

Lasco_Cheng_Settlement_Agreement_Pop-up Drain and RV Hot or Cold Stem S-536-3 3193

1. INTRODUCTION

1.1 The Parties

This Private Settlement Agreement ("Private Settlement") is hereby entered into by and between King Pun Cheng (hereinafter "Cheng") and Larsen Supply Company, (hereinafter "Larsen") and True Value Company (hereinafter "True Value"). Larsen, True Value 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. Larsen and True Value employ ten or more persons and each is a person in the course of doing business for purposes of Proposition 65, Cal. Health & Safety Code §§ 25249.6 et seq.

1.2 Allegations and Representations

Cheng alleges that Larsen has offered for sale in the State of California and has sold in California, plumbing accessories containing lead, and that such sale have not been accompanied by Proposition 65 warnings. Lead is listed under Proposition 65 as a chemical known to the State of California to cause cancer and birth defects or other reproductive harm. Cheng has cited "Lasco Pop-up Drain" UPC 052151030207, hereafter ("Pop-up Drain"), and "Lasco RV Hot or Cold Stem S-536-3 3193" UPC 052151450821, hereafter ("RV Hot or Cold Stem") as specific examples of brass drain and plumbing hardware that is the subject of his allegations.

For purposes of this private settlement only, Larsen represents that: 1) UPCs 052151030207 and 052151450821 are items manufactured for and distributed the said products to retailers (online and storefront) that sold the products to the citizens residing in the state of California and had no reason to believe that the items contained lead and lead compounds until receiving Cheng's 60-Day Notices on or about November 26, 2013 and January 27, 2014 respectively.

1.3 Product Description

The products that are covered by this Private Settlement are defined as Lasco Pop-up Drain UPC 052151030207 and Lasco RV Hot or Cold Stem UPC 052151450821, containing exposed brass or other metals containing lead that are distributed by Lasco to True Value ("True Value") and others and sold in California. All such items shall be referred to herein as the "Products."

1.4 Notices of Violation

A) On or about November 26, 2013 and January 27, 2014, Cheng served Lasco, True Value, and various public enforcement agencies with a document entitled "60-Day Notice of Violation" pursuant to Health

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& Safety Code §25249.7(d) (the "Notice"), alleging that Lasco and True Value were in violation of Proposition 65 for failing to warn consumers and customers that the Product exposed users in California to lead. No public enforcer diligently prosecuted the claims threatened in the Notice within sixty days plus service time relative to the provision of the Notice to them by Cheng.

1.5 Stipulation as to Jurisdiction/No Admission/Consent Judgment

For purposes of this Private Settlement only, the Parties stipulate that in the event that enforcement of this Private Settlement or a dispute arises regarding this Private Settlement, the Superior Court of California, County of San Diego has proper jurisdiction over Lasco and True Value as to the allegations contained in the in the 60 day notice served on Lasco and True Value on or about November 26, 2013 and January 27, 2014, that venue is proper in the County of San Diego, and that this Court has jurisdiction to approve, enter, and oversee the enforcement of this Private Settlement.

Lasco and True Value deny the material allegations contained in Cheng's Notice and maintain that it has not violated Proposition 65. Nothing in this Private Settlement shall be construed as an admission by Lasco of any fact, finding, issue of law, or violation of law; nor shall compliance with this Settlement Agreement constitute or be construed as an admission by Lasco of any fact, finding, conclusion, issue of law, or violation of law, such being specifically denied by Lasco. However, this section shall not diminish or otherwise affect the obligations, responsibilities, and duties of Lasco under this Settlement Agreement.

In the event Lasco would like to enter into a Consent Judgment at a later time, Lasco must inform Cheng no later than December 2, 2015 and Cheng will file the Complaint no later than January 30, 2016. In such event, Lasco agrees to waive statute of limitation defense until January 30, 2016 pertaining to the products covered in this agreement. Lasco further agrees to receive service of the summons and petition by Federal Express Overnight. Cheng shall be responsible for Cheng's filing fees and cost associated with the filing of the complaint. Cheng will not request additional attorney fees and costs from Lasco. Lasco shall pay for its own attorneys fees and costs associated with the consent judgment.

