

FILED
Clerk of the Superior Court

OCT 27 2017

By: K. BRECKENRIDGE

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Attorney for Plaintiff, King Pun Cheng

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN DIEGO

UNLIMITED CIVIL JURISDICTION

KING PUN CHENG,

Plaintiff,

v.

EXCEL HOBBY BLADES CORP.

Defendant.

CASE NO.: 37-2017-00019387-CU-PO-CTL

[PROPOSED]

**JUDGMENT APPROVING
PROP 65 STIPULATION AND
CONSENT JUDGMENT**

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

Date: October 27, 2017

Time: 1:30 PM

Dept. C-72

Judge: Hon. Timothy Taylor

Action Filed: May 30, 2017

"IMAGED FILE"

In the above entitled action, Plaintiff, Kingpun Cheng and Defendant, Excel Hobby Blades Corp. having agreed through their respective counsel that judgment be entered pursuant to the terms of the Proposition 65 settlement agreement in the form of a [Proposed] Consent Judgment entered into by the parties, and following the issuance of an order approving

1 this Proposition 65 settlement agreement and entering this Consent Judgment on

2 10/27/17.

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

6
7 IT IS SO ORDERED.

8
9 Dated: 10/27/17

Timothy B. Taylor

10 JUDGE OF THE SUPERIOR COURT
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Exhibit 1

1 PARKER SMITH, ESQ. (SBN 290311)
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2 11622 El Camino Real, Suite 100
Del Mar, CA 92130
3 Telephone: (858) 746-9554
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4 Attorneys for Plaintiff, King Pun Cheng
5
6
7

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

10 KING PUN CHENG,

11 Plaintiff,

12 vs.

13 EXCEL HOBBY BLADES CORP.

14 Defendants.
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Case No. 37-2017-00019387—CU-NP-
CTL

UNLIMITED JURISDICTION

STIPULATION AND [PROPOSED]
ORDER RE ENTRY OF CONSENT
JUDGMENT AS TO EXCEL
HOBBY BLADES CORP.

Complaint Filed: May 30, 2017

18 I. Introduction

19 1.1 Parties

20 This Stipulation and [Proposed] Order re Consent Judgment ("Consent Judgment") is
21 hereby entered into by and between Kingpun Cheng, as an individual and acting in the interest of
22 the public, (hereinafter "Cheng") and Excel Hobby Blades Corp. (hereinafter "Excel,"), Excel
23 and Cheng shall be collectively referred to as the "Parties" and each of them as a "Party." Cheng
24 is an individual residing in California who seeks to promote awareness of exposures to toxic
25 chemicals and improve human health by reducing or eliminating hazardous substances contained
26 in consumer products. Excel employs ten or more persons as required for purposes of Cal. Health
27 & Safety Code §§ 25249.5 *et seq.* ("Proposition 65").
28

1 1.2 General Allegations

2 Cheng alleges that Excel offered for sale and sold in the State of California Excel
3 Improved Hammer Sets, including but not limited to "Excel Improved Hammer Set No. 50500"
4 UPC098171505004 containing lead and lead compounds, chemicals listed under Proposition 65
5 as a chemical known to the State of California to cause cancer, birth defects, and/or other
6 reproductive harm, and that they did so without providing the warning Cheng alleges is required
7 by Proposition 65. The products that are covered by this Consent Judgment are defined as knives,
8 blades or hand tools and parts containing aluminum, brass, steel, copper, their alloys and plastic,
9 and their mixes, which are manufactured by Excel Hobby Blades and sold by other retailers in
10 California whether as a standalone item like Set No. 50500 or as parts of sets containing other
11 products in addition to knives, blades or hand tools. All such knives, blades or hand tools
12 including but not limited to, Excel Improved Hammer Set No. 50500 are referred to herein as
13 "Covered Products". Excel had no reason to believe that the Covered Products contained
14 allegedly impermissible levels of accessible lead or lead compound that would expose users to
15 lead in excess of the allowable safe harbor number for lead until receiving Cheng's 60-day notice
16 in December 2016. Cheng represents and contends that he has confirmed through testing
17 conducted by an independent laboratory that lead was present and accessible in amounts that
18 would expose users to lead in excess of the allowable safe harbor number for lead, .05 ug/day for
19 reproductive toxicity and for carcinogens 15 ug/day oral, as established by California Office of
20 Environmental Health Hazard Assessment. See [https://oehha.ca.gov/proposition-](https://oehha.ca.gov/proposition-65/chemicals/lead-and-lead-compounds)
21 65/chemicals/lead-and-lead-compounds.
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26 1.3 Notice of Violation
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1 On or about December 9, 2016, Cheng issued a 60 Day Notice of Violation to Excel,
2 Hobby Lobby, and various public enforcement agencies pursuant to Health & Safety Code
3 §25249.7(d) alleging that Excel Hobby Blades Corp. was in violation of Proposition 65 for failing
4 to warn California consumers that the Covered Products exposed them to LEAD ("60 Day
5 Notice") in excess of the safe harbor levels as established by the California Office of
6 Environmental Health Hazard Assessment. The 60 Day Notice is referred to herein as "Notice".
7 No public enforcer diligently prosecuted the claims threatened in the Notice within sixty days
8 plus service time after service of the Notice to them by Cheng.
9

