng and Defendant, The Lincoln
24 Products, Inc. having agreed through their respective counsel that judgment be entered pursuant
25 to the terms of the Proposition 65 settlement agreement in the form of a [Proposed] Consent
26 Judgment entered into by the parties, and following issuance of an order approving this
27 Proposition 65 settlement agreement and entering this Consent Judgment on 4/14/16.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that pursuant to Code of Civil Procedure §664.6, judgment is entered in accordance with the Consent Judgment attached hereto as Exhibits 1 and 2.

IT IS SO ORDERED.

Dated: APR - 4 2016

GREGORY W. POLLACK
JUDGE OF THE SUPERIOR COURT

EXHIBIT 1

1 Parker A. Smith, Esq.
2 **PARKER A. SMITH, ATTORNEY AT LAW**
3 2173 Salk Ave. , Suite 250
4 Carlsbad, CA 92008
5 Phone: 760 579 7600

6
7
8 Attorney for Plaintiff, Kingpung Cheng

9
10
11 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
12 **COUNTY OF SAN DIEGO**

13 KINGPUNG_CHENG,

14 Plaintiff,

15 v.

16 LINCOLN PRODUCTS, ET AL.,

17 Defendant.

Case No. XXX

**[PROPOSED] STIPULATED CONSENT
JUDGMENT**

[Assigned for All Purposes to Hon. XXX, Dept. XX]

Trial Date: None Set

18 1. DEFINITIONS

19 1.1 The products covered by this Consent Judgment shall be designated "Covered
20 Products."

21 1.2 Covered Products are defined as Lincoln Product Inc.'s Shower Drain, UPC #
22 054374142774.

23 1.3 The term "Effective Date" means the date this Consent Judgment is approved by
24 the San Diego County Superior Court.

25 1.4 The term "Proposition 65" means California Health and Safety Code §25249.5, et
26 seq.

27 1.5 The term "Listed Chemical" means lead and lead compounds.

28 1.6 The term "Plaintiff" means and refers to Plaintiff Kingpung Cheng, in the public
interest of the citizens of the State of California.

1 1.7 The term "Defendants" means Dixieline Lumber Company ("Dixieline") and
2 Lincoln Products, Inc. (named and sued as "Lincoln Products") ("Lincoln"); the singular term
3 "Defendant" shall refer to each of the respective Defendants. Plaintiff and Defendants are
4 collectively referred to as the "Parties."

5 2. INTRODUCTION

6 2.1 This Consent Judgment is entered into by and between Plaintiff and Defendants.

7 2.2 Plaintiff is an individual residing in California that is acting as a private enforcer
8 pursuant to California Health & Safety Code §25249.7(d).

9 2.3 For purposes of this Consent Judgment, each Defendant employs 10 or more
10 persons and is a person doing business in California for the purpose of Proposition 65.

11 2.4 On or about June 24, 2014, Plaintiff served Defendants as well as one of
12 Defendants' downstream retailers, Dixieline, and various public enforcement agencies with a
13 document entitled "60-Day Notice of Violation" pursuant to Health & Safety Code §25249.7(d)
14 (the "Notice"), alleging that Defendants were in violation of Proposition 65.

15 2.5 The Notice alleges that Defendants have manufactured, distributed, and/or offered
16 for sale in California certain plumbing replacement parts that expose consumers to lead and lead
17 compounds without the requisite Proposition 65 warnings.

18 2.6 Lead and lead compounds (the "Listed Chemical") are listed pursuant to
19 Proposition 65 as a chemical known to the State of California to cause cancer, birth defects and
20 other reproductive harm.

21 2.7 The Notice alleges that Defendants' conduct violates Health & Safety Code
22 §25249.6, the warning provision of Proposition 65.

23 2.8 On October 28, 2014, Plaintiff filed the action entitled *Kingpung Cheng v. Lincoln*
24 *Products, Inc., et al.*, Case No. 37-2014-00036774-CU-PO-CTL, alleging violations of
25 Proposition 65 (the "Action").

26 2.9 Defendants deny the material, factual, and legal allegations contained in the Notice
27 and Complaint, and maintain that all products sold, distributed, or offered for sale in California
28 have been and are in compliance with all laws, including, without limitation, Proposition 65.

1 2.10 The Parties enter into this Consent Judgment to resolve all Proposition 65 claims
2 concerning the Covered Products.

3 2.11 By executing this Consent Judgment, the Parties do not admit any facts or
4 conclusions or law.

5 2.12 It is the Parties' intent that nothing in this Consent Judgment shall be construed as
6 an admission by the Parties of any fact, conclusion of law, issue of law, or violation of law, nor
7 shall compliance with the Consent Judgment constitute or be construed as an admission by the
8 Parties of any fact, conclusion of law, issue of law, or violation of law.

9 2.13 Upon approval of this Consent Judgment, the Parties waive their respective rights
10 to a hearing or a trial on the allegations of the Complaint.

11 2.14 Nothing in this Consent Judgment shall prejudice, waive, or impair any right,
12 remedy, argument, or defense the Parties may have in any other or future legal proceedings, except
13 as provided in this Consent Judgment.

14 3. INJUNCTIVE RELIEF -- PRODUCT LABELING

15 3.1 On or before one hundred and eighty (180) days after the Effective Date,
16 Defendants shall not ship or deliver for sale or distribution in California Covered Products that
17 contain lead and/or lead compounds, unless such Covered Products are shipped or delivered with
18 one of the clear and reasonable warnings set forth in Section 3.4.

