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FILED
ALAMEDA COUNTY

APR 18 2019

7 *Attorney for Plaintiff, Kingpun Cheng*

CLERK OF THE SUPERIOR COURT
By *Venus L. Vail*
Deputy

8
9 SUPERIOR COURT OF THE STATE OF CALIFORNIA

10 COUNTY OF ALAMEDA

11 UNLIMITED CIVIL JURISDICTION

12
13 KINGPUN CHENG,

CASE NO.: RG18920878

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Plaintiff,

~~PROPOSED~~

JUDGMENT APPROVING
PROP 65 STIPULATION AND
CONSENT JUDGMENT

v.

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

MELNOR, INC.

"IMAGED FILE"

Date: April 18, 2019

Time: 09:00 AM

Defendant

Dept. 24

Judge: Hon. Noël Wise

Complaint Filed: September 17, 2018

Reservation # R-2048663

In the above entitled action, Plaintiff, Kingpun Cheng and Melnor, Inc. 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 this Proposition 65 settlement agreement and entering this Consent Judgment on April 18, 2019.

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

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7 Dated: 4/18/19


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JUDGE OF THE SUPERIOR COURT

Exhibit 1

1 PARKER SMITH, ESQ. (SBN 290311)
2 SY AND SMITH, PC.
3 11622 El Camino Real, Suite 100
4 San Diego, CA 92130
5 Telephone: (858) 746-9554
6 Facsimile: (858) 746-5199
7
8 Attorneys for Plaintiff, Kingpun Cheng

9 SUPERIOR COURT OF THE STATE OF CALIFORNIA
10 COUNTY OF ALAMEDA

11 KINGPUN CHENG,
12 Plaintiff,
13 vs.
14 MELNOR, INC.,
15 Defendants.

Case No.: RG18920878

UNLIMITED JURISDICTION

STIPULATION AND ~~PROPOSED~~
ORDER RE ENTRY OF CONSENT
JUDGMENT AS TO MELNOR,
INC.

Complaint Filed: September 17, 2018

17 I. Introduction

18 1.1 Parties

19 This Stipulation and [Proposed] Order re Consent Judgment ("Consent Judgment") is
20 hereby entered into by and between Kingpun Cheng, as an individual and acting in the interest of
21 the public (hereinafter "Cheng"), and Melnor, Inc. (hereinafter "Melnor"). Melnor and Cheng
22 shall be collectively referred to as the "Parties" and each of them as a "Party." Cheng is an
23 individual residing in California who seeks to promote awareness of exposures to toxic chemicals
24 and improve human health by reducing or eliminating hazardous substances contained in
25 consumer products. For purposes of this Stipulation and proposed Order, Melnor acknowledges
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1 that it employs ten or more persons as required for purposes of Cal. Health & Safety Code §§
2 25249.5 *et seq.* ("Proposition 65").

3 1.2 General Allegations

4 Cheng alleges that Melnor manufactured for sale in the State of California hot water
5 nozzles, including but not limited to "Ace Hot Water Nozzles with Rear Triggers #7165657"
6 UPC082901214786, containing lead and lead compounds, which are chemicals listed under
7 Proposition 65 as a chemical known to the State of California to cause cancer, birth defects,
8 and/or other reproductive harm, and that it did so without providing the warning Cheng alleges is
9 required by Proposition 65. The products that are covered by this Consent Judgment are defined
10 as hot water nozzles manufactured or distributed by or for Melnor that are or were sold by Melnor
11 and other retailers, including Ace Hardware Corporation, in or into California. All such hot water
12 nozzles, including but not limited to "Ace Hot Water Nozzles with Rear Triggers #7165657," are
13 referred to herein as "Covered Products".
14

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16 1.3 Notice of Violation

17 On or about October 8, 2018, Cheng issued a 60 Day Notice of Violation to Melnor and
18 various public enforcement agencies pursuant to Health & Safety Code §25249.7(d) alleging that
19 Melnor was in violation of Proposition 65 for failing to warn California consumers that the
20 Covered Products exposed them to lead in excess of the safe harbor levels as established by the
21 California Office of Environmental Health Hazard Assessment. The 60 Day Notice is referred to
22 herein as "Notice". No public enforcer diligently prosecuted the claims threatened in the Notice
23 within sixty days plus service time after service of the Notice to them by Cheng.
24

25 1.4 Complaint

26 On or about September 17, 2018, Cheng filed a Complaint against Ace Hardware for civil
27 penalties and injunctive relief ("Complaint") in Alameda Superior Court, Case No. RG18920878.
28

1 On or about January 10, 2019, Cheng filed a First Amended Complaint against Melnor. The
2 Complaint alleges, among other things, that Melnor violated Proposition 65 by failing to give
3 clear and reasonable warnings of exposure to lead and lead compounds from the Covered
4 Products.