10 1.4 Complaint

11 On or about May 30, 2017 Cheng filed a Complaint against Excel for civil penalties and
12 injunctive relief ("Complaint") in San Diego Superior Court, Case No. 37-2017-00019387—CU-
13 NP-CTL The Complaint alleges, among other things, that Excel violated Proposition 65 by failing
14 to give clear and reasonable warnings of exposure to lead and lead compounds from the Covered
15 Products.
16

17 1.5 Consent to Jurisdiction/ No Admission

18 For purposes of this Consent Judgment only, the Parties consent that this Court has
19 jurisdiction over the allegations of violations contained in the Complaint and personal jurisdiction
20 over the named Defendant as to the acts alleged in the Complaint, that venue is proper in the
21 County of San Diego and that this Court has jurisdiction to enter this Consent Judgment as a full
22 settlement and resolution of the allegations contained in the Notices, Complaint, and of all claims
23 which were or could have been raised by any person or entity based in whole or in part, directly
24 or indirectly, on the prior conduct of the Parties or on the facts alleged in the Complaint or arising
25 therefrom or related to.
26

27 1.6 No Admission
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1 Excel denies the material, factual, and legal allegations contained in Cheng's Notice and
2 Complaint and maintains that it has not violated Proposition 65. Nothing in this Consent
3 Judgment shall be construed as an admission by Excel or Hobby Lobby of any fact, finding,
4 conclusion of law, issue of law, or violation of law; nor shall compliance with this Consent
5 Judgment constitute or be construed as an admission by Excel of any fact, finding, conclusion of
6 law, issue of law, or violation of law, such being specifically denied by Excel. However, this
7 section shall not diminish or otherwise affect the obligations, responsibilities and duties under this
8 Consent Judgment.
9

10 1.7 Effective Date

11 For purposes of this Consent Judgment, the term "Effective Date" shall mean the date that
12 the Motion to Approve the Consent Judgment has been granted by the Court. For purposes of this
13 Consent Judgment, the term "Execution Date" shall mean the date this Consent Judgment is
14 signed by all parties in Clause 13 below.
15

16 2. Injunctive Relief

17 Commencing on the Effective Date, Excel shall only sell, offer for sale, or distribute for
18 sale in California, Covered Products that are either (a) reformulated pursuant to Section 2.1 or (b)
19 include a warning as provided in Section 2.3.
20

21 2.1 Reformulation Option.

22 The Covered Products shall be deemed to comply with Proposition 65 with regard to lead,
23 and be exempt from any Proposition 65 warning requirements for lead, if the exposed the
24 Covered Products meet the following criteria: the alloy from which the components are made
25 shall have a lead content by weight of no more than 0.4%. Excel may comply with the above
26 requirements by relying on information obtained from its suppliers regarding the content of the
27 alloy from which the components are made, provided such reliance is in good faith. Obtaining
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1 test results showing that the lead content is no more than 0.4%, using a method of sufficient
2 sensitivity to establish a limit of quantification (as distinguished from detection) shall be deemed
3 to establish good faith reliance. For purposes of this Consent Judgment, Covered Products in
4 compliance with this standard are "Reformulated Products".
5

6 2.2 Warning Alternative.