19 3.2 Each warning required by Section 3.1 shall be prominently placed upon a product's
20 label or other labeling or displayed at the retail outlet with such conspicuousness, as compared
21 with other words, statements, designs, or devices in the label, labeling or display as to render it
22 likely to be read and understood by an ordinary individual under customary conditions of purchase
23 or use.

24 3.3 Each warning required by Section 3.1 shall be provided in a manner such that the
25 consumer or user understands to which specific Product the warning applies, so as to minimize the
26 risk of consumer confusion.

27 ///

28 ///

1 3.4 Product Labeling. The following warning statement shall be applied to the
2 Products:

3 “WARNING: This product contains [{OR} may contain] chemicals
4 [including lead and lead compounds] known to the State of
5 California to cause cancer and birth defects or other reproductive
6 harm. [Do not use in connection with drinking water.] [Wash hands
7 after handling.]”

8 3.5 The word “WARNING” shall be in bold.

9 3.6 Bracketed language may be omitted at Defendants’ option.

10 3.7 Defendants may add additional listed chemicals to the warning unless the Attorney
11 General advises that the inclusion of such chemicals would render the warning misleading or
12 constitute over warning.

13 4. SETTLEMENT PAYMENTS

14 4.1 Payment of Civil Penalties. In settlement of all the claims referred to in this
15 Consent Judgment, on behalf of all Defendants, Lincoln will pay a total of \$1,000.00 in civil
16 penalties in accordance with this Section. The penalty payment will be allocated in accordance
17 with California Health & Safety Code §25249.12(c)(1) & (d), with 75% of the funds remitted to
18 the California Office of Environmental Health Hazard Assessment (“OEHHA”) and the remaining
19 25% of the penalty remitted to Plaintiff. Payment shall be made within five (5) business days of
20 the date it is due and be delivered to the addresses listed in Section 4.2, below. Within ten (10)
21 days of execution by the parties of this [Proposed] Consent Judgment, Lincoln shall issue a check
22 to address the Defendants’ civil penalty in the amount of \$1,000.00 to “Wood, Smith, Henning &
23 Berman LLP” (“Wood Smith”). Plaintiff acknowledges that payment of this penalty by Lincoln
24 fully discharges the obligations of any and all Defendants to pay any penalty. Wood Smith shall
25 provide Plaintiff’s counsel with written confirmation within five (5) days of receipt that the funds
26 have been deposited in a trust account. Within five (5) days of the date that this Consent
27 Judgment is approved by the Court, Wood Smith shall issue two (2) separate checks for the civil
28 penalty payment to: (1) “OEHHA” in the amount of \$750.00, and (2) to “Kingsung Cheng” in the
29 amount of \$250.00.

30 ///

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

4.2 Reimbursement of Plaintiff's Fees and Costs.

4.2.1 The Parties reached an accord on the compensation due to Plaintiff and his counsel under general contract principles and the private attorney general doctrine codified at California Code of Civil Procedure §1021.5, for all work performed in this matter, except fees that may be incurred on appeal.

4.2.2 Under these legal principles, Lincoln, on behalf of all Defendants, shall pay the amount of \$12,000.00 for fees and costs incurred investigating, litigating and enforcing this matter, including the fees and costs incurred (and yet to be incurred) negotiating, drafting, and obtaining approval of this Stipulated Consent Judgment in the public interest.

4.2.3 Within ten (10) days of execution by the parties of this [Proposed] Consent Judgment, Lincoln shall issue a check payable to "Parker A. Smith, Attorney at Law" in the amount of \$12,000.00 on behalf of all Defendants to address Plaintiff's fees and costs in this matter. The check in the amount of \$12,000.00 shall be mailed to the address listed in Section 4.3(a), below. Plaintiff acknowledges that payment of this amount by Lincoln fully discharges the obligations of any and all Defendants to pay any contribution toward Plaintiff's fees and costs incurred investigating, litigating and enforcing this matter, including the fees and costs incurred (and yet to be incurred) negotiating, drafting, and obtaining approval of this Stipulated Consent Judgment in the public interest.

4.3 Payment Procedures. All payments shall be delivered as follows:

(a) All payments owed to Plaintiff or his counsel, pursuant to Sections 4.1 through 4.3, shall be delivered to the following payment address:

Parker A. Smith, Attorney at Law
2173 Salk Ave. , Suite 250
Carlsbad, CA 92008

(b) All payments owed to OEHHA, pursuant to Sections 4.1 through 4.3, shall be delivered directly to OEHHA (Memo line "Prop 65 Penalties") at the following addresses:

///

1 For United States Postal Service Delivery:

2 Mike Gyurics

3 Fiscal Operations Branch Chief

4 Office of Environmental Health Hazard Assessment

5 P.O. Box 4010

6 Sacramento, CA 95812-4010

7 For Non-United States Postal Service Delivery:

8 Mike Gyurics

9 Fiscal Operations Branch Chief

10 Office of Environmental Health Hazard Assessment

11 1001 I Street

12 Sacramento, CA 95814

13 A copy of the checks payable to OEHHA shall also be mailed to Parker A. Smith, Attorney
14 at Law, at the address set forth above, as proof of payment to OEHHA.

15 (c) All payments owed to Kingpung Cheng, pursuant to Sections 4.1 through 4.3, shall
16 be delivered to Kingpung Cheng at the following address:

17 Parker A. Smith, Attorney at Law

18 2173 Salk Ave., Suite 250

19 Carlsbad, CA 92008

20 4.4 Dismissal: Upon the entry of the Consent Judgment, and in any event, not later than
21 five (5) business days of the entry of the Consent Judgment, Plaintiff will dismiss its entire
22 complaint against all Defendants, with prejudice.