5
6 1.5 Consent to Jurisdiction/No Admission

7 For purposes of this Consent Judgment only, the Parties consent that this Court has
8 jurisdiction over the allegations of violations contained in the Complaint and personal jurisdiction
9 over the named Defendant as to the acts alleged in the Complaint, that venue is proper in the
10 County of Alameda and that this Court has jurisdiction to enter this Consent Judgment as a full
11 settlement and resolution of the allegations contained in the Notices, Complaint, and of all claims
12 which were or could have been raised by any person or entity based in whole or in part, directly
13 or indirectly, on the prior conduct of the Parties or on the facts alleged in the Complaint or arising
14 therefrom or related to.
15

16 1.6 No Admission

17 Nothing in this Consent Judgment shall be construed as an admission by Melnor of any
18 fact, finding, conclusion of law, issue of law, or violation of law; nor shall compliance with this
19 Consent Judgment constitute or be construed as an admission by Melnor of any fact, finding,
20 conclusion of law, issue of law, or violation of law, such being specifically denied by Melnor.
21 However, this section shall not diminish or otherwise affect the obligations, responsibilities and
22 duties under this Consent Judgment.
23

24 1.7 Effective Date

25 For purposes of this Consent Judgment, the term "Effective Date" shall mean the date that
26 the Motion to Approve the Consent Judgment has been granted by the Court. For purposes of this
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1 Consent Judgment, the term "Execution Date" shall mean the date this Consent Judgment is
2 signed by all parties.

3 2. Injunctive Relief

4 Any Covered Product manufactured after the Effective Date that is sold, offered for sale,
5 or distributed for sale in California shall either (a) be reformulated pursuant to Section 2.1 or
6 (b) include a warning as provided in Section 2.3. Compliance with the terms of this Consent
7 Judgment shall constitute compliance with Proposition 65 by Melnor and the Releasees with
8 respect to lead or lead compounds in Covered Products.
9

10 2.1 Reformulation Option.

11 The Covered Products shall be deemed to comply with Proposition 65 with regard to lead,
12 and be exempt from any Proposition 65 warning requirements for lead, if the accessible
13 components of the Covered Products meet the following criteria: the alloy from which the
14 ~~components are made shall have a lead content by weight of no more than 0.30% (3,000 parts per~~
15 ~~million, or "3,000 ppm"). Melnor may comply with the above requirements by relying on~~
16 ~~information obtained from its suppliers regarding the content of the alloy from which the~~
17 ~~components are made, provided such reliance is in good faith. Obtaining test results showing that~~
18 ~~the lead content is no more than 0.30%, using a method of sufficient sensitivity to establish a limit~~
19 ~~of quantification (as distinguished from detection) of less than 3,000 ppm shall be deemed to~~
20 ~~establish good faith reliance. For purposes of this Consent Judgment, Covered Products in~~
21 ~~compliance with this standard are "Reformulated Products".~~
22


23 2.2 Warning Alternative.

24 As an alternative to reformulating the Covered Products, Covered Products manufactured
25 after the Effective Date that Melnor ships for sale, sells, or offers for sale in or into California that
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1 are not Reformulated Products as set forth in Section 2.1 above shall be accompanied by a clear
2 and reasonable warning as described in Section 2.3 below.

3 2.3 Clear and Reasonable Warnings.

4 Where required under Section 2.2 above, Melnor shall provide Proposition 65 warnings
5 substantially as follows:
6

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

10 OR other warning content and methods allowed now or in the future pursuant to
11 Proposition 65 or its implementing regulations.

12 Where the unit packaging, label, package insert, or product is not printed using the color
13 yellow, the symbol may be printed in black and white. The symbol shall be placed to the left of
14 the text of the warning, in a size no smaller than the height of the word "WARNING."
15

16 2.3.1 Where utilized as an alternative to meeting the criteria set forth in Section 2.1,
17 Melnor shall provide the warning language set forth in Section 2.3 either with the unit package of
18 the Covered Products or affixed to the Covered Products. Such warning shall be prominently
19 affixed to or printed on each Product's label, package, package insert, or the Product itself. If
20 printed on the label, the warning shall be contained in the same section that states other safety
21 warnings, if any, concerning the use of the Product. Melnor may continue to utilize, on an
22 ongoing basis, unit packaging that is not identical but contains substantively the same
23 Proposition 65 warnings as those set forth in Section 2.3 above, but only to the extent such
24 packaging materials have already been printed no later than ninety days after the Effective Date.
25 Any such warnings comply with both Proposition 65 and the terms of this Consent Judgment.
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1 2.3.2 The requirements for warnings set forth in Section 2.3 above are imposed pursuant
2 to the terms of this Consent Judgment. The Parties recognize that these are not the exclusive
3 methods of providing a warning under Proposition 65 and its implementing regulations and that
4 they may or may not be appropriate in other circumstances. Moreover, the Parties acknowledge
5 that nothing in this Consent Judgment shall prohibit Melnor from providing additional
6 information in connection with the warnings required herein.
7