7 As an alternative to reformulating the Covered Products, commencing on the Effective
8 Date, Covered Products that Excel ships for sale, sells or offers for sale in California that are not
9 Reformulated Products as set forth in Section 2.1 above shall be accompanied by a clear and
10 reasonable warning as described in Section 2.3 below.

11 2.3 Clear and Reasonable Warnings.

12 Where required under Section 2.2 above, Excel shall provide Proposition 65 warnings
13 substantially as follows:
14

15 WARNING: This product can expose you to chemicals including lead, which is known to
16 the State of California to cause cancer and birth defects or other reproductive harm. For more
17 information go to www.P65Warnings.ca.gov.

18 OR

19 WARNING: This product contains chemicals known to the State of California to cause
20 cancer, birth defects or other reproductive harm.
21

22 2.3.1 Where utilized as an alternative to meeting the criteria set forth in Section 2.1,
23 Excel shall provide the warning language set forth in Section 2.3 either with the unit package of
24 the Covered Products or affixed to the Covered Products. Such warning shall be prominently
25 affixed to or printed on each Product's label or package or the Product itself. If printed on the
26 label, the warning shall be contained in the same section that states other safety warnings, if any,
27 concerning the use of the Product. Excel may continue to utilize, on an ongoing basis, unit
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1 packaging containing substantively the same Proposition 65 warnings as those set forth in Section
2 2.3 above, but only to the extent such packaging materials have already been printed within
3 ninety days after the Effective Date.

4 2.3.2 The requirements for warnings, set forth in Section 2.3 above are imposed
5 pursuant to the terms of this Consent Judgment. The Parties recognize that these are not the
6 exclusive methods of providing a warning under Proposition 65 and its implementing regulations
7 and that they may or may not be appropriate in other circumstances.

8
9 2.4 Products Manufactured Prior to the Effective Date

10 Notwithstanding anything else in this Consent Judgment, Covered Products that were
11 manufactured prior to the Effective Date shall be subject to the release of liability pursuant to
12 Section 5 of this Consent Judgment, without regard to when such Covered Products were, or are
13 in the future, distributed or sold to customers. As a result, the obligations of Excel as set forth in
14 this Consent Judgment, including but not limited to Section 2, do not apply to these products
15 manufactured prior to the Effective Date.

16
17 3. Entry of Consent Judgment

18 3.1 With regard to all claims that have been raised or which could be raised with
19 respect to failure to warn pursuant to Proposition 65 with regard to lead in the Covered Products,
20 Excel shall pay a civil penalty of \$2,500 pursuant to Health and Safety Code section 25249.7(b),
21 to be apportioned in accordance with California Health & Safety Code § 25192, with 75% of
22 these funds remitted to the State of California's Office of Environmental Health Hazard
23 Assessment ("OEHHA") and the remaining 25% of the penalty remitted to Cheng, as provided by
24 California Health & Safety Code § 25249.12(c)(1) and (d) and the instructions directly below.

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26 3.2 Payment Procedures
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1 Excel shall issue two separate checks for the penalty payment: (a) one check made
2 payable to "OEHHA" (tax identification number: 68-0284486) in an amount representing 75% of
3 the total penalty (i.e., \$1,875); and (b) one check in an amount representing 25% of the total
4 penalty (i.e., \$625) made payable directly to Cheng. Excel shall mail these payments within five
5 (5) days after the Effective Date at which time such payments shall be mailed to the following
6 addresses respectively:
7

8 Proposition 65 Settlement Coordinator

9 California Department of Justice

10 1515 Clay Street, 20th Floor

11 Oakland, CA 94612-1413
12

13
14 Mr. Kingpun Cheng

15 C/O Sy and Smith, PC

16 11622 El Camino Real, Suite 100

17 San Diego, CA 92130
18

19 4. Reimbursement of Fees and Costs

20 The Parties reached an accord on the compensation due to Cheng and his counsel under
21 the private attorney general doctrine and principles of contract law. Under these legal principles,
22 Excel shall reimburse Cheng's counsel for fees and costs incurred as a result of investigating,
23 bringing this matter to Excel's attention, and negotiating a settlement. Excel shall pay Cheng's
24 counsel \$30,000 for all attorneys' fees, expert and investigation fees, and related costs associated
25 with this matter, the Notices and associated fees and costs Excel shall send a check payable to
26 "Sy and Smith, PC" within seven (7) days of the Effective Date. Sy and Smith, PC will provide
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1 Excel with their tax identification information on or before the Effective Date if requested. Other
2 than the payment required hereunder, each side is to bear its own attorneys' fees and costs.

