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8 Attorneys for Plaintiff, King Pun Cheng

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

11 KING PUN CHENG,

12 Plaintiff,

13 vs.

14 PLASTIC RESEARCH AND DEVELOPMENT
15 CORPORATION AND DOES 1-25,

16 Defendants.

Case No. 37-2016-00044228-CU-NP-CTL

UNLIMITED JURISDICTION

**STIPULATION AND [PROPOSED]
ORDER RE ENTRY OF CONSENT
JUDGMENT AS TO PLASTIC
RESEARCH AND DEVELOPMENT
CORPORATION**

Complaint Filed: DECEMBER 15,
2016

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18 **1. Introduction**

19 **1.1 Parties**

20 This Consent Judgment is hereby entered into by and between Kingpun Cheng, as an
21 individual and acting in the interest of the public, (hereinafter "Cheng") and Plastic Research And
22 Development Corporation (hereinafter "PLASTIC"). PLASTIC and Cheng shall be collectively
23 referred to as the "Parties" and each of them as a "Party." Cheng is an individual residing in
24 California who seeks to promote awareness of exposures to toxic chemicals and improve human
25 health by reducing or eliminating hazardous substances contained in consumer products.
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1 PLASTIC 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 PLASTIC offered for sale and sold in the State of California FISHING
5 LURES, including but not limited to "Yum Dinger Bama Bug Gummy Worms,"
6 UPC719339092746 containing DIISONONYL PHTHALATE (hereinafter "DINP"), a chemical
7 listed under Proposition 65 as known to the State of California to cause cancer and that they did
8 so without providing the warning. Cheng alleges is required by Proposition 65. FISHING
9 LURES are referred to herein as "Covered Products".
10

11 **1.3 Notice of Violation**

12 On or about June 11, 2015, Cheng issued a 60 Day Notice of Violation to Plastic Research
13 and Development Company, The Sports Authority, Inc., TSA Stores, Inc., and various public
14 enforcement agencies pursuant to Health & Safety Code §25249.7(d) alleging that PLASTIC, The
15 Sports Authority, Inc., and TSA Stores, Inc. were in violation of Proposition 65 for failing to
16 warn California consumers that the Covered Products exposed them to DINP ("Notice"). No
17 public enforcer diligently prosecuted the claims stated in the Notice within sixty days plus service
18 time after service of the Notice to them by Cheng.
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20 **1.4 Complaint**

21 On or about December 15, 2016 Cheng filed a Complaint against PLASTIC for civil
22 penalties and injunctive relief ("Complaint") in San Diego Superior Court, Case No. 37-2016-
23 00044228-CU-NP-CTL. The Complaint alleges, among other things, that PLASTIC violated
24 Proposition 65 by failing to give clear and reasonable warnings of exposure to DINP from the
25 Covered Products.
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27 **1.5 Consent to Jurisdiction**

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1 While otherwise disputed, for purposes of this Consent Judgment, the Parties consent that
2 this Court has jurisdiction over the allegations of violations contained in the Complaint and
3 personal jurisdiction over the named Defendant as to the acts alleged in the Complaint, that venue
4 is proper in the County of San Diego and that this Court has jurisdiction to enter this Consent
5 Judgment as a full settlement and resolution of the allegations contained in the Notice and
6 Complaint, and of all claims which were or could have been raised by any person or entity based
7 in whole or in part, directly or indirectly, on the prior conduct of the Parties or on the facts alleged
8 in the Complaint or arising therefrom or related to.
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10 **1.6 No Admission**

