

1 PARKER SMITH, ESQ. (SBN 290311)
2 **SY AND SMITH, PC.**
3 11622 El Camino Real, Suite 100
4 Del Mar, CA 92130
5 Telephone: (858) 746-9554
6 Facsimile: (858)746-5199
7
8 Attorneys for Plaintiff, King Pun Cheng

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

10 KING PUN CHENG,
11 Plaintiff,
12 vs.
13 CERRO WIRE, LLC
14 Defendants.

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

UNLIMITED JURISDICTION

**STIPULATION AND [PROPOSED]
ORDER RE ENTRY OF CONSENT
JUDGMENT AS TO CERRO WIRE,
LLC.**

Complaint Filed: December XX, 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 Cerro Wire, LLC.
22 (hereinafter "Cerro Wire,"). Cerro Wire and Cheng shall be collectively referred to as the
23 "Parties" and each of them as a "Party." Cheng is an individual residing in California who seeks
24 to promote awareness of exposures to toxic chemicals and improve human health by reducing or
25 eliminating hazardous substances contained in consumer products. Cerro Wire employs ten or
26 more persons as required for purposes of Cal. Health & Safety Code §§ 25249.5 *et seq.*
27 ("Proposition 65").
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1.2 General Allegations

Cheng alleges that Cerro Wire offered for sale and sold in the State of California Cerro Wire low voltage cables, including but not limited to “Cerro Wire Low Voltage Cable” UPC048243319480 containing DINP and DINP compounds, chemicals listed under Proposition 65 as a chemical known to the State of California to cause cancer, birth defects, and/or other reproductive harm, and that they did so without providing the warning Cheng alleges is required by Proposition 65. Cerro Wire Low Voltage Cable and other Cerro Wire low voltage cables of various lengths and widths, are referred to herein as “Covered Products”.

1.3 Notice of Violation

On or about September 26, 2016, Cheng issued a 60 Day Notice of Violation to Cerro Wire, Home Depot, Inc. and various public enforcement agencies pursuant to Health & Safety Code §25249.7(d) alleging that Cerro Wire, LLC was in violation of Proposition 65 for failing to warn California consumers that the Covered Products exposed them to DINP (“60 Day Notice”). The 60 Day Notice is referred to herein as “Notice”. 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.

1.4 Complaint

On or about December XX, 2016 Cheng filed a Complaint against Cerro Wire for civil penalties and injunctive relief (“Complaint”) in San Diego Superior Court, Case No. _____. The Complaint alleges, among other things, that Cerro Wire violated Proposition 65 by failing to give clear and reasonable warnings of exposure to DINP and DINP compounds from the Covered Products.

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1.5 Consent to Jurisdiction

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

1.6 No Admission

Cerro Wire denies the material, factual, and legal allegations contained in the Notices and Complaint. Nothing in this Consent Judgment shall be construed as an admission by Cerro Wire of any fact, finding, conclusion of law, issue of law, or violation of law; nor shall compliance with this Consent Judgment constitute or be construed as an admission by Cerro Wire of any fact, finding, conclusion of law, issue of law, or violation of law, such being specifically denied by Cerro Wire. However, this section shall not diminish or otherwise affect the obligations, responsibilities and duties under this Consent Judgment.

1.7 For purposes of this Consent Judgment, the term "Effective Date" shall mean the date that the Motion to Approve the Consent Judgment has been granted by the Court.

2. Injunctive Relief

Commencing on the Effective Date, Cerro Wire shall only sell, offer for sale, or distribute 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 2.3.

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2.1 Reformulation Option.

The Covered Products shall be deemed to comply with Proposition 65 with regard to DINP, and be exempt from any Proposition 65 warning requirements for DINP, if the exposed the Covered Products meet the following criteria: the alloy from which the components are made shall have a DINP content by weight of no more than 0.10% (1,000 parts per million, or "1,000 ppm"). Cerro Wire 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 DINP content is no more than 0.10%, using a method of sufficient sensitivity to establish a limit of quantification (as distinguished from detection) of less than 1,000 ppm shall be deemed to establish good faith reliance. For purposes of this Consent Judgment, Covered Products in compliance with this standard are "Reformulated Products".

2.2 Warning Alternative.

As an alternative to reformulating the Covered Products, commencing on the Effective Date, Covered Products that Cerro Wire ships for sale, sells or offers for sale in California that are not Reformulated Products as set forth in Section 2.1 above shall be accompanied by a clear and reasonable warning as described in Section 2.3 below.

2.3 Clear and Reasonable Warnings.

Where required under Section 2.2 above, Cerro Wire shall provide Proposition 65 warnings substantially as follows:

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

OR

1 **WARNING:** This product contains chemicals known to the State of California to cause
2 cancer.