3 5. Release of all Claims

4 5.1 Release of Excel and Downstream Customers, Retailers and Entities

5 Cheng, acting on behalf of himself and in the public interest, releases Excel and their
6 respective officers, directors, attorneys, representatives, shareholders, agents, and employees,
7 sister and parent entities, successors, and assigns, and each entity to whom it directly or indirectly
8 distributed or distributes or sold or sells the Covered Products including, but not limited to, their
9 downstream distributors, wholesalers, licensors, licensees, auctioneers, retailers (including, but
10 not limited to Hobby Lobby, their parent and all affiliates and subsidiaries thereof), their
11 respective employees, agents and assigns, franchisees, dealers, customers, owners, purchasers,
12 users, parent companies, corporate affiliates, subsidiaries, (collectively "Releasees") from all
13 claims for violations of Proposition 65 up through the Effective Date, and consistent with the
14 provisions of Section 2.4, above, based on exposure to lead from the Covered Products as set
15 forth in the Notices. Compliance with the terms of this Consent Judgment constitutes compliance
16 with Proposition 65 with respect to exposures to lead from the Covered Products.

17 In addition to the foregoing, Cheng, on behalf of himself, his past and current agents,
18 representatives, attorneys, and successors and/or assignees, and *not* in his representative capacity,
19 hereby waives all rights to institute or participate in, directly or indirectly, any form of legal
20 action and releases any other claims, cause of action, obligation, costs, expenses, attorneys' fees,
21 damages, losses, liabilities, and demands that he could make against Excel or the Releasees with
22 respect to violations of Proposition 65 based upon the Covered Products. The Parties
23 acknowledge that the claims released above may include unknown claims, and with respect to the
24 foregoing waivers and releases in this paragraph, Cheng hereby specifically waives any and all
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1 rights and benefits which he now has, or in the future may have, conferred by virtue of the
2 provisions of Section 1542 of the California Civil Code, which provides as follows:

3
4 A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS
5 WHICH THE CREDITOR DOES NOT KNOW OR SUSPECT TO
6 EXIST IN HIS FAVOR AT THE TIME OF EXECUTING THE
7 RELEASE, WHICH IF KNOWN BY HIM MUST HAVE
8 MATERIALLY AFFECTED HIS SETTLEMENT WITH THE
9 DEBTOR.

10 Cheng acknowledges and understands the significance and consequences of this specific
11 waiver of California Civil Code section 1542.

12 5.2 Excel Release of Cheng

13 Excel waives any and all claims against Cheng, his attorneys and other representatives, for
14 any and all actions taken or statements made (or those that could have been taken or made) by
15 Cheng and his attorneys and other representatives whether in the course of investigating claims or
16 otherwise seeking enforcement of Proposition 65 against it in this matter, and/or with respect to
17 the Covered Products.

18 6. Non-Disparagement

19 The Parties agree to refrain from taking action or making statements, written, oral or
20 through any form of social media, which disparage or defame the goodwill or reputation of the
21 other Party.

22 7. Severability and Merger

23 If, subsequent to the execution of this Consent Judgment, any of the provisions of this
24 document are held by a court to be unenforceable, the validity of the enforceable provisions
25 remaining shall not be adversely affected.

26 This Consent Judgment contains the sole and entire agreement of the Parties and any and
27 all prior negotiations and understandings related hereto shall be deemed to have been merged
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1 within it. No representations or terms of agreement other than those contained herein exist or
2 have been made by any Party with respect to the other Party or the subject matter hereof.

3 8. Governing Law

4
5 The terms of this Consent Judgment shall be governed by the laws of the State of
6 California and apply within the State of California.

7 Compliance with the terms of this Consent Judgment resolves any issue, now or in the
8 future, with the requirements of Proposition 65 with respect to alleged exposures to lead and lead
9 compounds arising from the Covered Products. In the event that Proposition 65 is repealed or is
10 otherwise rendered inapplicable by reason of law generally, or as to the Covered Products, then
11 Excel shall provide written notice to Cheng of any asserted change in the law, and shall have no
12 further obligations pursuant to this Consent Judgment with respect to, and to the extent that, the
13 Covered Products are so affected.