23 5. ENFORCEMENT

24 Plaintiff, by motion or application for an order to show cause before the San Diego County
25 Superior Court, may enforce the terms and conditions contained in this Consent Judgment. Prior
26 to bringing any motion or application to enforce the requirements of Section 3 above, Plaintiff
27 shall provide the Defendants with Notice of Violation and a copy of any test results which
28 purportedly support Plaintiff's Notice of Violation. The Parties shall then meet and confer

1 regarding the basis for Plaintiff's anticipated motion or application in an attempt to resolve the
2 matter informally, including providing Defendants a reasonable opportunity of at least thirty (30)
3 days to cure any alleged violation. Should such attempts at informal resolution fail, Plaintiff may
4 file its enforcement motion or application. The prevailing party on any motion to enforce this
5 Consent Judgment shall be entitled to its reasonable attorney's fees and costs incurred as a result
6 of such motion or application.

7 6. CLAIMS COVERED AND RELEASED

8 6.1 Full and Binding Resolution. This Consent Judgment is a full, final, and binding
9 resolution between Plaintiff on behalf of itself, and in its representative capacity, its past and
10 current attorneys, agents, representatives, successors, assigns, and in the public interest pursuant to
11 California Health and Safety Code §25249.7(d), on the one hand, and Defendants, and each of
12 them, and their respective parents, shareholders, divisions, subdivisions, subsidiaries, partners,
13 sister companies, affiliates, directors, officers, employees, attorneys, and any and all successors
14 and assigns ("Defendant Releasees"), and inures to the benefit of all entities to whom Defendant
15 Releasees directly or indirectly distribute or sell or have in the past directly or indirectly
16 distributed or sold Covered Products, including but not limited to distributors, wholesalers,
17 customers, retailers, franchisees, cooperative members, and Defendant Releasees' licensors and
18 licensees (collectively "Downstream Retailers"), including but not limited to, Dixieline Lumber
19 Company on the other hand, regarding any violation of Proposition 65 that was or could have been
20 asserted against Defendants and Downstream Defendant Releasees, with respect to the failure to
21 warn about any Covered Products manufactured, shipped, distributed or sold by Defendant
22 Releasees and/or any (collectively "Downstream Retailers") prior to the Effective Date.

23 6.2 Compliance. Compliance with the terms of this Consent Judgment constitutes
24 compliance with Proposition 65 with respect to exposures to the Listed Chemical from the
25 Covered Products.

26 6.3 Individual Release. In further consideration of the promises and agreements herein
27 contained, the injunctive relief commitments set forth in Section 3, and for the payments to be
28 made pursuant to Section 4, Plaintiff, on behalf of itself, its past and current agents,

1 representatives, attorneys, including but not limited to Parker A. Smith, Esq., successors, and/or
2 assignees and not in its representative capacity, hereby waives all rights to institute or participate
3 in, directly or indirectly, any form of legal action and releases all claims, including, without
4 limitation, all actions, and causes of action, in law or in equity, suits, liabilities, demands,
5 obligations, damages, costs, fines, penalties, losses, or expenses (including, but not limited to,
6 investigation fees, expert fees, and attorneys' fees) of any nature whatsoever, whether known or
7 unknown, fixed, or contingent (collectively "Claims") that were brought or could have been
8 brought against Defendants and Downstream Defendant Releasees based on claims arising under
9 Proposition 65 with respect to Listed Chemicals in the Covered Products, as such claims relate to
10 the alleged failure to warn under California Health and Safety Code §25249.6.

11 6.4 General Release. In furtherance of the foregoing, Plaintiff on its own behalf and
12 not in its representative capacity, hereby waives any and all rights and benefits which it now has,
13 or in the future may have respecting the Covered Products, conferred upon it with respect to
14 claims involving Covered Products by virtue of the provisions of Section 1542 of the California
15 Civil Code, which provides as follows:

16 **A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE**
17 **CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER**
18 **FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF**
19 **KNOWN BY HIM OR HER MUST HAVE MATERIALLY AFFECTED HIS**
20 **OR HER SETTLEMENT WITH THE DEBTOR.**

21 By executing this Consent Judgment, Plaintiff understands and acknowledges that the
22 significance and consequence of this waiver of California Civil Code §1542 is that even if Plaintiff
23 suffers future damages arising out of or resulting from, or directly related to or indirectly to, in
24 whole or in part, the Covered Products, including but not limited any exposure to, or failure to
25 warn with respect to exposure to lead or lead compounds from the Covered Products, Plaintiff will
26 not be able to make any claim for those damages against Defendants and Downstream Defendant
27 Releasees, and the successors and assigns of any of them, who may manufacture, use, maintain,
28 distribute, retail, or sell the Covered Product.

1 6.5 Furthermore, Plaintiff acknowledges that it intends these consequences for any
2 such claim and any other claims related to the Action which may exist as of the date of this release
3 pertaining to the Covered Products listed in the Notice but which Plaintiff does not know exist,
4 and which, if known, would materially affect its decision to enter into this Consent Judgment,
5 regardless of whether the lack of knowledge is the result of ignorance, oversight, error, negligence,
6 or any other cause.

7 6.6 Defendants' Release. On behalf of themselves and Defendant Downstream
8 Releasees, Defendants waive all rights to institute any form of action against Plaintiff, its
9 attorneys, consultants, and representatives for all actions taken or statements made in the course of
10 this Action prior to the date of the execution of this Consent Judgment.

11 6.7 Liability for Covered Products that were manufactured and/or distributed for retail
12 sale in California prior to the Effective Date shall be subject to the release of liability pursuant to
13 Section 6 of this Consent Judgment, without regard to when such Covered Products were, or are in
14 the future, sold to consumers.