8 2.4 Products Manufactured Prior to the Effective Date

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

16 3. Entry of Consent Judgment

17 3.1 With regard to all claims that have been raised or which could be raised with respect to
18 respect to failure to warn pursuant to Proposition 65 with regard to lead in the Covered Products,
19 Melnor shall pay a civil penalty of \$1,000.00 pursuant to Health and Safety Code section
20 25249.7(b), to be apportioned in accordance with California Health & Safety Code § 25192, with
21 75% of these funds remitted to the State of California's Office of Environmental Health Hazard
22 Assessment ("OEHHHA") and the remaining 25% of the penalty remitted to Cheng, as provided by
23 California Health & Safety Code § 25249.12(c)(1) and (d) and the instructions directly below.
24

25 3.2 Payment Procedures

26 Melnor shall issue two separate checks for the penalty payment: (a) one check made
27 payable to "OEHHHA" (tax identification number: 68-0284486) in an amount representing 75% of
28

1 the total penalty (i.e., \$750.00); and (b) one check in an amount representing 25% of the total
2 penalty (i.e., \$250.00) made payable directly to Cheng. Melnor shall mail these payments within
3 five (5) days after the Effective Date to the following addresses respectively:
4

5 To Office of Environmental Health Hazard Assessment:
6 Attn: Mike Gyurics
7 Fiscal Operations Branch Chief
8 Office of Environmental Health Hazard Assessment
9 P.O. Box 4010, MS #19B
10 Sacramento, CA 95812-4010

11 To Mr. Kingpin Cheng:
12 Mr. Kingpin Cheng
13 C/O Sy and Smith, PC
14 11622 El Camino Real, Suite 100
15 San Diego, CA 92130

16 4. Reimbursement of Fees and Costs

17 The Parties reached an accord on the compensation due to Cheng and his counsel under the
18 private attorney general doctrine and principles of contract law. Under these legal principles,
19 Melnor shall reimburse Cheng's counsel for fees and costs incurred as a result of investigating,
20 bringing this matter to Melnor's attention, and negotiating a settlement. Melnor shall pay
21 Cheng's counsel \$20,250.00 for all attorneys' fees, expert and investigation fees, and related costs
22 associated with this matter and the Notices. Melnor shall send a check payable to "Sy and Smith,
23 PC" within five (5) days of the Effective Date. Sy and Smith, PC will provide Melnor with their
24 tax identification information on or before the Effective Date if requested. Other than the
25 payment required hereunder, each side is to bear its own attorneys' fees and costs.

26 5. Release of all Claims

27 5.1 Release of Melnor and Downstream Customers, Retailers, and Entities
28 Cheng, acting on behalf of himself and in a representative capacity in the public interest,
releases Melnor and its respective officers, directors, attorneys, representatives, shareholders,

1 agents, and employees, sister and parent entities, successors, and assigns, and each entity to
2 whom it directly or indirectly distributed or distributes or sold or sells the Covered Products
3 including, but not limited to, their downstream distributors, wholesalers, licensors, licensees,
4 auctioneers, retailers (including, but not limited to Ace Hardware Corporation, their parents and
5 all affiliates and subsidiaries thereof), their respective employees, agents and assigns,
6 franchisees, dealers, customers, owners, purchasers, users, parent companies, corporate affiliates,
7 subsidiaries, (collectively "Releasees") from all claims for violations of Proposition 65 up
8 through the Effective Date, and consistent with the provisions of Section 2.4, above, based on
9 exposure to lead from the Covered Products as set forth in the Notices. The release in this
10 Section applies to all Covered Products that were manufactured prior to the Effective Date,
11 regardless of the date any Releasee distributes or sells the Covered Products. Compliance with
12 the terms of this Consent Judgment constitutes compliance with Proposition 65 with respect to
13 exposures to lead from the Covered Products.
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16 In addition to the foregoing, Cheng, on behalf of himself, his past and current agents,
17 representatives, attorneys, and successors and/or assignees, and *not* in his representative capacity,
18 hereby waives all rights to institute or participate in, directly or indirectly, any form of legal
19 action and releases any other claims, cause of action, obligation, costs, expenses, attorneys' fees,
20 damages, losses, liabilities, and demands that he could make against Melnor or the Releasees with
21 respect to violations of Proposition 65 based upon the Covered Products. The Parties
22 acknowledge that the claims released above may include unknown claims, and with respect to the
23 foregoing waivers and releases in this paragraph, Cheng hereby specifically waives any and all
24 rights and benefits which he now has, or in the future may have, conferred by virtue of the
25 provisions of Section 1542 of the California Civil Code, which provides as follows:
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A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN BY HIM OR HER MUST HAVE MATERIALLY AFFECTED HIS OR HER SETTLEMENT WITH THE DEBTOR.