1.6 Effective Date

For purposes of this Private Settlement, the term "Effective Date" shall mean the date of this Private Settlement.

For purposes of this Private Settlement, the term "Execution Date" shall mean the date this Private Settlement is signed by all parties in Clause 14 below.

2. INJUNCTIVE RELIEF: WARNINGS AND REFORMULATION

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Commencing on the Effective Date, Lasco shall not ship, sell, or offer to sell in California a Product(s) that is/are manufactured, distributed or sold by Lasco containing more than 100ppm lead. On the Effective Date in California shall either be (a) reformulated pursuant to Section 2.1 or (b) include a warning as provided in Section 2.3.

2.1 Reformulation Option.

The Products shall be deemed to comply with Proposition 65 with regard to lead and be exempt from any Proposition 65 warning requirements for lead if the exposed brass or other metal components that are part of the Products meet the following criteria: (a) the alloy from which the components are made shall have no lead as an intentionally added constituent; and (b) the alloy from which the components are made shall have a lead content by weight of no more than 0.01% (100 parts per million, or "100 ppm"). Lasco may comply with the above requirements by relying on information obtained from its suppliers regarding the content of the alloy from which the components are made, provided such reliance is in good faith. Obtaining test results showing that the lead content is no more than 0.03%, using a method of sufficient sensitivity to establish a limit of quantification (as distinguished from detection) of less than 100 ppm shall be deemed to establish good faith reliance.

2.2 Warning Alternative.

Commencing on the Effective Date, Products that Lasco ships, sells or offers for sale in California that do not meet the warning exemption standard set forth in Section 2.1 above shall be accompanied by a warning as described in Section 2.3 below. Where warnings are utilized, Lasco shall certify periodically that it is affixing the prescribed warnings. 2.3 Warnings.

Where required under Section 2.2 above, Lasco shall provide Proposition 65 warnings as follows:

California Prop. 65 WARNING: This product contains lead, a chemical known to the State of California to cause birth defects or other reproductive harm.

OR

California Prop. 65 WARNING: This product contains one or more chemicals known to the State of California to cause cancer and birth defects or other reproductive harm.

2.4 Where utilized as an alternative to meeting the criteria set forth in Section 2.1, Lasco shall provide the warning language set forth in Section 2.3 either:

(a) With the unit package of the Products or affixed to the Products. Such warning shall be prominently affixed to or printed on each Product's label or package or the Product itself. If printed on the label, the warning shall be contained in the same section that states other safety warnings, if any, concerning the use of the Product; Lasco may continue to utilize, on an ongoing basis, unit packaging

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containing substantively the same Proposition 65 warnings as those set forth in Section 2.3 above, but only to the extent such packaging materials have already been printed within ninety days of the Effective Date, or

(b) In the owner's manual of another product in which the Product is a component, but only if the other product: (i) may cause serious injury or bodily harm unless used as directed; (ii) is sophisticated, difficult to understand or install, set-up, or assemble; or (iii) has one or more features a consumer must read about in order to know how to program or use the Product. If the warning is given in the owner's manual pursuant to this subsection, it shall be located in one of the following places in the manual: the outside of the front cover; the inside of the front cover; the first page other than the cover; or the outside of the back cover. The warning shall be printed or stamped in the manual or contained in a durable label or sticker affixed to the manual in a font no smaller than the font used for other chemically-related safety warnings in the manual. Alternatively, the warning may be included in a safety warning section of the owner's manual. Lasco may continue to utilize, on an ongoing basis, owner's manuals containing substantively the same Proposition 65 warnings and without the additional admonitions as those set forth in Section 2.3 above, but only to the extent such manuals have already been printed within ninety days of the Effective Date. Owner's manual warnings may only be allowed if the owner's manual is sold in the same package and at the same time as the other product and not for Products sold separately.