15 7. MODIFICATION

16 7.1 This Consent Judgment may be modified from time to time by express written
17 agreement of the Parties, with the approval of the Court, or by an order of this Court upon motion
18 and in accordance with law.

19 7.2 A Party seeking to modify this Consent Judgment shall attempt in good faith to
20 meet and confer with all affected Parties prior to filing a motion to modify the Consent Judgment.

21 8. ENTIRE AGREEMENT

22 8.1 This Consent Judgment contains the sole and entire agreement and understanding
23 of the Parties with respect to the entire subject matter hereof, and any and all prior discussions,
24 negotiations, commitments, or understandings related thereto, if any, are hereby merged herein
25 and therein.

26 8.2 No representations, oral or otherwise, express or implied, other than those
27 specifically referred to in this Consent Judgment have been made by any Party hereto.

28 ///

1 8.3 No supplementation, modification, waiver, or termination of this Consent Judgment
2 shall be binding unless executed in writing by the Party to be bound thereby.

3 8.4 No waiver of any of the provisions of this Consent Judgment shall be deemed or
4 shall constitute a waiver of any of the other provisions hereof whether or not similar; nor shall
5 such waiver constitute a continuing waiver.

6 9. GOVERNING LAW AND APPLICATION

7 9.1 The terms of this Consent Judgment shall be governed by the laws of the State of
8 California and shall apply only to Covered Products that are sold or offered for sale in the State of
9 California.

10 9.2 In the event that Proposition 65 is repealed, preempted or is otherwise rendered
11 inapplicable by reason of law generally, or if any of the provisions of this Consent Judgment are
12 rendered inapplicable or no longer required as a result of any such repeal or preemption or
13 rendered inapplicable by reason of law generally as to the Covered Products, then Defendants
14 shall notify Plaintiff and his counsel and may have no further obligations pursuant to this Consent
15 Judgment with respect to, and to the extent that, the Covered Products are so affected.

16 9.3 This Consent Judgment shall apply to and be binding upon the Parties and their
17 divisions, subdivisions, and subsidiaries, and the Parties' successors and assigns.

18 9.4 The Parties, including their counsel, have participated in the preparation of this
19 Consent Judgment and this Consent Judgment is the result of the joint efforts of the Parties.

20 9.5 This Consent Judgment was subject to revision and modification by the Parties and
21 has been accepted and approved as to its final form by all Parties and their counsel.

22 9.6 Accordingly, any uncertainty or ambiguity existing in this Consent Judgment shall
23 not be interpreted against any Party as a result of the manner of the preparation of this Consent
24 Judgment.

25 10. PROVISION OF NOTICE

26 All notices required pursuant to this Consent Judgment and correspondence shall be sent to
27 the following:

28 ///

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

For Plaintiff:

Parker A. Smith, 2173 Salk Ave., Suite 250, Carlsbad, CA 92008

For Lincoln:

Brenda K. Radmacher, 505 N. Brand Boulevard, Suite 1100, Glendale, CA 91203

For Dixieline Lumber Company:

Daniel T. Pascucci, Mintz Levin, 3580 Carmel Mountain Road, Suite 300, San Diego, CA
92130

11. ATTORNEY'S FEES

11.1 A Party who unsuccessfully brings or contests an action arising out of this Consent Judgment shall be required to pay the prevailing Party's reasonable attorney's fees and costs unless the unsuccessful Party has acted with substantial justification.

11.2 For purposes of this Consent Judgment, the term substantial justification shall carry the same meaning as used in the Civil Discovery Act of 1986, Code of Civil Procedure §2016, et seq.

11.3 Nothing in this Section 11 shall preclude a Party from seeking an award of sanctions pursuant to law.

12. EXECUTION AND COUNTERPARTS

The stipulations to this Consent Judgment may be executed in counterparts and by means of facsimile and/or portable document format (pdf), which taken together shall be deemed to constitute one document.

14. COMPLIANCE WITH HEALTH AND SAFETY CODE §25249.7(t)

Plaintiff agrees to comply with the reporting form requirements referenced in California Health and Safety Code §25249.7(f).

15. COURT APPROVAL

15.1 This Consent Judgment shall become effective upon entry by the Court.

15.2 Plaintiff shall prepare and file a Motion for Approval of this Consent Judgment and Defendants shall support entry of this Consent Judgment.

///

1 15.3 If this Consent Judgment is not entered by the Court, it shall be of no force or effect
2 and shall never be introduced into evidence or otherwise used in any proceeding for any purpose
3 other than to allow the Court to determine if there was a material breach of the previous section.

4 16. AUTHORIZATION

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

8 17. REQUEST FOR FINDINGS, APPROVAL OF SETTLEMENT AND ENTRY OF
9 CONSENT JUDGMENT

10 17.1 This Consent Judgment came before this Court upon the request of the Parties.

11 17.2 The Parties request the Court to review this Consent Judgment and to make the
12 following findings pursuant to California Health & Safety Code §25249.7(f)(4):

13 1. The injunctive relief required by the Consent Judgment complies with California
14 Health & Safety Code §25249.7;

15 2. The reimbursement of fees and costs to be paid pursuant to the Consent Judgment
16 is reasonable under California law; and

17 3. The civil penalty amount to be paid pursuant to Consent Judgment is reasonable.
18

19 The undersigned have read, understand and agree to all of the terms and conditions of this
20 Consent Judgment.

21 Except as explicitly provided herein, each party is to bear its own fees and costs.
22

23 AGREED TO:

24
25 Dated:

26 
KINGPUNG CHENG
27
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Dated:

DAVID N. MEERZ
[Print Name]

[Signature]

For Lincoln Products, Inc.,

Dated:

Mark Butkman
[Print Name]

[Signature]

For Dixieline Lumber Company

EXHIBIT 2

1 Parker A. Smith, Esq.
2 **PARKER A. SMITH, ATTORNEY AT LAW**
3 2173 Salk Ave., Suite 250
4 Carlsbad, CA 92008
5 Phone: 760 579 7600

6 Attorney for Plaintiff, Kingpun Cheng

7
8 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
9 **COUNTY OF SAN DIEGO**

10
11 KINGPUN CHENG,

12 Plaintiff,

13 v.

