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FILED
SAN DIEGO SUPERIOR COURT

DEC 4 2019

CLERK OF THE SUPERIOR COURT

BY: T. RAY

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN DIEGO

UNLIMITED CIVIL JURISDICTION

KINGPUN CHENG,

Plaintiff,

HARBOR FREIGHT TOOLS USA, INC.
et al.

Defendant.

CASE NO.: 37-2018-00060205-CU-NP-CTL

**[PROPOSED] ORDER APPROVING
PROPOSITION 65 SETTLEMENT**

"IMAGED FILE"

Date: November 22, 2019

Time: 09:30 AM

Dept.: C-71

Judge: Hon. Gregory W. Pollack

Complaint Filed: November 29, 2018

Plaintiff, Kingpun Cheng and Defendant, Harbor Freight Tools USA, INC. having agreed through their respective counsel that judgment be entered pursuant to the terms of the Proposition 65 Settlement entered into by the parties, and attached to the Judgment pursuant to the terms of the Proposition 65 Settlement as Exhibit 1. After consideration of the papers submitted and arguments presented, the Court finds that the settlement agreement set out in the

1 attached Proposition 65 Settlement meets the criteria established by Health & Safety Code
2 §25249.7, in that:

- 3 a) the health hazard warning required by the Proposition 65 Settlement complies
4 with Health & Safety Code §25249.7;
5 b) the reimbursement of fees and costs to be paid pursuant to the parties'
6 Proposition 65 Settlement is reasonable under California law; and
7 c) the civil penalty amount to be paid pursuant to the parties' Proposition 65
8 Settlement is reasonable
9

10 **IT IS HEREBY ORDERED, ADJUDGED AND DECREED** that pursuant to Code of Civil
11 Procedure §664.6, judgment is entered in accordance with the Proposition 65 Settlement attached
12 hereto as Exhibit 1.
13

14 **IT IS SO ORDERED.**

15
16 Dated: 12.6-19

GREGORY W. POLLACK

JUDGE OF THE SAN DIEGO 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 Attorneys for Plaintiff, Kingpun Cheng

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SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SAN DIEGO

KINGPUN CHENG,

Plaintiff,

vs.

HARBOR FREIGHT TOOLS USA, INC., et al.;

Defendants.

Case No. 37-2018-00060205-CU-NP-CTL

UNLIMITED JURISDICTION

**STIPULATION AND [PROPOSED]
ORDER RE ENTRY OF CONSENT
JUDGMENT AS TO HARBOR
FREIGHT TOOLS USA, INC.**

Complaint Filed: November 29, 2018

1. **Introduction**

1.1 **Parties**

This Stipulation and [Proposed] Order re Consent Judgment ("Consent Judgment") is hereby entered into by and between Kingpun Cheng, as an individual and acting in the interest of the public (hereinafter "Cheng"), and Harbor Freight Tools USA, Inc. and HFT Holdings, Inc. (hereinafter collectively referred to as "Harbor Freight" or "Defendants"). Harbor Freight and Cheng shall be collectively referred to as the "Parties" and each of them as a "Party." Cheng is an individual residing in California who seeks to promote awareness of exposures to toxic chemicals and improve human health by reducing or eliminating hazardous substances contained in consumer products. For purposes of this Stipulation and proposed Order, Harbor Freight

1 acknowledges that it employs ten or more persons as required for purposes of Cal. Health &
2 Safety Code §§ 25249.5 *et seq.* ("Proposition 65").

3 1.2 General Allegations

4 Cheng alleges that Harbor Freight offered for sale and sold in the State of California
5 various product categories, including but not limited to Heavy Duty Combination Squares ,
6 Automotive Mechanic's Stethoscopes, TIG Parts Kits , and Double-Sided Mallets , containing
7 lead and lead compounds; and PVC-Coated Safety Utility Gloves containing Diisononyl phthalate
8 (DINP). DINP is a chemical listed under Proposition 65 as a chemical known to the State of
9 California to cause cancer, while lead and lead compound are chemicals listed under Proposition
10 65 as a chemicals known to the State of California to cause cancer, birth defects, and/or other
11 reproductive harm. Cheng alleges that Harbor Freight offered for sale and sold these product
12 categories in California without providing the warning Cheng alleges was required by Proposition
13 65. The product categories described above and covered by this Consent Judgment that were
14 manufactured or distributed by or for Harbor Freight and are or were sold tby Harbor Freight and
15 other retailers in or into California are referred to herein as "Covered Products".
16

