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

10 KINGPUN CHENG,
11 Plaintiff,
12 vs.
13 MORRIS ROTHENBERG & SON, INC.; et. al.
14 Defendants.

Case No.

UNLIMITED JURISDICTION

**STIPULATION AND [PROPOSED]
ORDER RE ENTRY OF CONSENT
JUDGMENT AS TO MORRIS
ROTHENBERG & SON, INC.**

Complaint Filed: October 30, 2017

17 **1. Introduction**

18 1.1 This Settlement Agreement is hereby entered into by and between Kingpun Cheng,
19 as an individual, (hereinafter “Cheng”) and Morris Rothenberg & Son, Inc. (hereinafter
20 “Rothco”). Rothco and Cheng shall be collectively referred to as the “Parties” and each of them
21 as a “Party.” Cheng is an individual residing in California who seeks to promote awareness of
22 exposures to toxic chemicals and improve human health by reducing or eliminating hazardous
23 substances contained in consumer products.

24 1.2 Cheng alleges that Rothco has offered for sale and sold in the State of California
25 Brass Cavalry Bugle sold by Rothco, including but not limited to “Rothco Brass Cavalry Bugle”
26 (“Covered Products”) containing lead, a chemical listed under Proposition 65 as a chemical
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1 known to the State of California to cause cancer, birth defects, or other reproductive harm, and
2 that they did so without providing the warning Cheng alleges is required by Proposition 65.

3 1.3 For purposes of this Settlement only, Rothco represents that: Brass Cavalry Bugle
4 SKU R10405 is an item it distributed to retailers and consumers (online and storefront) in the
5 state of California.

6 1.4 On or about April 21, 2017, Cheng served Rothco, Walmart Stores, Inc.
7 ("Walmart"), and various public enforcement agencies with a document entitled "60-Day Notice
8 of Violation" pursuant to Health & Safety Code §25249.7(d) (the "Notice"), alleging that Rothco
9 and Walmart were in violation of Proposition 65 for failing to warn consumers and customers that
10 the Covered Products exposed users in California to lead. No public enforcer diligently
11 prosecuted the claims threatened in the Notice within sixty days plus service time after service of
12 the Notice to them by Cheng.

13 1.5 Rothco denies the material, factual, and legal allegations contained in the Notice,
14 and maintains that all of the products it has sold and distributed for sale in California, including
15 the Products, have been, and are, in compliance with all laws. Nothing in this Settlement shall be
16 construed as an admission of any fact, finding, conclusion of law, issue of law, or violation of
17 law, nor shall compliance with this Settlement constitute or be construed as an admission of any
18 fact, finding, conclusion of law, issue of law, or violation of law. This Section shall not,
19 however, diminish or otherwise affect Rothco's obligations, responsibilities, and duties under this
20 Settlement.

21 1.6 For purposes of this Settlement only, the Parties stipulate that in the event that
22 enforcement of this Settlement or a dispute arises regarding this Settlement, the Superior Court of
23 California, County of San Diego has proper jurisdiction over Rothco as to the allegations
24

1 contained in the 60 day notice served on or about April 21, 2017, and that venue is proper in the
2 County of San Diego.

3 1.7 For purposes of this Consent Judgment, the term "Effective Date" shall mean the
4 date on which notice of the approval and entry of this Consent Judgment by the Court is received
5 by Rothco.

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7 **2. Injunctive Relief**

8 Commencing on the Effective Date, Rothco shall only sell, offer for sale, or distribute for
9 sale in California, Covered Products that are either (a) reformulated pursuant to Section 2.1 or (b)
10 include a warning as provided in Section 2.3.

11 2.1 Reformulation Option. The Covered Products shall be deemed to comply with
12 Proposition 65 with regard to lead and be exempt from any Proposition 65 warning requirements
13 for lead if the exposed brass or other metal components that are part of the Covered Products
14 meet the following criteria: the alloy from which the components are made shall have a lead
15 content by weight of no more than 0.03% (300 parts per million, or "300 ppm"). Rothco shall
16 comply with the above requirements by obtaining test results showing that the lead content is no
17 more than 0.03%, using a method of sufficient sensitivity to establish a limit of quantification (as
18 distinguished from detection) of less than 300 ppm and providing a copy of said results to
19 Plaintiff.
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22 2.2 Warning Alternative. As an alternative to reformulating the Covered Products,
23 within 180 days of the Effective Date, Covered Products that Rothco ships for sale in California
24 that do not meet the Reformulation Option set forth in Section 2.1 above shall be accompanied by
25 a warning as described in Section 2.3 below.

26 2.3 Warnings. Where required under Section 2.2 above, Rothco shall provide
27 Proposition 65 warnings substantially as follows:
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1 WARNING: This product can expose you to chemicals including lead, which is known to
2 the State of California to cause cancer and birth defects or other reproductive harm. For more
3 information go to www.P65Warnings.ca.gov.

4 Or

5 WARNING: This product contains a chemical known to the State of California to cause
6 cancer, birth defects and other reproductive harm.
7

8 2.4 Where utilized as an alternative to meeting the criteria set forth in Section 2.1,
9 Rothco shall provide the warning language set forth in Section 2.3 either with the unit package of
10 the Covered Products, affixed to the Covered Products, or displayed online. If affixed to the
11 Covered Products, such warning shall be prominently affixed to or printed on each Product's
12 label or package or the Product itself. If printed on the label, the warning shall be contained in
13 the same section that states other safety warnings, if any, concerning the use of the Product.
14

15 2.5 The requirements for warnings, set forth in Section 2.3 above are imposed
16 pursuant to the terms of this Settlement. The Parties recognize that these are not the exclusive
17 methods of providing a warning under Proposition 65 and its implementing regulations and that
18 they may or may not be appropriate in other circumstances.

