

# Cheng - Winters Instruments Settlement Agreement

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## 1. INTRODUCTION

### 1.1 The Parties

This Private Settlement Agreement (hereinafter "Private Settlement") is hereby entered into by and between Kingpun Cheng, as an individual, (hereinafter "Cheng") and Winters Instruments, Inc. ("Winters Instruments"). Winters Instruments 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. Winters Instruments employs ten or more persons and 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 Winters Instruments and Amazon.com have offered for sale and sold in the State of California Economy vacuum pressure gauge containing lead, and that such sales 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, birth defects, or other reproductive harm. Cheng has cited "Winters PEM 135 Economy Vacuum Gauge 1/4 " NPT B0087UBCIE, as an example of economy vacuum pressure gauge that is the subject of his allegation.

For purposes of this Private Settlement only, Winters Instruments represents that: Winters PEM 135 Economy Vacuum Gauge 1/4 " NPT B0087UBCIE is an item it distributes to retailers and consumers (online and storefront) in the state of California.

### 1.3 Product Description

The product that is covered by this Private Settlement is defined as Winters Instruments' economy vacuum pressure gauge that are distributed by Winters Instruments to Amazon.com (hereinafter "Amazon") or others and sold in California. All such items shall be referred to herein as the "Products."

### 1.4 Notices of Violation

On or about November 25, 2014, Cheng served Winters Instruments, Amazon.com, and various public enforcement agencies with a document entitled "60-Day Notice of Violation" pursuant to Health & Safety Code §25249.7(d) (the "Notice"), alleging that Winters Instruments and Amazon.com were in violation of Proposition 65 for failing to warn consumers and customers that the Products exposed users in California to lead. No public enforcer diligently prosecuted the claims threatened in the Notice within sixty days plus service time after service of the Notice to them by Cheng.

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## 1.5 Stipulation as to Jurisdiction/No Admission

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 Winters Instruments as to the allegations contained in the 60 day notice served on or about March 17, 2015, and that venue is proper in the County of San Diego.

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

## 1.6 Effective Date

For purposes of this Private Settlement, the term "Effective Date" shall mean the date this Private Settlement is signed by all parties.

## 2. INJUNCTIVE RELIEF: WARNINGS AND REFORMULATION

Shelter Period: No later than 180 days from the Effective Date, Winters Instruments shall not ship for sale, sell, or offer for sale in California Products that are manufactured, distributed or sold by Winters Instruments containing more than 100 ppm lead unless they comply with this section. No later than 180 days from the Effective Date, Winters Instruments shall ship for sale, sell, or offer for sale in California Products that are either (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: 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"). Winters Instruments 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 0.01%, 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. As an alternative to reformulating the Products, commencing on the Effective Date, Products that Winters Instruments ships for sale, sells or offers for sale in California

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that do not meet the Reformulation Option set forth in Section 2.1 above shall be accompanied by a warning as described in Section 2.3 below.

2.3 Warnings. Where required under Section 2.2 above, Winters Instruments shall provide Proposition 65 warnings as follows:

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

OR

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

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

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; Winters Instruments may continue to utilize, on an ongoing basis, unit packaging 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 after the Effective Date.

2.5 The requirements for warnings, set forth in Section 2.3 above are imposed pursuant to the terms of this Private Settlement. 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, Winters Instruments shall have no further warning obligations pursuant to this Private Settlement.

### 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, Winters Instruments shall pay a civil penalty of \$1,000 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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Winters Instrument 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 Cheng. Winters Instruments shall mail these payments within five (5) days after the Effective Date at which time such payments shall be mailed to the following addresses respectively:

Proposition 65 Settlement Coordinator  
California Department of Justice  
1515 Clay Street, 20th Floor  
Oakland, CA 94612-1413

Mr. Kingpun Cheng  
C/O Parker A. Smith, Attorney at Law  
11622 El Camino Real, Suite 100  
San Diego, CA 92130

#### 4. REIMBURSEMENT OF FEES AND COSTS

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, Winters Instruments and Amazon.com shall reimburse Cheng's counsel for fees and costs incurred as a result of investigating, bringing this matter to Winters Instruments and Amazon.com's attention, and negotiating a settlement in the public interest. Winters Instruments shall pay Cheng's counsel \$20,000 for all attorneys' fees, expert and investigation fees, and related costs associated with this matter and the Notice. Winters, Inc. shall wire said monies to "Parker A. Smith, Attorney at Law" within five (5) days of the Effective Date. Parker A. Smith, Attorney at Law will provide Winters Instruments with wire instruction and tax identification information on or before the Effective Date. Other than the payment required hereunder, each side is to bear its own attorneys' fees and costs.