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

2.6 If Proposition 65 warnings for lead or lead compounds or other specified chemicals should no longer be required, Lasco shall have no further warning obligations pursuant to this Settlement Agreement. Except in the event that a change in the law requires modification or ceases to require such warnings in the event that Lasco ceases to implement or modifies the warnings required under this Settlement Agreement, Lasco shall provide written notice to Cheng (through counsel) of its intent to do so, and of the basis for its intent, no less than thirty (30) days in advance.

3. PAYMENTS PURSUANT TO HEALTH & SAFETY CODE §25249.7(b)

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

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Lasco shall issue two separate checks for the penalty payment: (a) one check made payable to "OEHHA" (tax identification number: 68-0284486) in an amount representing 75% of the total penalty (i.e., \$750); and (b) one check in an amount representing 25% of the total penalty (i.e., \$250) made payable directly to King Pun Cheng. Lasco shall deliver said checks to Al Israel by August 31, 2014 to be held and mailed to the respective addresses below on or before December 2, 2014:

Proposition 65 Settlement Coordinator

California Department of Justice

1515 Clay Street, 20th Floor

Oakland, CA 94612-1413

and

Mr. King Pun Cheng

C/O Parker A. Smith, Attorney at Law

2173 Salk Ave., Suite #250

Carlsbad, CA 92008

4. REIMBURSEMENT OF FEES AND COSTS

4.1 The parties reached an accord on the compensation due to Cheng and his counsel under the private attorney general doctrine and principles of contract law. Under these legal principles, Lasco, on behalf of Lasco and True Value shall reimburse Cheng's counsel for fees and costs, incurred as a result of investigating, bringing this matter to Lasco's attention, and negotiating a settlement. Lasco, on behalf of Lasco and True Value shall pay Cheng's counsel \$32,000.00 for all attorneys' fees, expert and investigation fees, and related costs associated with this matter and the Notice. Payment of the \$32,000 shall be split up into three payments of \$5,000, \$11,000, and \$16,000 respectively. Lasco shall make three checks payable to the "Parker A. Smith, Attorney at Law" and deliver said checks to attorney Al Israel no later than August 31, 2014. Al Israel shall mail the checks, via certified mail to the address for Cheng's counsel referenced above in the following manner: the first payment of \$5,000 to be received by December 2, 2014, the second payment of \$11,000 to be received by January 2, 2015, and the final payment of \$16,000 to be received by February 2, 2015. Other than the payment required hereunder, each side is to bear its own attorneys' fees and costs.

4.2 Lasco shall W-9 Parker A. Smith, Attorney at Law for \$5,000.00 for 2014 and \$27,000.00 for 2015.

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5. RELEASE OF ALL CLAIMS

5.1 Release of Defendant(s) and Downstream Customers

Cheng, releases Lasco and each of its downstream distributors, wholesalers, licensors, licensees, auctioneers, retailers, franchisees, dealers, cooperatives, cooperative members, members/shareholders of any national stocking purchasing cooperative, customers, owners, purchasers, users, parent companies, corporate affiliates, subsidiaries, including, but not limited to True Value and their respective officers, directors, attorneys, representatives, shareholders, agents, and employees, and sister and parent entities or who directly or indirectly provide, distribute, drop-ship, bill through or sell the Products" (collectively "Releasees") from all claims for violations of Proposition 65 up through the Effective Date based on exposure to lead from the Products as set forth in his Notice of Violation. Compliance with the terms of this Settlement Agreement constitutes compliance with Proposition 65 with respect to exposures to lead from the Products.

The Parties further understand and agree that this release shall not extend upstream to any entities that manufactured the Products for Lasco or any component parts thereof or to any distributors or suppliers who sold Products or any component parts thereof to Lasco ("Upstream Entities").

In addition to the foregoing, Cheng, on behalf of himself, his past and current agents, representatives, attorneys, and successors and/or assignees, and not in his representative capacity, hereby waives all rights to institute or participate in, directly or indirectly, any form of legal action and releases any other Claims that he could make against Lasco or its Releasees arising up to the Effective Date with respect to violations of Proposition 65 based upon the Products. With respect to the foregoing waivers and releases in this paragraph, Cheng hereby specifically waives any and all rights and benefits which he now has, or in the future may have, conferred by virtue of the provisions of Section 1542 of the California Civil Code, which provides as follows:

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 SETTLEMENT WITH THE DEBTOR.