14 9. Notices

15 9.1 Unless specified herein, all correspondence and notices required to be provided
16 pursuant to this Consent Judgment shall be in writing and personally delivered or sent by:
17 electronic mail and either (i) first-class, (registered or certified mail) return receipt requested; or
18 (ii) overnight courier on any Party by the other Party at the following addresses:

19 Excel:

20 Hany Hammam
21 Excel Blades
22 481 Getty Ave.
23 Paterson, NJ 07503
hany@excelblades.com

24 With a copy to:

25 Anne Marie Ellis, Esq.
26 Buchalter
27 18400 Von Karman Ave Suite 800
28 Irvine, CA 92612-0514

1 and

2 For Cheng:

3 Parker A. Smith
4 Sy and Smith, PC
5 11622 El Camino Real, Suite 100
6 Del Mar, CA 92130
7 parker@sysmithlaw.com

8 Any Party, from time to time, may specify in writing by the means set forth above to the
9 other Party a change of address to which all notices and other communications shall be sent.

10 10. Counterparts: Facsimile Signatures

11 10.1 This Consent Judgment may be executed in counterparts and by facsimile or
12 exchange by electronic means, each of which shall be deemed an original, and all of which, when
13 taken together, shall constitute one and the same document.

14 11. Post Execution Activities

15 Cheng agrees to comply with the requirements set forth in California Health & Safety
16 Code §25249.7(f). The Parties further acknowledge that, pursuant to Health and Safety Code
17 section 25249.7(f), a noticed motion is required to obtain judicial approval of the settlement. In
18 furtherance of obtaining such approval, Cheng agrees to employ his best efforts, and those of his
19 counsel, to support the entry of this agreement as judgment, and to obtain judicial approval of this
20 Consent Judgment in a timely manner.

21
22 In the event the Court does not grant Cheng's motion for approval of or enter this
23 Consent Judgment within eighteen (18) months after it has been fully executed by the parties,
24 the parties shall meet and confer as to (and jointly agree on) whether to modify the language or
25 appeal the ruling. If the parties do not jointly agree on a course of action to take, then the case
26 shall proceed in its normal course on the trial court's calendar and Cheng's counsel shall refund
27 Excel the payment provided pursuant paragraph 4 in full within thirty (30) days of Excel
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1 providing written notice thereof.

2

3 12. Modification

4 This Consent Judgment may be modified only by further written agreement of the Parties
5 with court approval or by noticed motion.

6 13. Authorization

7 The undersigned are authorized to execute this Consent Judgment on behalf of their
8 respective Parties and have read, understood and agree to all of the terms and conditions of this
9 document and certifies that he or she is fully authorized by the Party he or she represents to
10 execute the Consent Judgment on behalf of the Party and legally bind that Party.
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IT IS SO STIPULATED:

Dated: 2017-9-7

Dated: _____

By: 

By: _____

Kingpun Cheng

Hany Hammam, Excel Blades Corp.

Dated: August 28, 2017

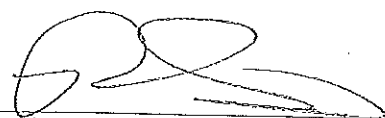
BUCHALTER

By: 

Anne Marie Ellis
Attorneys for Defendant,
EXCEL BLADES CORP.

Dated: August 28, 2017

SY & SMITH

By: 

Parker A. Smith, Esq.
Attorneys for Plaintiff,
KING PUN CHENG

IT IS SO ORDERED, ADJUDGED AND DECREED:

Dated: _____

Judge of the Superior Court

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IT IS SO STIPULATED:

Dated: _____

By: _____

Kingpun Cheng

Dated: 8/24/17

By: [Signature]

Hany Hammam, Excel Blades Corp.

Dated: June XX, 2017

BUCHALTER

By: _____

Anne Marie Ellis
Attorneys for Defendant,
EXCEL BLADES CORP.

Dated: June XX, 2017

SY & SMITH

By: _____

Parker A. Smith, Esq.
Attorneys for Plaintiff,
KING PUN CHENG

IT IS SO ORDERED, ADJUDGED AND DECREED:

Dated: _____

Judge of the Superior Court