14 LINCOLN PRODUCTS, ET AL.,

15 Defendant.

Case No. 37-2014-00036774-CU-PO-CTL

**[PROPOSED] STIPULATED MODIFIED
CONSENT JUDGMENT**

[Assigned for All Purposes to Hon. Ronald S. Prager,
Dept. C71]

Action Filed: 10/28/14
Trial Date: None Set

16
17 1. DEFINITIONS

18 1.1 The products covered by this Consent Judgment shall be designated "Covered
19 Products."

20 1.2 Covered Products are defined as Lincoln Product Inc.'s Shower Drain, UPC #
21 054374142774.

22 1.3 The terms "Execution" and "Effective Date" refer to the date this Consent
23 Judgment is approved by the San Diego County Superior Court.

24 1.4 The term "Proposition 65" means California Health and Safety Code §25249.5, et
25 seq.

26 1.5 The term "Listed Chemical" means lead and lead compounds.

27 1.6 The term "Plaintiff" means and refers to Plaintiff Kingpun Cheng, in the public
28 interest of the citizens of the State of California.

1 1.7 The term "Defendants" means Dixieline Lumber Company ("Dixieline") and
2 Lincoln Products, Inc. (named and sued as "Lincoln Products") ("Lincoln"); the singular term
3 "Defendant" shall refer to each of the respective Defendants. Plaintiff and Defendants are
4 collectively referred to as the "Parties."

5 2. INTRODUCTION

6 2.1 This Consent Judgment is entered into by and between Plaintiff and Defendants.

7 2.2 Plaintiff is an individual residing in California that is acting as a private enforcer
8 pursuant to California Health & Safety Code §25249.7(d).

9 2.3 For purposes of this Consent Judgment, each Defendant employs 10 or more
10 persons and is a person doing business in California for the purpose of Proposition 65.

11 2.4 On or about June 24, 2014, Plaintiff served Defendants as well as one of
12 Defendants' downstream retailers, Dixieline, and various public enforcement agencies with a
13 document entitled "60-Day Notice of Violation" pursuant to Health & Safety Code §25249.7(d)
14 (the "Notice"), alleging that Defendants were in violation of Proposition 65.

15 2.5 The Notice alleges that Defendants have manufactured, distributed, and/or offered
16 for sale in California certain plumbing replacement parts that expose consumers to lead and lead
17 compounds without the requisite Proposition 65 warnings.

18 2.6 Lead and lead compounds (the "Listed Chemical") are listed pursuant to
19 Proposition 65 as a chemical known to the State of California to cause cancer, birth defects and
20 other reproductive harm.

21 2.7 The Notice alleges that Defendants' conduct violates Health & Safety Code
22 §25249.6, the warning provision of Proposition 65.

23 2.8 On October 28, 2014, Plaintiff filed the action entitled *Kingpun Cheng v. Lincoln*
24 *Products, Inc., et al.*, Case No. 37-2014-00036774-CU-PO-CTL, alleging violations of
25 Proposition 65 (the "Action").

26 2.9 Defendants deny the material, factual, and legal allegations contained in the Notice
27 and Complaint, and maintain that all products sold, distributed, or offered for sale in California
28 have been and are in compliance with all laws, including, without limitation, Proposition 65.

1 2.10 The Parties enter into this Consent Judgment to resolve all Proposition 65 claims
2 concerning the Covered Products.

3 2.11 By executing this Consent Judgment, the Parties do not admit any facts or
4 conclusions or law.

5 2.12 It is the Parties' intent that nothing in this Consent Judgment shall be construed as
6 an admission by the Parties of any fact, conclusion of law, issue of law, or violation of law, nor
7 shall compliance with the Consent Judgment constitute or be construed as an admission by the
8 Parties of any fact, conclusion of law, issue of law, or violation of law.

9 2.13 Upon approval of this Consent Judgment, the Parties waive their respective rights
10 to a hearing or a trial on the allegations of the Complaint.

11 2.14 Nothing in this Consent Judgment shall prejudice, waive, or impair any right,
12 remedy, argument, or defense the Parties may have in any other or future legal proceedings, except
13 as provided in this Consent Judgment.

14 3. INJUNCTIVE RELIEF -- PRODUCT LABELING

15 3.1 On or before one hundred and eighty (180) days after the Effective Date,
16 Defendants shall not ship or deliver for sale or distribution in California Covered Products that
17 contain lead and/or lead compounds, unless such Covered Products are shipped or delivered with
18 one of the clear and reasonable warnings set forth in Section 3.4.

19 3.2 Each warning required by Section 3.1 shall be prominently placed upon a product's
20 label or other labeling or displayed at the retail outlet with such conspicuousness, as compared
21 with other words, statements, designs, or devices in the label, labeling or display as to render it
22 likely to be read and understood by an ordinary individual under customary conditions of purchase
23 or use.

24 3.3 Each warning required by Section 3.1 shall be provided in a manner such that the
25 consumer or user understands to which specific Product the warning applies, so as to minimize the
26 risk of consumer confusion.