3 2.3.1 Where utilized as an alternative to meeting the criteria set forth in Section 2.1,
4 Cerro Wire shall provide the warning language set forth in Section 2.3 either with the unit
5 package of the Covered Products or affixed to the Covered Products. Such warning shall be
6 prominently affixed to or printed on each Product's label or package or the Product itself. If
7 printed on the label, the warning shall be contained in the same section that states other safety
8 warnings, if any, concerning the use of the Product. Cerro Wire may continue to utilize, on an
9 ongoing basis, unit packaging containing substantively the same Proposition 65 warnings as those
10 set forth in Section 2.3 above, but only to the extent such packaging materials have already been
11 printed within ninety days after the Effective Date.
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13 2.3.2 The requirements for warnings, set forth in Section 2.3 above are imposed
14 pursuant to the terms of this Consent Judgment. The Parties recognize that these are not the
15 exclusive methods of providing a warning under Proposition 65 and its implementing regulations
16 and that they may or may not be appropriate in other circumstances.
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18 2.3.3 If Proposition 65 warnings for DINP or other specified chemicals should no longer
19 be required by Proposition 65, Cerro Wire shall have no further warning obligations pursuant to
20 this Consent Judgment. In the event that a change in the law requires modification of such
21 warnings, Cerro Wire may cease to implement or may modify the warnings required under this
22 Consent Judgment in compliance with the change in the law per Section 13 of this Consent
23 Judgment. In the event that the Office of Environmental Health Hazard Assessment promulgates
24 one or more regulations requiring or permitting warning text and/or methods of transmission
25 different than those set forth above, Cerro Wire shall, in accordance with Section 13 of this
26 Consent Judgment, be entitled to either use, at its discretion, such other warning text and/or
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1 method of transmission without being deemed in breach of this Consent Judgment, or continue to
2 comply with the warning provisions in this Consent Judgment.

3 **2.4 Products Manufactured Prior to the Effective Date**

4 Notwithstanding anything else in this Consent Judgment, Covered Products that were
5 manufactured prior to the Effective Date shall be subject to the release of liability pursuant to
6 section 5 of this Consent Judgment, without regard to when such Covered Products were, or are
7 in the future, distributed or sold to customers. As a result, the obligations of Cerro Wire as set
8 forth in this Consent Judgment, including but not limited to Section 2, do not apply to these
9 products manufactured prior to the Effective Date.
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11 **3. Entry of Consent Judgment**

12 3.1 With regard to all claims that have been raised or which could be raised with
13 respect to failure to warn pursuant to Proposition 65 with regard to DINP in the Covered
14 Products, Cerro Wire shall pay a civil penalty of \$2,000 pursuant to Health and Safety Code
15 section 25249.7(b), to be apportioned in accordance with California Health & Safety Code §
16 25192, with 75% of these funds remitted to the State of California's Office of Environmental
17 Health Hazard Assessment ("OEHHA") and the remaining 25% of the penalty remitted to Cheng,
18 as provided by California Health & Safety Code § 25249.12(c)(1) and (d) and the instructions
19 directly below.
20

21 **3.2 Payment Procedures**

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

3 Proposition 65 Settlement Coordinator

4 California Department of Justice

5 1515 Clay Street, 20th Floor

6 Oakland, CA 94612-1413

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8
9 Mr. Kingpun Cheng

10 C/O Sy and Smith, PC

11 11622 El Camino Real, Suite 100

12 San Diego, CA 92130

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

15 The Parties reached an accord on the compensation due to Cheng and his counsel
16 under the private attorney general doctrine and principles of contract law. Under these legal
17 principles, Cerro Wire shall reimburse Cheng's counsel for fees and costs incurred as a result of
18 investigating, bringing this matter to Cerro Wire's attention, and negotiating a settlement. Cerro
19 Wire shall pay Cheng's counsel \$21,000 for all attorneys' fees, expert and investigation fees, and
20 related costs associated with this matter, the Notices and associated fees and costs Cerro Wire
21 shall wire said monies or send a check payable to "Sy and Smith, PC" within five (5) days of the
22 Effective Date. Sy and Smith, PC will provide Cerro Wire with wire instruction and tax
23 identification information on or before the Effective Date if requested. Other than the payment
24 required hereunder, each side is to bear its own attorneys' fees and costs.
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1 5. Release of all Claims

