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SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SAN DIEGO

10 KINGPUN CHENG,

11 Plaintiff,

12 vs.

13 FERGUSON ENTERPRISES, INC.; AND
14 DOES 1-25

15 Defendants.
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Case No.

UNLIMITED JURISDICTION

STIPULATION RE ENTRY OF
CONSENT JUDGMENT AS TO
FERGUSON ENTERPRISES, INC.

Complaint Filed: May 30, 2017

1 **1. INTRODUCTION**

2 **1.1 The Parties**

3 This Stipulation and [Proposed] Order Re Consent Judgment (“Consent Judgment”) is
4 hereby entered into by and between Kingpun Cheng acting on behalf of the public interest
5 (hereinafter “Cheng”) and Ferguson Enterprises, Inc., (hereinafter “Ferguson” or “Defendant”).
6 Collectively Ferguson and Cheng shall be referred to hereafter as the “Parties” and each of them
7 as a “Party.” Cheng is an individual residing in California who seeks to promote awareness of
8 exposures to toxic chemicals and improve human health by reducing or eliminating hazardous
9 substances contained in consumer products. Defendant employs ten or more persons and is a
10 person in the course of doing business for purposes of Proposition 65, Cal. Health & Safety Code
11 §§ 25249.6 et seq.

12 **1.2 Allegations and Representations**

13 Cheng alleges that Defendant has offered for sale in the State of California and has sold in
14 California, water gauges and pressure gauges, which contain lead, and that such sales have not
15 been accompanied by Proposition 65 warnings. Lead is listed under Proposition 65 as a chemical
16 known to the State of California to cause cancer and birth defects or other reproductive harm.
17 Cheng has cited Ferguson “Raptor Water Gauge RAP142611 and Raptor Pressure Gauge
18 RAP142614”, as a specific examples of water and pressure gauges that are the subject of his
19 allegations.

20 **1.3 Covered Products Description**

21 The products that are covered by this Consent Judgment are defined as Raptor Water
22 Gauge RAP142611 and Raptor Pressure Gauge RAP142614 All such items shall be referred to
23 herein as the “Covered Products.”

24 **1.4 Notices of Violation/Complaint**

25 A) On or about March 30, 2017, Cheng served Dixieline Lumber Company (“Dixieline”),
26 Ferguson and various public enforcement agencies with a document entitled "60-Day Notice of
27 Violation" pursuant to Health & Safety Code §25249.7(d) (the "Notice"), alleging that Ferguson
28 and Dixieline were in violation of Proposition 65 for failing to warn consumers and customers

1 that the Covered Products exposed users in California to lead. No public enforcer diligently
2 prosecuted the claims threatened in the Notice within sixty days plus service time relative to the
3 provision of the Notice to them by Cheng.

4 B) On May 30, 2017, Cheng, acting in the interest of the general public in the State of
5 California, filed a complaint in the Superior Court of San Diego County alleging violations of
6 Health & Safety Code §25249.6 (the "Complaint") based on the alleged failure to warn of
7 exposures to lead contained in Covered Products manufactured, distributed, or sold by Dixieline
8 or Ferguson.

9 **1.5 Stipulation as to Jurisdiction/No Admission**

10 For purposes of this Consent Judgment only, the Parties stipulate that this Court has
11 jurisdiction over Defendant as to the allegations contained in the complaint filed in this matter,
12 that venue is proper in the County of San Diego, and that this Court has jurisdiction to approve,
13 enter, and oversee the enforcement of this Consent Judgment as a full and final binding resolution
14 of all claims which were or could have been raised in the Complaint based on the facts alleged
15 therein and/or in the Notices.

16 Nothing in this Consent Judgment shall be construed as an admission by Defendant of any
17 fact, finding, issue of law, or violation of law; nor shall compliance with this Consent Judgment
18 constitute or be construed as an admission by Defendant of any fact, finding, conclusion, issue of
19 law, or violation of law, such being specifically denied by Defendant. However, this section shall
20 not diminish or otherwise affect the obligations, responsibilities, and duties of Defendant under
21 this Consent Judgment.

22 **1.6 Effective Date**

23 For purposes of this Consent Judgment, the term "Effective Date" shall mean the date this
24 Consent Judgment is entered as a judgment of the Court. All Covered Products already shipped
25 on or before the "Effective Date" or within 90 days thereafter are deemed to be covered by the
26 waiver and release provisions of Paragraph 5.1 of this Consent Judgment and shall not be subject
27 to any future enforcement action by Cheng hereunder. The reformulation and warning
28 requirements of Paragraphs 2.1 and 2.2 shall apply to any Covered Product shipped later than 90

1 days after the Effective Date.