5.2 Lasco and True Value's Release of Cheng

Lasco and True Value waives any and all claims against Cheng, his attorneys and other representatives, for any and all actions taken or statements made (or those that could have been taken or 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 Products.

6. SEVERABILITY AND MERGER

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If, subsequent to the execution of this Settlement Agreement, 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 Settlement Agreement 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.

7. GOVERNING LAW

The terms of this Settlement Agreement shall be governed by the laws of the State of California and apply within the State of California. Compliance with the terms of this Private Settlement resolves any issue, now or in the future, with the requirements of Proposition 65 with respect to alleged exposures to lead arising from the Products. In the event that Proposition 65 is repealed or is otherwise rendered inapplicable by reason of law generally, or as to the Products, then Lasco shall provide written notice to Cheng of any asserted change in the law, and shall have no further obligations pursuant to this Settlement Agreement with respect to, and to the extent that, the Products are so affected.

8. NOTICES

Unless specified herein, all correspondence and notices required to be provided pursuant to this Settlement Agreement shall be in writing and personally delivered or sent by: (i) first-class, (registered or certified mail) return receipt requested; or (ii) overnight courier on any party by the other party at the following addresses:

For Lasco and True Value:

Albert Israel

111 W Ocean Blvd., Suite 1940

Long Beach, CA 90802

and

For Cheng:

Parker A. Smith, Attorney at Law

2173 Salk Ave., Suite #250

Carlsbad, CA 92008

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Any party, from time to time, may specify in writing to the other party a change of address to which all notices and other communications shall be sent.

9. COUNTERPARTS; FACSIMILE SIGNATURES

This Settlement Agreement may be executed in counterparts and by facsimile, each of which shall be deemed an original, and all of which, when taken together, shall constitute one and the same document.

10. COMPLIANCE WITH HEALTH & SAFETY CODE § 25249.7(f)

Cheng agrees to comply with the requirements set forth in California Health & Safety Code §25249.7(f).

11. MODIFICATION

This Settlement Agreement may be modified only by further agreement of the Parties.

12. ATTORNEY'S FEES

12.1 A party who unsuccessfully brings or contests an action arising out of this Settlement Agreement shall be required to pay the prevailing party's reasonable attorney's fees and costs unless the unsuccessful party has acted with substantial justification. For purposes of this Settlement Agreement, the term substantial justification shall carry the same meaning as used in the Civil Discovery Act of 1986, Code of Civil Procedure Section 2016, et seq.

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

13. RETENTION OF JURISDICTION

13.1 The Superior Court of California, County of San Diego shall have jurisdiction to enforce this Settlement Agreement.

14. AUTHORIZATION

The undersigned are authorized to execute this Settlement Agreement 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 Settlement

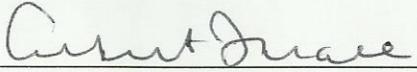
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Agreement on behalf of the Party represented and legally bind that Party. Except as explicitly provided herein each Party is to bear its own fees and costs.

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[Signatures Follow]

APPROVED:

By: 

Date: 9/29/14

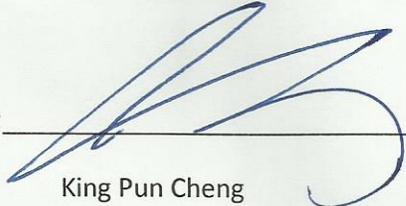
Al Israel
Attorney for Defendant, Lasco

By: 

Date: 10/6/14

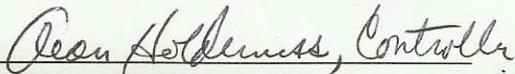
Parker A. Smith
Attorney for Plaintiff, King Pun Cheng

IT IS HEREBY AGREED TO:

By: 
King Pun Cheng

Date: 10-6-2014

IT IS HEREBY AGREED TO:

By: 

Date: 9-24-14

On Behalf of:
Lasco