27 ///

28 ///

1 3.4 Product Labeling. The following warning statement shall be applied to the
2 Products:

3 **“WARNING:** This product contains lead, a chemical known to the
4 State of California to cause cancer and birth defects and other
reproductive harm.

5 3.5 The word **“WARNING”** shall be in bold.

6
7 4. SETTLEMENT PAYMENTS

8 4.1 Payment of Civil Penalties. In settlement of all the claims referred to in this
9 Consent Judgment, on behalf of all Defendants, Lincoln will pay a total of \$1,000.00 in civil
10 penalties in accordance with this Section. The penalty payment will be allocated in accordance
11 with California Health & Safety Code §25249.12(c)(1) & (d), with 75% of the funds remitted to
12 the California Office of Environmental Health Hazard Assessment (“OEHHHA”) and the remaining
13 25% of the penalty remitted to Plaintiff. Payment shall be made within five (5) business days of
14 the date it is due and be delivered to the addresses listed in Section 4.2, below. Within ten (10)
15 days of the Effective Date, Lincoln shall issue a check to address the Defendants’ civil penalty in
16 the amount of \$1,000.00 to “Wood, Smith, Henning & Berman LLP” (“Wood Smith”). Plaintiff
17 acknowledges that payment of this penalty by Lincoln fully discharges the obligations of any and
18 all Defendants to pay any penalty. Wood Smith shall provide Plaintiff’s counsel with written
19 confirmation within five (5) days of receipt that the funds have been deposited in a trust account.
20 Within five (5) days of the date that this Consent Judgment is approved by the Court, Wood Smith
21 shall issue two (2) separate checks for the civil penalty payment to: (1) “OEHHHA” in the amount
22 of \$750.00, and (2) to “Kingpun Cheng” in the amount of \$250.00.

23 4.2 Reimbursement of Plaintiff’s Fees and Costs.

24 4.2.1 The Parties reached an accord on the compensation due to Plaintiff and his counsel
25 under general contract principles and the private attorney general doctrine codified at California
26 Code of Civil Procedure §1021.5, for all work performed in this matter, except fees that may be
27 incurred on appeal.

1 4.2.2 Under these legal principles, Lincoln, on behalf of all Defendants, shall pay the
2 amount of \$12,000.00 for fees and costs incurred investigating, litigating and enforcing this
3 matter, including the fees and costs incurred (and yet to be incurred) negotiating, drafting, and
4 obtaining approval of this Stipulated Consent Judgment in the public interest.

5 4.2.3 Within ten (10) days of execution by the parties of this [Proposed] Consent
6 Judgment, Lincoln shall issue a check payable to "Parker A. Smith, Attorney at Law" in the
7 amount of \$12,000.00 on behalf of all Defendants to address Plaintiff's fees and costs in this
8 matter. The check in the amount of \$12,000.00 shall be mailed to the address listed in Section
9 4.3(a), below. Plaintiff acknowledges that payment of this amount by Lincoln fully discharges the
10 obligations of any and all Defendants to pay any contribution toward Plaintiff's fees and costs
11 incurred investigating, litigating and enforcing this matter, including the fees and costs incurred
12 (and yet to be incurred) negotiating, drafting, and obtaining approval of this Stipulated Consent
13 Judgment in the public interest.

14 4.3 Payment Procedures. All payments shall be delivered as follows:

15 (a) All payments owed to Plaintiff or his counsel, pursuant to Sections 4.1 through 4.3,
16 shall be delivered to the following payment address:

17 Parker A. Smith, Attorney at Law
18 2173 Salk Ave., Suite 250
19 Carlsbad, CA 92008

20 (b) All payments owed to OEHHA, pursuant to Sections 4.1 through 4.3, shall be
21 delivered directly to OEHHA (Memo line "Prop 65 Penalties") at the following addresses:

22 ///
23 ///
24 ///
25 ///
26 ///
27 ///
28 ///

1 For United States Postal Service Delivery:

2 Mike Gyurics

3 Fiscal Operations Branch Chief

4 Office of Environmental Health Hazard Assessment

5 P.O. Box 4010

6 Sacramento, CA 95812-4010

7 For Non-United States Postal Service Delivery:

8 Mike Gyurics

9 Fiscal Operations Branch Chief

10 Office of Environmental Health Hazard Assessment

11 1001 I Street

12 Sacramento, CA 95814

13 A copy of the checks payable to OEIHA shall also be mailed to Parker A. Smith, Attorney
14 at Law, at the address set forth above, as proof of payment to OEIHA.

15 (c) All payments owed to Kingpun Cheng, pursuant to Sections 4.1 through 4.3, shall
16 be delivered to Kingpun Cheng at the following address:

17 Parker A. Smith, Attorney at Law

18 2173 Salk Ave., Suite 250

19 Carlsbad, CA 92008

20
21 5. ENFORCEMENT

22 Plaintiff, by motion or application for an order to show cause before the San Diego County
23 Superior Court, may enforce the terms and conditions contained in this Consent Judgment. Prior
24 to bringing any motion or application to enforce the requirements of Section 3 above, Plaintiff
25 shall provide the Defendants with Notice of Violation and a copy of any test results which
26 purportedly support Plaintiff's Notice of Violation. The Parties shall then meet and confer
27 regarding the basis for Plaintiff's anticipated motion or application in an attempt to resolve the
28 matter informally, including providing Defendants a reasonable opportunity of at least thirty (30)

1 days to cure any alleged violation. Should such attempts at informal resolution fail, Plaintiff may
2 file its enforcement motion or application. The prevailing party on any motion to enforce this
3 Consent Judgment shall be entitled to its reasonable attorney's fees and costs incurred as a result
4 of such motion or application.