17 1.3 Notice of Violation

18 On or about October 9, 2017 and October 11, 2017, Cheng issued a series of 60 Day
19 Notices of Violation to Harbor Freight and various public enforcement agencies pursuant to
20 Health & Safety Code §25249.7(d) alleging that Harbor Freight was in violation of Proposition 65
21 for failing to warn California consumers that the Covered Products exposed them to Lead and
22 Lead Compounds or Diisononyl phthalate (DINP) ("60 Day Notices"). The 60 Day Notices are
23 referred to herein as "Notices". No public enforcer diligently prosecuted the claims threatened in
24 the Notices within sixty days plus service time after service of the Notices to them by Cheng.
25

26 1.4 Complaint

1 On or about November 29, 2018, Cheng filed a Complaint against Harbor Freight for civil
2 penalties and injunctive relief ("Complaint") in San Diego Superior Court, Case No. 37-2018-
3 00060205-CU-NP-CTL. On or about July 16, 2019, Cheng filed a First Amended Complaint,
4 also for penalties and injunctive relief. The First Amended Complaint alleges, among other
5 things, that Harbor Freight violated Proposition 65 by failing to give clear and reasonable
6 warnings of exposure to lead and lead compounds from some of the Covered Products and
7 Diisononyl phthalate (DINP) from other Covered Products.
8

9 **1.5 Consent to Jurisdiction/ No Admission**

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

19 **1.6 No Admission**

20 Nothing in this Consent Judgment shall be construed as an admission by Harbor Freight of
21 any fact, finding, conclusion of law, issue of law, or violation of law; nor shall compliance with
22 this Consent Judgment constitute or be construed as an admission by Harbor Freight of any fact,
23 finding, conclusion of law, issue of law, or violation of law. However, this section shall not
24 diminish or otherwise affect the obligations, responsibilities and duties under this Consent
25 Judgment.
26

27 **1.7 Effective Date**
28

1 For purposes of this Consent Judgment, the term "Effective Date" shall mean the date that
2 Harbor Freight's counsel has received notice that the Motion to Approve the Consent Judgment
3 has been granted by the Court. For purposes of this Consent Judgment, the term "Execution Date"
4 shall mean the date this Consent Judgment is signed by all parties.
5

6 **2. Injunctive Relief**

7 Any Covered Product manufactured more than sixty (60) days after the Effective Date that
8 is sold, offered for sale, or distributed for sale in California by Harbor Freight shall either (a) be
9 reformulated pursuant to Section 2.1 or (b) include a warning as provided in Section 2.3.
10 Compliance with the terms of this Consent Judgment shall constitute compliance with
11 Proposition 65 by Harbor Freight and the Releasees with respect to DINP and lead or lead
12 compounds in Covered Products.
13

14 **2.1 Reformulation Option.**

15 The Covered Products other than PVC-Coated Safety Gloves shall be deemed to comply
16 with Proposition 65 with regard to lead and lead compounds, and be exempt from any Proposition
17 65 warning requirements for lead and lead compounds, if the exposed components of the Covered
18 Products meet the following criteria: the alloy from which the components are made shall have a
19 lead content by weight of no more than 0.30% (3,000 parts per million, or "3,000 ppm"). Harbor
20 Freight may comply with the above requirements by relying on information obtained from its
21 suppliers regarding the content of the alloy from which the components are made, provided such
22 reliance is in good faith. Obtaining test results showing that the lead content is no more than
23 0.30%, using a method of sufficient sensitivity to establish a limit of quantification (as
24 distinguished from detection) of less than 3,000 ppm shall be deemed to establish good faith
25 reliance. For purposes of this Consent Judgment, Covered Products in compliance with this
26 standard are "Reformulated Lead Products".
27
28

