

# Cheng / Modern Home Settlement Agreement

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## 1. INTRODUCTION

### 1.1 The Parties

This Settlement Agreement (hereafter "Settlement Agreement") is hereby entered into by and between Kingpun Cheng, as an individual, (hereinafter "Cheng") and Modern Home Products Corp. (hereafter "Modern Home"). Modern Home 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. Cheng alleges that Modern Home 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

Cheng alleges that Modern Home has offered for sale and sold in the State of California an Open Flame Replacement Burner 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.

### 1.3 Product Description

The product that is covered by this Settlement Agreement is defined as Open Flame Replacement Burner products that are distributed and/or sold by Modern Home to Amazon.com, Inc. (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 6, 2015, Cheng served Modern Home, Amazon 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 Modern Home and Amazon.com, Inc. were in violation of Proposition 65 for failing to warn consumers and customers that the Products exposed users in California to lead. To the best of the Parties' knowledge, no public enforcer is diligently prosecuting the claims in the Notice.

### 1.5 Stipulation as to Jurisdiction/No Admission

For purposes of this Settlement Agreement only, the Parties stipulate that in the event that enforcement becomes necessary, or a dispute arises regarding this Settlement Agreement, the Superior Court of California, County of San Diego has specific jurisdiction over Modern

## Cheng / Modern Home Settlement Agreement

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Home for the purposes of enforcing the terms of this Settlement Agreement only, and that venue is proper in the County of San Diego.

The Parties enter into this Settlement Agreement to resolve disputed claims and avoid prolonged and costly litigation. Modern Home denies the material factual and legal allegations contained in Cheng's Notice and maintains that all of the products it has sold and distributed in California, including the Products, have been, and are, in compliance with all laws, and are completely safe for their intended use. Nothing in this Settlement Agreement shall be construed as an admission by Modern Home 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 Modern Home of any fact, finding, conclusion, issue of law, or violation of law, such being specifically denied by Modern Home. However, this section shall not diminish or otherwise affect the obligations, responsibilities, and duties of Modern Home under this Settlement Agreement.

### **1.6 Effective Date**

For purposes of this Settlement Agreement, the term "Effective Date" shall mean the date this Settlement Agreement is fully executed by all parties.

## **2. INJUNCTIVE RELIEF: WARNINGS AND REFORMULATION**

Commencing on the Effective Date, Modern Home shall not ship for sale, sell, or offer for sale in California Products that are manufactured, distributed or sold by Modern Home containing more than 300 ppm lead unless they comply with this section. Commencing on the Effective Date, Modern Home shall only 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 0.03% (300 parts per million, or "300 ppm"). Modern Home 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 300 ppm shall be deemed to establish good faith reliance.

## Cheng / Modern Home Settlement Agreement

2.2 **Warning Alternative.** As an alternative to reformulating the Products, commencing on the Effective Date, Products that Modern Home ships for sale, sells or offers for sale in California 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, Modern Home shall provide Proposition 65 warnings substantially 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 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, Modern Home 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; Modern Home may continue to utilize, on an ongoing basis, unit packaging containing not identical but 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. Plaintiff agrees any such warnings comply with both Proposition 65 and the terms of this Settlement Agreement.

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.

2.6 If Proposition 65 warnings for lead or lead compounds or other specified chemicals should no longer be required, Modern Home shall have no further warning obligations pursuant to this Settlement Agreement. In the event that a change in the law requires modification of such warnings, Modern Home may cease to implement or may modify the warnings required under this Settlement Agreement in compliance with the change in the law.

## Cheng / Modern Home Settlement Agreement

### **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 or lead compounds in the Products, Modern Home shall pay a civil penalty of \$500 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. After a full investigation, Cheng agrees that this penalty payment satisfies and complies with the criteria set forth under Proposition 65.

Modern Home 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., \$375); and (b) one check in an amount representing 25% of the total penalty (i.e., \$125) made payable directly to Cheng. Modern Home 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:

Mike Gyurics  
Fiscal Operations Branch Chief  
Office of Environmental Health Hazard Assessment  
P.O. Box 4010  
Sacramento, CA 95812-4010

Mr. Kingpun Cheng  
C/O Sy and Smith, PC  
11622 El Camino Real, Suite 100  
Del Mar, CA 92130

Cheng shall have sole responsibility for transmitting to OEHHA its portion of the penalty payment.