5 6. CLAIMS COVERED AND RELEASED

6 6.1 Full and Binding Resolution. This Consent Judgment is a full, final, and binding
7 resolution between Plaintiff on behalf of itself, and in its representative capacity, its past and
8 current attorneys, agents, representatives, successors, assigns, and in the public interest pursuant to
9 California Health and Safety Code §25249.7(d), on the one hand, and Defendants, and each of
10 them, and their respective parents, shareholders, divisions, subdivisions, subsidiaries, partners,
11 sister companies, affiliates, directors, officers, employees, attorneys, and any and all successors
12 and assigns ("Defendant Releasees"), and inures to the benefit of all entities to whom Defendant
13 Releasees directly or indirectly distribute or sell or have in the past directly or indirectly
14 distributed or sold Covered Products, including but not limited to distributors, wholesalers,
15 customers, retailers, franchisees, cooperative members, and Defendant Releasees' licensors and
16 licensees (collectively "Downstream Retailers"), including but not limited to, Dixieline Lumber
17 Company on the other hand, regarding any violation of Proposition 65 that was or could have been
18 asserted against Defendants and Downstream Defendant Releasees, with respect to the failure to
19 warn about lead or lead compounds in any Covered Products manufactured, shipped, distributed or
20 sold by Defendant Releasees and/or any (collectively "Downstream Retailers") prior to the
21 Effective Date.

22 6.2 Compliance. Compliance with the terms of this Consent Judgment constitutes
23 compliance with Proposition 65 with respect to exposures to Lead and Lead Compounds from the
24 Covered Products.

25 6.3 Individual Release. In further consideration of the promises and agreements herein
26 contained, the injunctive relief commitments set forth in Section 3, and for the payments to be
27 made pursuant to Section 4, Plaintiff, on behalf of itself, its past and current agents,
28 representatives, attorneys, including but not limited to Parker A. Smith, Esq., successors, and/or

1 assignees and not in its representative capacity, hereby waives all rights to institute or participate
2 in, directly or indirectly, any form of legal action and releases all claims, including, without
3 limitation, all actions, and causes of action, in law or in equity, suits, liabilities, demands,
4 obligations, damages, costs, fines, penalties, losses, or expenses (including, but not limited to,
5 investigation fees, expert fees, and attorneys' fees) of any nature whatsoever, whether known or
6 unknown, fixed, or contingent (collectively "Claims") that were brought or could have been
7 brought against Defendants and Downstream Defendant Releasees based on claims arising under
8 Proposition 65 with respect to Listed Chemicals in the Covered Products, as such claims relate to
9 the alleged failure to warn under California Health and Safety Code §25249.6.

10 6.4 General Release. In furtherance of the foregoing, Plaintiff on its own behalf and
11 NOT in its representative capacity, hereby waives any and all rights and benefits which it now has,
12 or in the future may have respecting the Covered Products, conferred upon it with respect to
13 claims involving Covered Products by virtue of the provisions of Section 1542 of the California
14 Civil Code, which provides as follows:

15 **A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE**
16 **CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER**
17 **FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF**
18 **KNOWN BY HIM OR HER MUST HAVE MATERIALLY AFFECTED HIS**
19 **OR HER SETTLEMENT WITH THE DEBTOR.**

20 By executing this Consent Judgment, Plaintiff understands and acknowledges that the
21 significance and consequence of this waiver of California Civil Code §1542 is that even if Plaintiff
22 suffers future damages arising out of or resulting from, or directly related to or indirectly to, in
23 whole or in part, the Covered Products, including but not limited any exposure to, or failure to
24 warn with respect to exposure to lead or lead compounds from the Covered Products, Plaintiff will
25 not be able to make any claim for those damages against Defendants and Downstream Defendant
26 Releasees, and the successors and assigns of any of them, who may manufacture, use, maintain,
27 distribute, retail, or sell the Covered Product.
28

1 6.5 Furthermore, Plaintiff acknowledges that it intends these consequences for any
2 such claim and any other claims related to the Action which may exist as of the date of this release
3 pertaining to the Covered Products listed in the Notice but which Plaintiff does not know exist,
4 and which, if known, would materially affect its decision to enter into this Consent Judgment,
5 regardless of whether the lack of knowledge is the result of ignorance, oversight, error, negligence,
6 or any other cause.

7 6.6 Defendants' Release. On behalf of themselves and Defendant Downstream
8 Releasees, Defendants waive all rights to institute any form of action against Plaintiff, its
9 attorneys, consultants, and representatives for all actions taken or statements made in the course of
10 this Action prior to the date of the execution of this Consent Judgment.

11 6.7 Liability for Covered Products that were manufactured and/or distributed for retail
12 sale in California prior to the Effective Date shall be subject to the release of liability pursuant to
13 Section 6 of this Consent Judgment, without regard to when such Covered Products were, or are in
14 the future, sold to consumers.

15 7. MODIFICATION

16 7.1 This Consent Judgment may be modified from time to time by express written
17 agreement of the Parties, with the approval of the Court, or by an order of this Court upon motion
18 and in accordance with law.

19 7.2 A Party seeking to modify this Consent Judgment shall attempt in good faith to
20 meet and confer with all affected Parties prior to filing a motion to modify the Consent Judgment.

21 8. ENTIRE AGREEMENT

22 8.1 This Consent Judgment contains the sole and entire agreement and understanding
23 of the Parties with respect to the entire subject matter hereof, and any and all prior discussions,
24 negotiations, commitments, or understandings related thereto, if any, are hereby merged herein
25 and therein.