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

5.2 Melnor Release of Cheng

Melnor waives any and all claims against Cheng, his attorneys and other representatives, for any and all actions taken or statements made by Cheng and his attorneys and other representatives whether in the course of investigating claims or otherwise seeking enforcement of Proposition 65 against it in this matter, and/or with respect to the Covered Products.

6. Non-Disparagement

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

7. Severability and Merger

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

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

8. Governing Law

1 The terms of this Consent Judgment shall be governed by the laws of the State of
2 California and apply within the State of California.

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

10

11 9. Notices

12 9.1 Unless specified herein, all correspondence and notices required to be provided
13 pursuant to this Consent Judgment shall be in writing and personally delivered or sent by:
14 electronic mail and either (i) first-class, (registered or certified mail) return receipt requested; or
15 (ii) overnight courier on any Party by the other Party at the following addresses:

16

For Melnor:

17

Juergen Nies
18 President/CEO
Melnor, Inc.
19 109 Tyson Drive
20 Winchester, VA 22603
jnies@melnor.com

21

22

With a copy to:

23

Jeffrey Margulies
Norton Rose Fulbright US LLP
24 555 South Flower Street, 41st Floor
Los Angeles, CA 90071
25 Jeff.margulies@nortonrosefulbright.com

26

and

27

For Cheng:

28

1 Parker A. Smith
2 Sy and Smith, PC
3 11622 El Camino Real, Suite 100
4 San Diego, CA 92130
5 Parker@sysmithlaw.com

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

8 10. Counterparts; Facsimile Signatures

9 10.1 This Consent Judgment may be executed in counterparts and by facsimile or
10 exchange by electronic means, each of which shall be deemed an original, and all of which, when
11 taken together, shall constitute one and the same document.

12 11. Post Execution Activities

13 Cheng agrees to comply with the requirements set forth in California Health & Safety
14 Code §25249.7(f). The Parties further acknowledge that, pursuant to Health and Safety Code

15 ~~section 25249.7(f), a noticed motion is required to obtain judicial approval of the settlement. In~~

16 furtherance of obtaining such approval, Cheng agrees to employ his best efforts, and those of his

17 ~~counsel, to support the entry of this agreement as judgment, and to obtain judicial approval of this~~

18 Consent Judgment in a timely manner.

19 12. Modification

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

22 13. Attorney Fees

23 A Party who unsuccessfully brings or contests an action arising out of this Consent Judgment
24 shall be required to pay the prevailing Party's reasonable attorney's fees and costs.
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26 14. Authorization

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

IT IS SO STIPULATED:

Dated: _____ Dated: 1/15/2019
By: _____ By: [Signature]
Kingpun Cheng On Behalf of: Melnor, Inc.

APPROVED AS TO FORM:

Dated: _____, 2018. NORTON ROSE FULBRIGHT US LLP

By: _____
Jeffrey Margulies, Esq.
Attorneys for Defendant,
MELNOR, INC.

Dated: _____, 2018 SY & SMITH, PC

By: _____
Parker A. Smith, Esq.
Attorneys for Plaintiff,
KINGPUN CHENG

IT IS SO ORDERED, ADJUDGED AND DECREED:

Dated: _____

Judge of the Superior Court

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

IT IS SO STIPULATED:

Dated: _____ Dated: _____

By: _____ By: _____
Kingpun Cheng On Behalf of: Melnor, Inc.

APPROVED AS TO FORM:

Dated: Jan 21, 2018 NORTON ROSE FULBRIGHT US LLP

By: _____
Jeffrey Margulies, Esq.
Attorneys for Defendant,
MELNOR, INC.

Dated: _____, 2018 SY & SMITH, PC

By: _____
Parker A. Smith, Esq.
Attorneys for Plaintiff,
KINGPUN CHENG

IT IS SO ORDERED, ADJUDGED AND DECREED:

Dated: _____

Judge of the Superior Court

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

IT IS SO STIPULATED:

Dated: 2019-1-14

Dated: _____

By: 
Kingpun Cheng

By: _____
On Behalf of: Melnor, Inc.

APPROVED AS TO FORM:


Dated: _____, 2018

NORTON ROSE FULBRIGHT US LLP

By: _____
Jeffrey Margulies, Esq.,
Attorneys for Defendant,
MELNOR, INC.,

Dated: Jan. 16, 2018

SY & SMITH, PC

By: 
Parker A. Smith, Esq.,
Attorneys for Plaintiff,
KINGPUN CHENG

IT IS SO ORDERED, ADJUDGED AND DECREED:

Dated: _____

Judge of the Superior Court