11 PLASTIC denies the material, factual, and legal allegations contained in the Notice and
12 Complaint, and maintains that, to the best of its knowledge, all products that are or have been sold
13 and distributed in California, including the Covered Products, have been and are in compliance
14 with all laws. Nothing in this Consent Judgment shall be construed as an admission by PLASTIC
15 of any fact, finding, conclusion of law, issue of law, or violation of law; nor shall compliance
16 with this Consent Judgment constitute or be construed as an admission by PLASTIC of any fact,
17 finding, conclusion of law, issue of law, or violation of law, such being specifically denied by
18 PLASTIC. However, this section shall not diminish or otherwise affect the obligations,
19 responsibilities and duties under this Consent Judgment. Notwithstanding the allegations in the
20 Notice, PLASTIC maintains that it has not knowingly manufactured, or caused to be
21 manufactured, or distributed the Product for sale in California in violation of Proposition 65.
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23 **1.7** For purposes of this Consent Judgment, the term “Effective Date” shall mean five
24 (5) business days after the Motion to Approve the Consent Judgment has been granted by the
25 Court.
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27 **2. Injunctive Relief**
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Commencing on the Effective Date, PLASTIC shall only manufacture for sale in California, Covered Products that are either (a) reformulated pursuant to Section 2.1 or (b) include a warning as provided in Section 2.2.

2.1 Reformulation Option.

Covered Products are deemed to comply with Proposition 65 with regard to DINP, and be exempt from any Proposition 65 warning requirements for DINP, if the Covered Products meet the following criteria: the Covered Products contains less than 1,000 parts per million (“ppm”) of DINP. For purposes of this Consent Judgment, Covered Products in compliance with this standard are “Reformulated Products”.

2.2 Warning Alternative.

Covered Products that are not Reformulated Products as set forth in Section 2.1 above shall be accompanied by a clear and reasonable warning substantially as follows:

WARNING: This product contains DINP, a chemical known to the State of California to cause cancer.

OR

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

Where utilized as an alternative to meeting the criteria set forth in Section 2.1, such warning shall be prominently affixed to or printed on each Covered Product’s label or package. The warning shall be contained in the same section that states other safety warnings, if any, concerning the use of the Covered Product.

3. Civil Penalties

3.1 PLASTIC shall pay a civil penalty of \$2,000 pursuant to Health and Safety Code section 25249.7(b), to be apportioned in accordance with California Health & Safety Code §

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

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6 **3.2 Payment Procedures**

7 PLASTIC shall issue two separate checks for the penalty payment: (a) one check made
8 payable to "OEHHA" (tax identification number: 68-0284486) in an amount representing 75% of
9 the total penalty (i.e., \$1,500); and (b) one check in an amount representing 25% of the total
10 penalty (i.e., \$500) made payable directly to Cheng. PLASTIC shall mail these payments within
11 five (5) days after the Effective Date at which time such payments shall be mailed to the
12 following addresses respectively:

13
14 Mike Gyurics
15 Fiscal Operations Branch Chief
16 Office of Environmental Health Hazard Assessment
17 P.O. Box 4010
18 Sacramento, CA 95812-4010

19 And

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

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

25 PLASTIC shall reimburse Cheng's counsel for fees and costs incurred as a result of
26 investigating, bringing this matter to PLASTIC's attention, and negotiating a settlement.

27 PLASTIC shall pay Cheng's counsel \$18,000 for all attorneys' fees, expert and investigation fees,
28 and related costs associated with this matter, the Notice, and associated fees and costs. PLASTIC
shall wire said monies or send a check payable to "Sy and Smith, PC" within five (5) days of the
Effective Date. Sy and Smith, PC will provide PLASTIC with wire instruction and tax

1 identification information on or before the Effective Date if requested. Other than the payment
2 required hereunder, each side is to bear its own attorneys' fees and costs.