1 The PVC-Coated Safety Gloves shall be deemed to comply with Proposition 65 with
2 regard to Diisononyl phthalate (DINP), and be exempt from any Proposition 65 warning
3 requirements for Diisononyl phthalate (DINP), if the exposed components of the Covered
4 Products meet the following criteria: the Covered Products shall have a Diisononyl phthalate
5 (DINP) content by weight of no more than 0.10% (1,000 parts per million, or "1,000 ppm").
6 Harbor Freight may comply with the above requirements by relying on information obtained from
7 its suppliers regarding the content of the Covered Products from which the components are made,
8 provided such reliance is in good faith. Obtaining test results showing that the DINP content is
9 no more than 0.10%, using a method of sufficient sensitivity to establish a limit of quantification
10 (as distinguished from detection) of less than 1,000 ppm shall be deemed to establish good faith
11 reliance. For purposes of this Consent Judgment, Covered Products in compliance with this
12 standard are "Reformulated DINP Products".
13
14

15 2.2 Warning Alternative.


16 As an alternative to reformulating the Covered Products, Covered Products manufactured
17 after the Effective Date that Harbor Freight ships for sale, sells, or offers for sale in or into
18 California that are not Reformulated Lead Products or Reformulated DINP Products as set forth
19 in Section 2.1 above shall be accompanied by a clear and reasonable warning as described in
20 Section 2.3 below.
21

22 2.3 Clear and Reasonable Warnings.


23 Where required under Section 2.2 above, Harbor Freight shall provide Proposition 65
24 warnings substantially as follows:

25 **⚠ WARNING:** This product can expose you to chemicals including lead, which is
26 known to the State of California to cause cancer and birth defects or other reproductive harm. For
27 more information go to www.P65Warnings.ca.gov.
28

1 OR

2  WARNING: This product can expose you to chemicals including Diisononyl
3 Phthalate (DINP), which is known to the State of California to cause cancer. For more
4 information go to www.P65Warnings.ca.gov.
5

6 OR

7  WARNING: Cancer -- www.P65Warnings.ca.gov.
8

9 OR

10  WARNING:: Reproductive Harm -- www.P65Warnings.ca.gov.
11

12 OR

13 WARNING: This product contains chemicals known to the State of California to cause
14 cancer and birth defects or other reproductive harm.
15

16 OR

17 WARNING: This product contains chemicals known to the State of California to cause
18 cancer.
19

20 OR

21 WARNING: This product contains chemicals known to the State of California to
22 cause birth defects or other reproductive harm.
23

24 OR other warning content and methods allowed or required now or in the future pursuant
25 to Proposition 65 or its implementing regulations.
26

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

2.3.1 Where utilized as an alternative to meeting the criteria set forth in Section 2.1,
Harbor Freight shall provide the warning language set forth in Section 2.3 either with the unit

1 package of the Covered Products or affixed to the Covered Products. Such warning shall be
2 prominently affixed to or printed on each Product's label, package, package insert, or the Product
3 itself. Harbor Freight may continue to utilize, on an ongoing basis, unit packaging that is not
4 identical but contains substantively the same Proposition 65 warnings as those set forth in Section
5 2.3 above, but only to the extent such packaging materials have already been printed no later than
6 ninety days after the Effective Date. Any such warnings comply with both Proposition 65 and the
7 terms of this Consent Judgment.
8

9 2.3.2 The requirements for warnings set forth in Section 2.3 above are imposed pursuant
10 to the terms of this Consent Judgment. The Parties recognize that these are not the exclusive
11 methods of providing a warning under Proposition 65 and its implementing regulations and that
12 they may or may not be appropriate in other circumstances. Moreover, the Parties acknowledge
13 that nothing in this Consent Judgment shall prohibit Harbor Freight from providing additional
14 information in connection with the warnings required herein.
15

16 2.4 Products Manufactured Prior to the Effective Date

17 Notwithstanding anything else in this Consent Judgment, Covered Products that were
18 manufactured prior to the Effective Date shall be subject to the release of liability pursuant to
19 Section 5 of this Consent Judgment, without regard to when such Covered Products were or are in
20 the future distributed or sold to customers. As a result, the obligations of Harbor Freight as set
21 forth in this Consent Judgment, including but not limited to reformulation or warning pursuant to
22 Section 2, do not apply to these products manufactured prior to the Effective Date.
23