2 For purposes of this Consent Judgment, the term "Execution Date" shall mean the date
3 this Consent Judgment is signed by all parties in Clause 14 below.

4
5 **2. INJUNCTIVE RELIEF: WARNINGS AND REFORMULATION**

6 Commencing Ninety (90) days after the Effective Date, Ferguson shall not ship, sell, or
7 offer to sell in California a Covered Product(s) that is/are manufactured, distributed or sold by
8 Ferguson containing more than 300 ppm lead without a warning as set forth in Section 2.3.

9 Ninety (90) days after the Effective Date in California, Covered Products manufactured,
10 distributed or sold by Ferguson shall either be (a) reformulated pursuant to Section 2.1 or (b)
11 include a warning as provided in Section 2.3.
12

13 **2.1 Reformulation Option.** The Covered Products shall be deemed to comply with
14 Proposition 65 with regard to lead and be exempt from any Proposition 65 warning requirements
15 for lead if the exposed brass or other metal components that are part of the Covered Products
16 meet the following criteria: (a) the alloy from which the components are made shall have no lead
17 as an intentionally added constituent; and (b) the alloy from which the components are made shall
18 have a lead content by weight of no more than 0.03% (300 parts per million, or "300 ppm").
19

20 **2.2 Warning Alternative.** Commencing on the Effective Date, Covered Products that
21 Ferguson ships, sells or offers for sale in California that do not meet the warning exemption
22 standard set forth in Section 2.1 above shall be accompanied by a warning as described in Section
23 2.3 below no later than Ninety (90) days after the Effective Date. The warning requirements set
24 forth in paragraph 2.3 below, apply only to Covered Products Defendant manufactures,
25 distributes, markets, sells or ships for distribution Ninety (90) days after the Effective Date for
26 sale or use inside the State of California.
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1 2.3 Warnings. Where required under Section 2.2 above, Ferguson shall provide either
2 of the Proposition 65 warnings as follows:

3 **WARNING: This product can expose you to chemicals including lead, which is**
4 **known to the State of California to cause cancer and birth defects or other reproductive**
5 **harm. For more information go to www.P65Warnings.ca.gov.**

6 OR

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

9
10 2.4 Where utilized as an alternative to meeting the reformulation criteria set forth in
11 Section 2.1, Defendant shall provide the warning language set forth in Section 2.3 either:

12 (a) With the unit package of the Covered Products or affixed to the Covered Products. Such
13 warning shall be prominently affixed to or printed on each Covered Product's label or package or
14 the Covered Product itself. If printed on the label, the warning shall be contained in the same
15 section that states other safety warnings, if any, concerning the use of the Covered Product;
16 Ferguson may continue to utilize, on an ongoing basis, unit packaging containing substantively
17 the same Proposition 65 warnings as those set forth in Section 2.3 above, but only to the extent
18 such packaging materials have already been printed within one hundred twenty days of the
19 Effective Date, or

20 (b) In the owner's manual of another product in which the Covered Product is a component,
21 but only if the other product: (i) may cause serious injury or bodily harm unless used as directed;
22 (ii) is sophisticated, difficult to understand or install, set-up, or assemble; or (iii) has one or more
23 features a consumer must read about in order to know how to program or use the Covered
24 Product. If the warning is given in the owner's manual pursuant to this subsection, it shall be
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1 located in one of the following places in the manual: the outside of the front cover; the inside of
2 the front cover; the first page other than the cover; or the outside of the back cover. The warning
3 shall be printed or stamped in the manual or contained in a durable label or sticker affixed to the
4 manual in a font no smaller than the font used for other chemically-related safety warnings in the
5 manual. Alternatively, the warning may be included in a safety warning section of the owner's
6 manual. Ferguson may continue to utilize, on an ongoing basis, owner's manuals containing
7 substantively the same Proposition 65 warnings and without the additional admonitions as those
8 set forth in Section 2.3 above, but only to the extent such manuals have already been printed
9 within ninety days of the Effective Date. Owner's manual warnings may only be allowed if the
10 owner's manual is sold in the same package and at the same time as the other product and not for
11 Covered Products sold separately.
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14 2.5 The requirements for warnings, set forth in Section 2.3 above are imposed
15 pursuant to the terms of this Settlement Agreement. The Parties recognize that these are not the
16 exclusive methods of providing a warning under Proposition 65 and its implementing regulations
17 and that they may or may not be appropriate in other circumstances.
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19 **3. PAYMENTS PURSUANT TO HEALTH & SAFETY CODE**
20 **§25249.7(b)**

