

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 Westbay LLC (hereinafter "Westbay"). Westbay 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. Westbay is alleged to employ 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 Westbay has offered for sale and sold in the State of California a Bottom Mount 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. Cheng has cited "Bottom Mount Pressure Gauge" as an example of the pressure gauge that is the subject of his allegation.

For purposes of this Private Settlement only, Westbay represents that: Bottom Mount Pressure Gauge 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 any and all Bottom Mount Pressure Gauge products that are distributed by Westbay and sold in California. All such items shall be referred to herein as the "Subject Products."

1.4 Notices of Violation

On or about June 27, 2016, Cheng served certain private entities 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 a violation of Proposition 65 for failing to warn consumers and customers that the Subject 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. Cheng then served Westbay, Leslie's, and various public enforcement agencies with a document entitled "Amended 60-Day Notice of Violation" pursuant to Health & Safety Code §25249.7(d) (the "Amended Notice")(collectively the "Notices").

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 Westbay as to the allegations contained in the 60 day notice served on or about May 6, 2016, and that venue is proper in the County of San Diego.

Westbay denies the material allegations contained in Cheng's Notices and maintains that it has not violated Proposition 65. Nothing in this Private Settlement shall be construed as an admission by Westbay 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 Westbay of any fact, finding, conclusion, issue of law, or violation of law, such being specifically denied by Westbay. However, this section shall not diminish or otherwise affect the obligations, responsibilities, and duties of Westbay 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

Commencing on the Effective Date, Westbay shall not ship for sale, sell, or offer for sale in California Products that are manufactured, distributed or sold by Westbay containing more than 100 ppm lead unless they comply with this section. Commencing on the Effective Date, Westbay 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 100 parts per million ("ppm"). Westbay 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 100 ppm, 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 Westbay 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, Westbay shall provide Proposition 65 warnings substantially as follows, and consistent with its obligations under the law:

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

OR

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

OR

[Warning symbol] WARNING: "This product can expose you to lead, which is known to the State of California to cause cancer and birth defects or other reproductive harm. For more information go to [www.P65Warnings.ca.gov](http://www.P65Warnings.ca.gov)."

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

With the unit package of the Subject Products or affixed to the Subject Products. Such warning shall be prominently affixed to or printed on each Subject 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 Subject Product; Westbay 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 other specified chemicals should no longer be required, Westbay shall have no further warning obligations pursuant to this Private Settlement. In the event that a change in the law requires modification of such warnings, Westbay may cease to implement or may modify the warnings required under this Private Settlement in compliance with the change in the law.

2.7 The Parties agree that pursuant to the Notice of Adoption Article 6: Clear and Reasonable Warnings issued by OEHHA on August 30, 2016, ("Revised Warnings") Westbay may modify the Proposition 65 warnings described at Section 2.3 for the Subject Products consistent with the amended regulations, or any later introduced changes thereto. Such revisions will constitute compliance with this 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 in the Products, Westbay shall pay a civil penalty of \$1,500 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.

Westbay 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., \$1,125; and (b) one check in an amount representing 25% of the total penalty (i.e., \$375) made payable directly to Cheng. Westbay shall mail these payments within ten (10) days after the Effective Date. 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

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, Westbay shall reimburse Cheng's counsel for fees and costs incurred as a result of investigating, bringing this matter to Westbay's attention, and negotiating a settlement in the public interest. Westbay shall pay Cheng's counsel \$18,500 for all attorneys' fees, expert and investigation fees, and related costs associated with this matter and the Notice. Westbay shall wire said monies to "Sy and Smith, PC" within ten (10) days of the Effective Date. Sy and Smith, PC will provide Westbay 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 Westbay and Downstream Customers

Cheng, on behalf of himself only, releases Westbay and each of its downstream distributors, wholesalers, licensors, licensees, auctioneers, retailers (including, but not limited to Leslie's Poolmart,

Inc. and their 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 from the Products as set forth in the Notice of Violation. 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 rights to institute or participate in, directly or indirectly, any form of legal action and releases any other claims that he could make against Westbay or the Releasees arising prior 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 FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN BY HIM MUST HAVE MATERIALLY AFFECTED HIS SETTLEMENT WITH THE DEBTOR.

#### 5.2 Westbay Release of Cheng

Westbay 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. Confidentiality and Non-Disparagement

The Parties agree that the terms of the Agreement are confidential and may not be divulged to any third party; except that the Parties may make any disclosure necessary to any accountant or tax preparer, and to secure legal advice related to this Agreement and any disclosure necessary to comply with federal and state laws or any court order.

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 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.

8. 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 Subject Products, then Westbay shall have no further obligations pursuant to this Private Settlement with respect to the products to the extent the Subject Products are so affected.

9. 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: electronic mail and 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 Westbay:

Shannon M. Nessier  
Hanson Bridgett LLP  
425 Market Street, 26th Floor  
San Francisco, CA, 94105

David Pothier  
67 S Higley Rd  
Suite 103-102  
Gilbert, AZ 85296

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.

Westbay\_Cheng Settlement

10. 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.

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).

12. MODIFICATION

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

13. ATTORNEY'S FEES


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

14. 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:

By:   
Shannon M. Nessier  
Attorney for Westbay LLC

Date: 4/25/17

By:   
Parker A. Smith  
Attorney for Kingpun Cheng

Date: 3/28/17

IT IS HEREBY AGREED TO:

By:   
Kingpun Cheng

Date: 2017-3-28

IT IS HEREBY AGREED TO:

Westbay\_Cheng Settlement

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By:   
David Pothier  
On Behalf of: Westbay LLC

Date: 4-24-17