24 3. Entry of Consent Judgment

25 3.1 With regard to all claims that have been raised or which could be raised with
26 respect to failure to warn pursuant to Proposition 65 with regard to lead in the Covered Products,
27 Harbor Freight shall pay a civil penalty of \$2,500 pursuant to Health and Safety Code section
28

1 25249.7(b), to be apportioned in accordance with California Health & Safety Code § 25192, with
2 75% of these funds remitted to the State of California's Office of Environmental Health Hazard
3 Assessment ("OEHHA") and the remaining 25% of the penalty remitted to Cheng, as provided by
4 California Health & Safety Code § 25249.12(c)(1) and (d) and the instructions directly below.
5

6 **3.2 Payment Procedures**

7 Harbor Freight shall issue two separate checks for the penalty payment: (a) one check
8 made payable to "OEHHA" (tax identification number: 68-0284486) in an amount representing
9 75% of the total penalty (i.e., \$1,875); and (b) one check in an amount representing 25% of the
10 total penalty (i.e., \$625) made payable directly to Cheng. Sy and Smith will provide Cheng's IRS
11 Form W9 to Harbor Freight's counsel no later than the Effective Date. Harbor Freight shall mail
12 these payments within five (5) days after the Effective Date to the following addresses
13 respectively:
14

15 To Office of Environmental Health Hazard Assessment:

16 Attn: Mike Gyurics
17 Fiscal Operations Branch Chief
18 Office of Environmental Health Hazard Assessment
19 P.O. Box 4010, MS #19B
20 Sacramento, CA 95812-4010

21 To Mr. Kingpun Cheng:

22 Mr. Kingpun Cheng
23 C/O Sy and Smith, PC
24 11622 El Camino Real, Suite 100
25 San Diego, CA 92130

26 **4. Reimbursement of Fees and Costs**

27 The Parties reached an accord on the compensation due to Cheng and his counsel under the
28 private attorney general doctrine and principles of contract law. Under these legal principles,
Harbor Freight shall reimburse Cheng's counsel for fees and costs incurred as a result of
investigating, bringing this matter to Harbor Freight's attention, and negotiating a settlement.

1 Harbor Freight shall pay Cheng's counsel \$27,500 for all attorneys' fees, expert and investigation
2 fees, and related costs associated with this matter and the Notices. Harbor Freight shall send a
3 check payable to "Sy and Smith, PC" within five (5) days of the Effective Date. Sy and Smith,
4 PC will provide Harbor Freight's counsel their IRS Form W9 on or before the Effective Date.
5 Other than the payment required hereunder, each side is to bear its own attorneys' fees and costs.
6

7 5. Release of all Claims

8 5.1 Release of Harbor Freight and Downstream Customers, Retailers, and
9 Entities

10 Cheng, acting on behalf of himself and in a representative capacity in the public interest,
11 releases Harbor Freight and its respective officers, directors, attorneys, representatives,
12 shareholders, agents, and employees, sister and parent entities, successors, and assigns, and each
13 entity to whom it directly or indirectly distributed or distributes or sold or sells the Covered
14 Products including, but not limited to, their downstream distributors, wholesalers, licensors,
15 licensees, auctioneers, retailers, their respective employees, agents and assigns, franchisees,
16 dealers, customers, owners, purchasers, users, parent companies, corporate affiliates, subsidiaries,
17 (collectively "Releasees") from all claims for violations of Proposition 65 up through the
18 Effective Date, and consistent with the provisions of Section 2.4, above, based on exposure to
19 lead or DINP from the Covered Products as set forth in the Notices. The release in this Section
20 applies to all Covered Products that were manufactured prior to the Effective Date, regardless of
21 the date any Releasee distributes or sells the Covered Products. Compliance with the terms of
22 this Consent Judgment constitutes compliance with Proposition 65 with respect to exposures to
23 lead from the Covered Products.
24
25

26 In addition to the foregoing, Cheng, on behalf of himself, his past and current agents,
27 representatives, attorneys, and successors and/or assignees, and *not* in his representative capacity,
28