21 With regard to all claims that have been raised or which could be raised with respect to
22 failure to warn pursuant to Proposition 65 with regard to lead in the Covered Products, Defendant
23 shall pay a civil penalty of \$1,000 pursuant to Health and Safety Code section 25249.7(b), to be
24 apportioned in accordance with California Health & Safety Code § 25192, with 75% of these
25 funds remitted to the State of California's Office of Environmental Health Hazard Assessment
26 and the remaining 25% of the penalty remitted to Cheng, as provided by California Health &
27 Safety Code § 25249.12(d) and the instructions directly below.
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Defendant shall issue two separate checks for the penalty payment: (a) one check made

1 payable to "OEHHA" (tax identification number: 68-0284486) in an amount representing 75% of
2 the total penalty (i.e., \$750); and (b) one check in an amount representing 25% of the total penalty
3 (i.e., \$250) made payable directly to Cheng. Defendant shall mail these payments within ten (10)
4 business days following the Execution Date, to be held in trust by Cheng's counsel, until the
5 Effective Date, at which time such payments shall be mailed to the following addresses
6 respectively:

7 Proposition 65 Settlement Coordinator
8 California Department of Justice
9 1515 Clay Street, 20th Floor
10 Oakland, CA 94612-1413

11 Mr. Kingpun Cheng
12 C/O Parker A. Smith, Attorney at Law
13 2173 Salk Ave., Suite 250
14 Carlsbad, CA 92008

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

16 The parties reached an accord on the compensation due to Cheng and his counsel under
17 the private attorney general doctrine and principles of contract law. Under these legal principles,
18 Defendant shall reimburse Cheng's counsel for fees and costs, incurred as a result of
19 investigating, bringing this matter to Defendant attention, and negotiating a settlement in the
20 public interest. Defendant shall pay Cheng's counsel \$17,500 for all attorneys' fees, expert and
21 investigation fees, and related costs associated with this matter and the Notice. Defendant shall
22 mail a check payable to "Sy and Smith, PC", via certified mail to the address for Cheng's counsel
23 referenced above within ten (10) business days following the Execution Date. Other than the
24 payment required hereunder, each side is to bear its own attorneys' fees and costs.

25 **5. RELEASE OF ALL CLAIMS**

26 **5.1 Cheng's Release of Defendant, Releasees, and Downstream Releasees**

27 As to those matters raised in the Complaint and in the Notice of Violation, Cheng, on
28 behalf of himself *and on behalf of the public interest*, hereby waives and releases any and all
claims against Defendant its parent companies, corporate affiliates, subsidiaries, predecessors,
successors and assigns (collectively "Releasees") and each of its distributors, wholesalers,

1 licensors, licensees, auctioneers, retailers (including but not limited to Dixieline), franchisees,
2 dealers, customers, owners, purchasers, users (collectively "Downstream Releasees") and their
3 respective officers, directors, attorneys, representatives, shareholders, agents, and employees, and
4 sister and parent entities for injunctive relief or damages, penalties, fines, sanctions, mitigation,
5 fees (including fees of attorneys, experts, and others), costs, expenses, or any other sum incurred
6 or claimed, for the alleged failure of Defendant, Releasees or Downstream Releasees to provide
7 clear, accurate and reasonable warnings under Proposition 65 and/or under Business and
8 Professions Code §17200, *et seq.* about exposure to lead arising from the sale, distribution, or use
9 of any Covered Products sold, manufactured or distributed by Defendant, Releasees or
10 Downstream Releasees in California prior to Ninety (90) days after the Effective Date.
11 Compliance with the Consent Judgment by Defendant or a Releasee shall constitute compliance
12 with Proposition 65 by that Defendant, Releasee, or Downstream Releasee with respect to the
13 presence of lead in the Covered Products. Plaintiff agrees that any and all claims in the
14 Complaint are resolved with prejudice by this Consent Judgment.

15 In addition to the foregoing, Cheng, on behalf of himself, his past and current agents,
16 representatives, attorneys, and successors and/or assignees, and not in his representative capacity,
17 hereby waives all rights to institute or participate in, directly or indirectly, any form of legal
18 action and releases any other Claims that he could make against Defendant, Releasees or
19 Downstream Releasees arising up to Ninety (90) days after the Effective Date with respect to
20 violations of Proposition 65 and/or Business and Professions Code §17200 based upon the
21 Covered Products. With respect to the foregoing waivers and releases in this paragraph, Cheng
22 hereby specifically waives any and all rights and benefits which he now has, or in the future may
23 have, conferred by virtue of the provisions of Section 1542 of the California Civil Code, which
24 provides as follows:

25 A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE
26 CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS FAVOR
27 AT THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN BY
28 HIM OR HER MUST HAVE MATERIALLY AFFECTED HIS OR HER
 SETTLEMENT WITH THE DEBTOR.