3 5. **Release of all Claims**

4 5.1 **Release of PLASTIC and Downstream Customers, Retailers and Entities**

5 Cheng, acting on behalf of himself and in the public interest, releases PLASTIC and its
6 parents, subsidiaries and affiliated entities, and their respective officers, directors, attorneys,
7 representatives, shareholders, agents, and employees, and each of their successors and assigns,
8 and each entity to whom it or they directly or indirectly distribute or sell the Covered Products
9 including, but not limited to, their downstream distributors, wholesalers, licensors, licensees,
10 auctioneers, retailers (including 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, based on exposure to DINP
14 from the Covered Products as set forth in the Notices. Compliance with the terms of this Consent
15 Judgment constitutes compliance with Proposition 65 with respect to exposure to DINP from the
16 Covered Products.
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19 In addition to the foregoing, Cheng, on behalf of himself, his past and current agents,
20 representatives, attorneys, and successors and/or assignees, and not in his representative capacity,
21 hereby waives all rights to institute or participate in, directly or indirectly, any form of legal
22 action and releases any other claims, cause of action, obligation, costs, expenses, attorneys' fees,
23 damages, losses, liabilities, and demands that he could make against PLASTIC or the Releasees
24 with respect to violations of Proposition 65 based upon the Covered Products. The Parties
25 acknowledge that the claims released above may include unknown claims, and with respect to the
26 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 A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS
4 WHICH THE CREDITOR DOES NOT KNOW OR SUSPECT TO
5 EXIST IN HIS FAVOR AT THE TIME OF EXECUTING THE
6 RELEASE, WHICH IF KNOWN BY HIM MUST HAVE
7 MATERIALLY AFFECTED HIS SETTLEMENT WITH THE
8 DEBTOR.

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

11 **5.2 PLASTIC's Release of Cheng**

12 PLASTIC waives any and all claims against Cheng, his attorneys and other
13 representatives, for any and all actions taken or statements made (or those that could have been
14 taken or made) by Cheng and his attorneys and other representatives in the course of investigating
15 claims or otherwise seeking enforcement of Proposition 65 against it in this matter.

16 **6. Court Approval**

17 This Consent Judgment is not effective until it is approved and entered by the Court and
18 shall be null and void if, for any reason, it is not approved and entered by the Court.

19 **7. Entire Agreement**

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

24 **8. Governing Law**

25 The terms of this Consent Judgment shall be governed by the laws of the State of
26 California. In the event that Proposition 65 is repealed or is otherwise rendered inapplicable by
27 reason of law generally, or as to the Covered Products, then PLASTIC shall have no further
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1 obligations pursuant to this Consent Judgment with respect to the Covered Products to the extent
2 the Covered Products are so affected.

3 **9. Notices**

4 9.1 Unless specified herein, all correspondence and notices required to be provided
5 pursuant to this Consent Judgment shall be in writing and personally delivered or sent by:
6 electronic mail and either (i) first-class, (registered or certified mail) return receipt requested; or
7 (ii) overnight courier on any Party by the other Party at the following addresses:
8

9 For PLASTIC:
10 Tyler B. Novak
11 Vice President, Legal Services
12 EBSCO Industries, Inc.
13 5724 Hwy 280 East
14 Birmingham, AL 35242

15 With a copy to:
16 Jeffrey Margulies
17 Norton Rose Fulbright US LLP
18 555 South Flower Street, Forty-First Floor
19 Los Angeles, CA 90071
20 jeff.margulies@nortonrosefulbright.com

21 and
22 For Cheng:
23 Parker A. Smith
24 Sy and Smith, PC
25 11622 El Camino Real, Suite 100
26 Del Mar, CA 92130
27 parker@sysmithlaw.com

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

10. Counterparts; Facsimile Signatures

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

11. Post Execution Activities

Cheng agrees to comply with the requirements set forth in California Health & Safety Code §25249.7(f). The Parties further acknowledge that, pursuant to Health and Safety Code 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 counsel, to support the entry of this agreement as judgment, and to obtain judicial approval of this Consent Judgment in a timely manner.

12. Modification

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

13. Attorney Fees

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

14. Authorization

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.

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IT IS SO STIPULATED:

Dated: 2/6/17

By: [Signature]

Parker A. Smith, Attorney for Plaintiff

Dated: 3/1/17

By: [Signature]

Jeffrey Margulies, Attorney for Defendant

Dated: 2017-1-30.

By: [Signature]

Kingpun Cheng

Dated: 3/1/17

By: [Signature]

Plastic Research And Development Corporation
Robert Schoenvogel
President

IT IS SO ORDERED, ADJUDGED AND DECREED:

Dated: _____

Judge of the Superior Court