#### 5. RELEASE OF ALL CLAIMS

##### 5.1 Release of Winters Instruments and Downstream Customers

Cheng, on behalf of himself only, releases Winters Instruments and each of its downstream distributors, wholesalers, licensors, licensees, auctioneers, retailers (including, but not limited to, Amazon.com and its affiliates and subsidiaries), franchisees, dealers, customers, owners, purchasers, users, parent companies, corporate affiliates, subsidiaries, and their respective officers, directors, attorneys, representatives, shareholders, agents, and employees, and sister and parent entities (collectively "Releasees") from all claims for violations of Proposition 65. Compliance with the terms of this Private Settlement constitutes compliance with Proposition 65 with respect to exposures to lead from the Products.

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

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rights to institute or participate in, directly or indirectly, any form of legal action and releases any other claims that he could make against Winters Instruments or its Releasees. 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 FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN BY HIM MUST HAVE MATERIALLY AFFECTED HIS SETTLEMENT WITH THE DEBTOR.

### 5.2 Winters Instruments' Release of Cheng

Winters Instruments and Amazon.com waive 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.

### 6. SEVERABILITY AND MERGER

If, subsequent to the execution of this Private Settlement, 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 Private Settlement 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 Private Settlement shall be governed by the laws of the State of California. In the event that Proposition 65 is repealed or is otherwise rendered inapplicable by reason of law generally, or as to the Products, then Winters Instruments shall provide written notice to Cheng of any asserted change in the law, and shall have no further obligations pursuant to this Private Settlement with respect to the products to the extent the Products are so affected.

### 8. NOTICES

Unless specified herein, all correspondence and notices required to be provided pursuant to this Private Settlement 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:

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Winters Instruments:

Patrick A. Fraioli, Jr.  
Ervin, Cohen, & Jessup, LLP  
9401 Wilshire Blvd., 9<sup>th</sup> Floor  
Beverly Hills, CA 90212

and

For Cheng:

Parker A. Smith, Attorney at Law  
11622 El Camino Real, Suite 100  
San Diego, CA 92130

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 Private Settlement 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 Private Settlement may be modified only by further written agreement of the Parties.

## 13. AUTHORIZATION

The undersigned are authorized to execute this Private Settlement 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 Private Settlement on behalf of the Party and legally bind that Party.

[Signatures Follow]


APPROVED: *as to form and content:*

By: *Patrick A. Fraioli, Jr.*  
Patrick Fraioli, Jr.  
Attorney for Defendant, Winters Instruments

Date: *4/18/16*

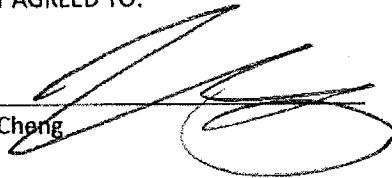
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By:   
Parker A. Smith  
Attorney for Plaintiff, Kingpun Cheng

Date: 4/14/16

IT IS HEREBY AGREED TO:

By:   
Kingpun Cheng

Date: 2016-4-15.

IT IS HEREBY AGREED TO:

By: \_\_\_\_\_  
On Behalf of:  
Winters Instruments

Date: \_\_\_\_\_

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By: \_\_\_\_\_  
Parker A. Smith  
Attorney for Plaintiff, Kingpun Cheng

Date: \_\_\_\_\_

IT IS HEREBY AGREED TO:

By: \_\_\_\_\_  
Kingpun Cheng

Date: \_\_\_\_\_

IT IS HEREBY AGREED TO:

By: \_\_\_\_\_  
On Behalf of:  
Winters Instruments

Date: April 6/16