1 **5.2 Defendant's Release of Cheng**

2 Defendant waives any and all claims against Cheng, his attorneys and other
3 representatives, for any and all actions taken or statements made (or those that could have been
4 taken or made) by Cheng and his attorneys and other representatives, in the course of
5 investigating claims or otherwise seeking enforcement of Proposition 65 against them in this
6 matter, and/or with respect to the Covered Products.

7 **6. SEVERABILITY AND MERGER**

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

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

15 **7. GOVERNING LAW**

16 The terms of this Consent Judgment shall be governed by the laws of the State of
17 California and apply within the State of California. Compliance with the terms of this Consent
18 Judgment resolves any issue, now or in the future, as to the requirements of Proposition 65 with
19 respect to alleged exposures to lead arising from the Covered Products. In the event that
20 Proposition 65 is repealed or is otherwise rendered inapplicable by reason of law generally, or as
21 to the Covered Products, then Defendant shall provide written notice to Cheng of any asserted
22 change in the law, and shall have no further obligations pursuant to this Consent Judgment with
23 respect to, and to the extent that, the Covered Products are so affected.

24 **8. NOTICES**

25 Unless specified herein, all correspondence and notices required to be provided pursuant
26 to this Consent Judgment shall be in writing and personally delivered or sent by: (i) first-class,
27 (registered or certified mail) return receipt requested; or (ii) overnight courier on any party by the
28 other party at the following addresses:

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For Ferguson Enterprises, Inc.:

Brenda K. Radmacher
Sonia Taylor
Wood, Smith, Henning, & Berman LLP
505 N. Brand Boulevard, Suite 1100
Glendale, California 9903

and

For Cheng:

Parker Smith, Esq.
Sy and Smith, PC
11622 El Camino Real, Suite 100
Del Mar, 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; EMAIL OR FACSIMILE SIGNATURES

This Consent Judgment may be executed in counterparts and by email or 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)/COURT APPROVAL

Cheng agrees to comply with the requirements set forth in California Health & Safety Code §25249.7(f) and to promptly bring a Motion for Approval of this Consent Judgment and Defendants shall support approval of such Motion.

This Consent Judgment shall not be effective until it is approved and entered by the Court and shall be null and void if, for any reason, it is not approved and entered by the Court within twelve months after it has been fully executed by the Parties.

11. MODIFICATION

This Consent Judgment may be modified only by further stipulation of the Parties and the approval of the Court or upon the granting of a motion brought to the Court by either Party.

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2 **12. ATTORNEY'S FEES**

3 12.1 A party who unsuccessfully brings or contests an action arising out of this Consent
4 Judgment shall be required to pay the prevailing party's reasonable attorney's fees and costs
5 unless the unsuccessful party has acted with substantial justification. For purposes of this
6 Consent Judgment, the term substantial justification shall carry the same meaning as used in the
7 Civil Discovery Act of 1986, Code of Civil Procedure Section 2016, et seq.

8 12.2 Nothing in this Section shall preclude a Party from seeking an award of sanctions
9 pursuant to law.

10 **13. RETENTION OF JURISDICTION**

11 13.1 This Court shall retain jurisdiction of this matter to implement or modify the Consent
12 Judgment.

13 **14. AUTHORIZATION**

14 The undersigned are authorized to execute this Consent Judgment on behalf of their respective
15 Parties and have read, understood and agree to all of the terms and conditions of this document
16 and certifies that he or she is fully authorized by the Party he or she represents to execute the
17 Consent Judgment on behalf of the Party represented and legally bind that Party. Except as
18 explicitly provided herein each Party is to bear its own fees and costs.
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20 **[Signatures Follow]**
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2 **IT IS HEREBY SO STIPULATED:**

3 **AGREED TO:**

AGREED TO:

4
5 Date: 2017-6-12

Date: 6/9/2017

6 By: 

By: 

7 KINGPUN CHENG

On Behalf of:

FERGUSON ENTERPRISES, INC.

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11 **APPROVED AS TO FORM:**

12
13 Dated: June 9, 2017

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16 By: 

Brenda K. Radmacher, Esq.
Sonia J. Taylor, Esq.
Attorneys for Defendant
Ferguson Enterprises, Inc.

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19 Dated: June 15th, 2017

20
21 By: 

Parker Smith, Esq.
Attorneys for Plaintiff,
Kingpun Cheng