1 hereby waives all rights to institute or participate in, directly or indirectly, any form of legal
2 action and releases any other claims, cause of action, obligation, costs, expenses, attorneys' fees,
3 damages, losses, liabilities, and demands that he could make against Harbor Freight or the
4 Releasees with respect to violations of Proposition 65 based upon the Covered Products. The
5 Parties acknowledge that the claims released above may include unknown claims, and with
6 respect to the foregoing waivers and releases in this paragraph, Cheng hereby specifically waives
7 any and all rights and benefits which he now has, or in the future may have, conferred by virtue of
8 the provisions of Section 1542 of the California Civil Code, which provides as follows:
9

10
11 **A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS**
12 **WHICH THE CREDITOR OR RELEASING PARTY DOES**
13 **NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER**
14 **FAVOR AT THE TIME OF EXECUTING THE RELEASE**
15 **AND THAT, IF KNOWN BY HIM OR HER WOULD HAVE**
16 **MATERIALLY AFFECTED HIS OR HER SETTLEMENT**
17 **WITH THE DEBTOR OR RELEASED PARTY.**

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

20 5.2 Harbor Freight Release of Cheng

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

26 6. Non-Disparagement

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

1 7. Severability and Merger

2 If, subsequent to the execution of this Consent Judgment, any of the provisions of this
3 document are held by a court to be unenforceable, the validity of the enforceable provisions
4 remaining shall not be adversely affected.
5

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

10 8. Governing Law

11
12 The terms of this Consent Judgment shall be governed by the laws of the State of
13 California and apply within the State of California.

14 Compliance with the terms of this Consent Judgment resolves any issue, now or in the
15 future, regarding the requirements of Proposition 65 with respect to alleged exposures to lead and
16 lead compounds arising from the Covered Products. In the event that Proposition 65 is repealed
17 or is otherwise rendered inapplicable by reason of law generally, or as to the Covered Products,
18 then Harbor Freight shall provide written notice to Cheng of any asserted change in the law, and
19 shall have no further obligations pursuant to this Consent Judgment with respect to, and to the
20 extent that, the Covered Products are so affected.

21 9. Notices

22 9.1 Unless specified herein, all correspondence and notices required to be provided
23 pursuant to this Consent Judgment shall be in writing and personally delivered or sent by:
24 electronic mail and either (i) first-class, (registered or certified mail) return receipt requested; or
25 (ii) overnight courier on any Party by the other Party at the following addresses:
26

27 For Harbor Freight:
28

1 Harbor Freight Tools USA, Inc.
2 Attn. Tammy Stafford, Assistant General Counsel
3 26541 Agoura Rd,
4 Calabasas, CA 91302

5 With a copy to:

6 Bruce Nye
7 Scali Rasmussen
8 1901 Harrison Street, 14th Floor
9 Oakland, CA 94612
10 bnye@scalilaw.com

11 and

12 For Cheng:

13 Parker A. Smith
14 Sy and Smith, PC
15 11622 El Camino Real, Suite 100
16 San Diego, CA 92130
17 parker@sysmithlaw.com

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

21 **10. Counterparts; Facsimile Signatures**

22 10.1 This Consent Judgment may be executed in counterparts and by facsimile or
23 exchange by electronic means, each of which shall be deemed an original, and all of which, when
24 taken together, shall constitute one and the same document.

25 **11. Post Execution Activities**

26 Cheng agrees to comply with the requirements set forth in California Health & Safety
27 Code §25249.7(f). The Parties further acknowledge that, pursuant to Health and Safety Code
28 section 25249.7(f), a noticed motion is required to obtain judicial approval of the settlement. In
furtherance of obtaining such approval, Cheng agrees to employ his best efforts, and those of his

1 counsel, to support the entry of this agreement as judgment, and to obtain judicial approval of this
2 Consent Judgment in a timely manner.

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. Attorney Fees**

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

9 **14. Authorization**

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

14 **IT IS SO STIPULATED:**

15 Dated: 2019-7-26

16 Dated: 7/23/19

17 By: Kingpun Cheng
18 Kingpun Cheng

19 Harbor Freight Tools USA, Inc.
20 By: Jimmy Stafford
21 Associate General Counsel

22 **IT IS SO ORDERED, ADJUDGED AND DECREED:**

23 Dated: _____

24 _____
25 Judge of the Superior Court