2 5.1 **Release of Cerro Wire and Downstream Customers, Retailers and Entities**

3 Cheng, acting on behalf of himself and in the public interest, releases Cerro Wire and their
4 respective officers, directors, attorneys, representatives, shareholders, agents, and employees,
5 sister and parent entities, all affiliates and subsidiaries thereof, successors, and assigns, and each
6 entity to whom it directly or indirectly distributed or distributes or sold or sells the Covered
7 Products including, but not limited to, their downstream distributors, wholesalers, licensors,
8 licensees, auctioneers, retailers (including, but not limited to Home Depot, Inc., Home Depot
9 U.S.A., Inc., their parent and all affiliates and subsidiaries thereof), their respective employees,
10 agents and assigns, franchisees, dealers, customers, owners, purchasers, users, parent companies,
11 corporate affiliates, subsidiaries, (collectively "Releasees") from all claims for violations of
12 Proposition 65 up through the Effective Date, and consistent with the provisions of Section 2.4,
13 above, based on exposure to DINP from the Covered Products as set forth in the Notices.
14 Compliance with the terms of this Consent Judgment constitutes compliance with Proposition 65
15 with respect to exposures to DINP from the Covered Products.
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17 In addition to the foregoing, Cheng, on behalf of himself, his past and current agents,
18 representatives, attorneys, and successors and/or assignees, and not in his representative capacity,
19 hereby waives all rights to institute or participate in, directly or indirectly, any form of legal
20 action and releases any other claims, cause of action, obligation, costs, expenses, attorneys' fees,
21 damages, losses, liabilities, and demands that he could make against Cerro Wire or the Releases
22 with respect to violations of Proposition 65 based upon the Covered Products. The Parties
23 acknowledge that the claims released above may include unknown claims, and with respect to the
24 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 WHICH THE
4 CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS FAVOR AT THE TIME OF
5 EXECUTING THE RELEASE, WHICH IF KNOWN BY HIM MUST HAVE MATERIALLY
6 AFFECTED HIS SETTLEMENT WITH THE DEBTOR.
7

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

10 **5.2 Cerro Wire Release of Cheng**

11 Cerro Wire waives any and all claims against Cheng, his attorneys and other
12 representatives, for any and all actions taken or statements made (or those that could have been
13 taken or made) by Cheng and his attorneys and other representatives in the course of investigating
14 claims or otherwise seeking enforcement of Proposition 65 against it in this matter.
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16 **6. Non-Disparagement**

17 The Parties agree to refrain from taking action or making statements, written, oral
18 or through any form of social media, which disparage or defame the goodwill or reputation of the
19 other Party.
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21 **7. Court Approval**

22 This Consent Judgment is not effective until it is approved and entered by the Court and
23 shall be null and void if, for any reason, it is not approved and entered by the Court within one (1)
24 year after it has been fully executed by the Parties.
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1 **8. Severability and Merger**

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

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

11 The terms of this Consent Judgment shall be governed by the laws of the State of
12 California. In the event that Proposition 65 is repealed or is otherwise rendered inapplicable by
13 reason of law generally, or as to the Covered Products, then Cerro Wire shall have no further
14 obligations pursuant to this Consent Judgment with respect to the Covered Products to the extent
15 the Covered Products are so affected.
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17 **10. Notices**

18 10.1 Unless specified herein, all correspondence and notices required to be provided
19 pursuant to this Consent Judgment shall be in writing and personally delivered or sent by:
20 electronic mail and either (i) first-class, (registered or certified mail) return receipt requested; or
21 (ii) overnight courier on any Party by the other Party at the following addresses:
22

23 Cerro Wire:

24 Nelson P. Lam
25 George Gigounas
26 DLA Piper LLP
27 555 Mission Street, Suite 2400
28 San Francisco, CA 94105
 nelson.lam@dlapiper.com
 george.gigounas@dlapiper.com

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and

For Cheng:

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

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.

11. Counterparts; Facsimile Signatures

11.1 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.

12. 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.

13. Modification

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

14. 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.

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15. Authorization

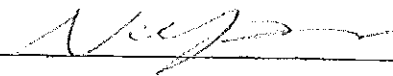
The undersigned are authorized to execute this Consent Judgment on behalf of their respective Parties and have read, understood and agree to all of the terms and conditions of this document and certifies that he or she is fully authorized by the Party he or she represents to execute the Consent Judgment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

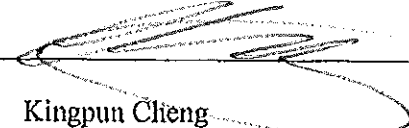
16. Warranties and Representations Regarding Other Potential Claims

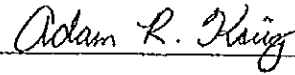
Cheng and his attorneys, Sy and Smith, PC, represent and warrant that neither of them is aware of any other actual or potential action, violation, or claim against Cerro Wire or any of the Releasees. Cheng and his attorneys, Sy and Smith, PC, agree, represent and warrant that neither of them shall, themselves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

IT IS SO STIPULATED:

Dated: 1/3/17
By: 
Parker A. Smith, Attorney for Plaintiff

Dated: 12-16-16
By: 
Nelson P. Lam, Attorney for Defendant

Dated: 2017-1-3
By: 
Kingpun Cheng

Dated: 12-16-16
By: 
Cerro Wire, VP of Finance

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IT IS SO ORDERED, ADJUDGED AND DECREED:

Dated: _____

Judge of the Superior Court

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