### **4. REIMBURSEMENT OF FEES AND COSTS**

The parties reached an accord on the compensation due to Cheng and his counsel under Code of Civil Procedure Section 1021.5 and other applicable law. Under these legal principles, Modern Home shall reimburse Cheng's counsel for fees and costs incurred as a result of investigating, bringing this matter to Modern Home's attention, and negotiating this Settlement Agreement in the public interest. Pursuant to and in satisfaction of Code of Civil Procedure

## Cheng / Modern Home Settlement Agreement

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Section 1021.5 and other applicable law, Modern Home shall pay Cheng's counsel a total of \$6,500 for any and all attorneys' fees, expert and investigation fees, and related costs associated with this matter, the Notice, and negotiating this Settlement Agreement. Modern Home shall wire said monies to "Sy and Smith, PC" within five (5) days of the Effective Date. Sy and Smith, PC will provide Modern Home 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 Modern Home and Downstream Customers

Cheng, on behalf of himself, his past and current agents, representatives, attorneys, and successors and/or assignees only, releases Modern Home and each of its downstream distributors, wholesalers, licensors, licensees, auctioneers, retailers (including, but not limited to, Amazon.com, Inc. 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 up through the Effective Date based on exposure to lead or lead compounds from the Products as set forth in the 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.

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 further provides a general release herein which shall be effective as a full and final accord and satisfaction, as a bar to all claims, liabilities, and demands of any nature, character or kind, known or unknown, suspected or unsuspected, as such claims relate to Proposition 65 and any products manufactured, distributed and/or sold by Modern Home prior to the Effective Date. Cheng further acknowledges that he is familiar with California Civil Code section 1542, 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 OR HER SETTLEMENT WITH THE DEBTOR.**

Cheng, on behalf of himself, his past and current agents, representatives, attorneys, successors, and/or assignees, expressly waives and relinquishes any and all rights and benefits that he may have under, or which may be conferred on him by the provisions of Civil Code

## **Cheng / Modern Home Settlement Agreement**

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section 1542 as well as under any other state or federal statute or common law principle of similar effect, to the fullest extent that he may lawfully waive such rights or benefits pertaining to the released matters herein.

### **5.2 Modern Home Release of Cheng**

Modern Home 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 in the course of investigating claims or otherwise seeking enforcement of Proposition 65 against it in this matter.

### **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 Settlement Agreement, any of the provisions of this Settlement Agreement 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.

### **8. GOVERNING LAW**

The terms of this Settlement Agreement 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 Modern Home shall have no further obligations pursuant to this Settlement Agreement with respect to the products to the extent the Products are so affected.

### **9. 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:

## Cheng / Modern Home Settlement Agreement

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either (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 Modern Home Products Corp.:

Thomas Koziol  
Modern Home Products Corp.  
150 South Ram Road  
Antioch, IL 60002

With copy to:

James Robert Maxwell  
Rogers Joseph O'Donnell, PC  
311 California Street, 10<sup>th</sup> Floor  
San Francisco, CA 94104

and

For Cheng:

Parker A. Smith  
Sy and Smith, PC  
11622 El Camino Real, Suite 100  
Del Mar, CA 92130

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**

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

### **11. 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).

## Cheng / Modern Home Settlement Agreement

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### 12. MODIFICATION

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

### 13. ATTORNEYS' FEES

13.1 A Party who successfully brings or contests an action arising out of this Settlement Agreement shall be entitled to its reasonable attorney's fees and costs provided such party has exhausted good faith efforts to resolve any dispute about compliance with the terms of this Settlement Agreement prior to bringing or contesting such motion.

### 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 Agreement on behalf of the Party and legally bind that Party.

### 15. WARRANTIES AND REPRESENTATIONS REGARDING OTHER POTENTIAL CLAIMS

Cheng and his attorneys, Sy and Smith, PC, represent and warrant that neither of them is aware of any other actual or potential action, violation, or claim against Modern Home or any of the Releasees. Cheng and his attorneys, Sy and Smith, PC, agree, represent and warrant that neither of them shall, themselves or by assisting others, file a notice or pursue a claim against Modern Home or any of the Releasees for alleged violation of Proposition 65 for a period of two (2) years from the Effective Date herein.

[Signatures Follow]

APPROVED AS TO FORM:

By: \_\_\_\_\_

Date: 7/17/16

James Robert Maxwell

Attorney for Defendant, The Modern Home Products Corp.

By: \_\_\_\_\_

Date: 7/19/16

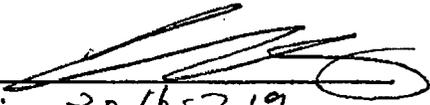
Parker A. Smith

Attorney for Plaintiff, Kingpun Cheng

## Cheng / Modern Home Settlement Agreement

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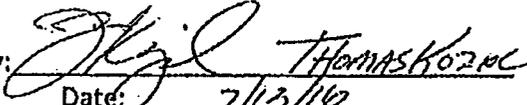
IT IS HEREBY AGREED TO:

By: 

Date: 2016-7-19

Kingpun Cheng

IT IS HEREBY AGREED TO:

By: 

Date: 7/13/16

On Behalf of: The Modern Home Products Corp.