26 8.2 No representations, oral or otherwise, express or implied, other than those
27 specifically referred to in this Consent Judgment have been made by any Party hereto.
28

1 8.3 No supplementation, modification, waiver, or termination of this Consent Judgment
2 shall be binding unless executed in writing by the Party to be bound thereby.

3 8.4 No waiver of any of the provisions of this Consent Judgment shall be deemed or
4 shall constitute a waiver of any of the other provisions hereof whether or not similar, nor shall
5 such waiver constitute a continuing waiver.

6 9. GOVERNING LAW AND APPLICATION

7 9.1 The terms of this Consent Judgment shall be governed by the laws of the State of
8 California and shall apply only to Covered Products that are sold or offered for sale in the State of
9 California.

10 9.2 In the event that Proposition 65 is repealed, preempted or is otherwise rendered
11 inapplicable by reason of law generally, or if any of the provisions of this Consent Judgment are
12 rendered inapplicable or no longer required as a result of any such repeal or preemption or
13 rendered inapplicable by reason of law generally as to the Covered Products, then Defendants
14 shall notify Plaintiff and his counsel and may have no further obligations pursuant to this Consent
15 Judgment with respect to, and to the extent that, the Covered Products are so affected.

16 9.3 This Consent Judgment shall apply to and be binding upon the Parties and their
17 divisions, subdivisions, and subsidiaries, and the Parties' successors and assigns.

18 9.4 The Parties, including their counsel, have participated in the preparation of this
19 Consent Judgment and this Consent Judgment is the result of the joint efforts of the Parties.

20 9.5 This Consent Judgment was subject to revision and modification by the Parties and
21 has been accepted and approved as to its final form by all Parties and their counsel.

22 9.6 Accordingly, any uncertainty or ambiguity existing in this Consent Judgment shall
23 not be interpreted against any Party as a result of the manner of the preparation of this Consent
24 Judgment.

25 10. PROVISION OF NOTICE

26 All notices required pursuant to this Consent Judgment and correspondence shall be sent to
27 the following:
28

1 For Plaintiff:

2 Parker A. Smith, 2173 Salk Ave., Suite 250, Carlsbad, CA 92008

3 For Lincoln:

4 Brenda K. Radmacher, 505 N. Brand Boulevard, Suite 1100, Glendale, CA 91203

5 For Dixieline Lumber Company:

6 Daniel T. Pascucci, Mintz Levin, 3580 Carmel Mountain Road, Suite 300, San Diego, CA
7 92130

8 11. ATTORNEY'S FEES

9 11.1 A Party who unsuccessfully brings or contests an action arising out of this Consent
10 Judgment shall be required to pay the prevailing Party's reasonable attorney's fees and costs unless
11 the unsuccessful Party has acted with substantial justification.

12 11.2 For purposes of this Consent Judgment, the term substantial justification shall carry
13 the same meaning as used in the Civil Discovery Act of 1986, Code of Civil Procedure §2016, et
14 seq.

15 11.3 Nothing in this Section 11 shall preclude a Party from seeking an award of
16 sanctions pursuant to law.

17 12. EXECUTION AND COUNTERPARTS

18 The stipulations to this Consent Judgment may be executed in counterparts and by means
19 of facsimile and/or portable document format (pdf), which taken together shall be deemed to
20 constitute one document.

21 14. COMPLIANCE WITH HEALTH AND SAFETY CODE §25249.7(t)

22 Plaintiff agrees to comply with the reporting form requirements referenced in California
23 Health and Safety Code §25249.7(t).

24 15. COURT APPROVAL

25 15.1 This Consent Judgment shall become effective upon entry by the Court.

26 15.2 Plaintiff shall prepare and file a Motion for Approval of this Consent Judgment and
27 Defendants shall support entry of this Consent Judgment.

1 15.3 If this Consent Judgment is not entered by the Court, it shall be of no force or effect
2 and shall never be introduced into evidence or otherwise used in any proceeding for any purpose
3 other than to allow the Court to determine if there was a material breach of the previous section.

4 16. AUTHORIZATION

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

8 17. REQUEST FOR FINDINGS, APPROVAL OF SETTLEMENT AND ENTRY OF
9 CONSENT JUDGMENT

10 17.1 This Consent Judgment came before this Court upon the request of the Parties.

11 17.2 The Parties request the Court to review this Consent Judgment and to make the
12 following findings pursuant to California Health & Safety Code §25249.7(f)(4):

13 1. The injunctive relief required by the Consent Judgment complies with California
14 Health & Safety Code §25249.7:

15 2. The reimbursement of fees and costs to be paid pursuant to the Consent Judgment
16 is reasonable under California law: and

17 3. The civil penalty amount to be paid pursuant to Consent Judgment is reasonable.

18
19 The undersigned have read, understand and agree to all of the terms and conditions of this
20 Consent Judgment.

21 Except as explicitly provided herein, each party is to bear its own fees and costs.

22 ///

23 ///

24 ///

25 ///

26 ///

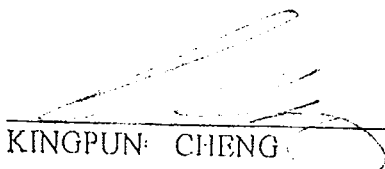
27 ///

28 ///

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

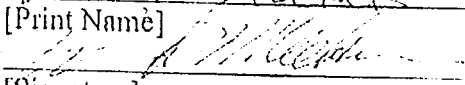
AGREED TO:

Dated: 3/17/2016.


KINGPUN CHENG

Dated: 3/16/2016

DAVID N. MEETER
[Print Name]


[Signature]

For Lincoln Products, Inc.,

Dated:

[Print Name]

[Signature]

For Dixieline Lumber Company