19 2.6 If Proposition 65 warnings for lead or lead compounds, or other specified
20 chemicals, should no longer be required, Rothco shall have no further warning obligations
21 pursuant to this Settlement. In the event that a change in the law requires modification of such
22 warnings, Rothco may cease to implement or may modify the warnings required under this
23 Settlement in compliance with the change in the law per Section 11 of this Settlement. In the
24 event that the Office of Environmental Health Hazard Assessment promulgates one or more
25 regulations requiring or permitting warning text and/or methods of transmission different than
26 those set forth above, Rothco shall be entitled to use, at its discretion, such other warning text
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1 and/or method of transmission without being deemed in breach of this Settlement per Section 11
2 of this Settlement.

3 **3. Entry of Consent Judgment**

4 3.1 With regard to all claims that have been raised or which could be raised with
5 respect to failure to warn pursuant to Proposition 65 with regard to lead in the Covered Products
6 and because opportunities for exposure are minimal due to the nature and expected use of the
7 product, Rothco shall pay a civil penalty of \$800.00 pursuant to Health and Safety Code section
8 25249.7(b), to be apportioned in accordance with California Health & Safety Code § 25192, with
9 75% of these funds remitted to the State of California's Office of Environmental Health Hazard
10 Assessment and the remaining 25% of the penalty remitted to Cheng, as provided by California
11 Health & Safety Code § 25249.12(d) and the instructions directly below.
12

13 Rothco shall issue two separate checks for the penalty payment: (a) one check
14 made payable to "OEHHA" (tax identification number: 68-0284486) in an amount representing
15 75% of the total penalty (i.e., \$600); and (b) one check in an amount representing 25% of the total
16 penalty (i.e., \$200) made payable directly to Cheng. Rothco shall mail these payments within
17 five (5) days after the Effective Date at which time such payments shall be mailed to the
18 following addresses respectively:
19

20 Office of Environmental Health Hazard Assessment

21 Attn: Mike Gyurics

22 1001 I Street

23 Mail Stop 12-B

24 Sacramento, CA 95814

25
26 And

27 Mr. Kingpun Cheng
28

1 C/O Sy and Smith, PC
2 11622 El Camino Real, Suite 100
3 San Diego, CA 92130

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

5 The parties reached an accord on the compensation due to Cheng and his counsel
6 under the private attorney general doctrine and principles of contract law. Under these legal
7 principles, Rothco shall reimburse Cheng's counsel for fees and costs incurred as a result of
8 investigating, bringing this matter to Rothco's attention, and negotiating a settlement. Rothco
9 shall pay Cheng's counsel \$7,200 for all attorneys' fees, expert and investigation fees, and related
10 costs associated with this matter and the Notice. Rothco shall wire said monies or send a check
11 payable to "Sy and Smith, PC" within five (5) days of the Effective Date. Sy and Smith, PC will
12 provide Rothco with wire instruction and tax identification information on or before the Effective
13 Date if requested. Other than the payment required hereunder, each side is to bear its own
14 attorneys' fees and costs.
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16 **5. Release of all Claims**

17 **5.1 Release of Rothco and Downstream Customers**

18 Cheng, on behalf of himself and on behalf of the general public, releases Rothco and their
19 respective officers, directors, attorneys, representatives, shareholders, agents, and employees,
20 sister and parent entities, successors, and assigns, and each entity to whom it directly or indirectly
21 distributes or sells the Covered Products including, but not limited to, their downstream
22 distributors, wholesalers, licensors, licensees, auctioneers, retailers (including, but not limited to,
23 Walmart and their affiliates and subsidiaries), franchisees, dealers, customers, owners,
24 purchasers, users, parent companies, corporate affiliates, subsidiaries, (collectively "Releasees")
25 from all claims for violations of Proposition 65 up through the Effective Date based on exposure
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1 to lead from the Covered Products as set forth in the Notice of Violation. Compliance with the
2 terms of this Consent Judgment constitutes compliance with Proposition 65 with respect to
3 exposures to lead from the Covered Products.

4 In addition to the foregoing, Cheng, on behalf of himself, his past and current agents,
5 representatives, attorneys, and successors and/or assignees, and not in his representative capacity,
6 hereby waives all rights to institute or participate in, directly or indirectly, any form of legal
7 action and releases any other claims that he could make against Rothco or the Releasees arising
8 prior to the Effective Date with respect to violations of Proposition 65 based upon the Covered
9 Products. The Parties acknowledge that the claims released above may include unknown claims,
10 and with respect to the foregoing waivers and releases in this paragraph, Cheng hereby
11 specifically waives any and all rights and benefits which he now has, or in the future may have,
12 conferred by virtue of the provisions of Section 1542 of the California Civil Code, which
13 provides as follows:
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16 A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE
17 CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS FAVOR AT THE TIME OF
18 EXECUTING THE RELEASE, WHICH IF KNOWN BY HIM MUST HAVE MATERIALLY
19 AFFECTED HIS SETTLEMENT WITH THE DEBTOR.
20

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

23 5.2 Rothco Release of Cheng

24 Rothco waives any and all claims against Cheng, his attorneys and other
25 representatives, for any and all actions taken or statements made (or those that could have been
26 taken or made) by Cheng and his attorneys and other representatives in the course of investigating
27 claims or otherwise seeking enforcement of Proposition 65 against it in this matter.
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6. Severability and Merger

If, subsequent to the execution of this Consent Judgment, 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 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.

7. Governing Law

The terms of this 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 Covered Products, then Rothco shall have no further obligations pursuant to this Settlement with respect to the Covered Products to the extent the Covered Products are so affected.

8. Notices

8.1 Unless specified herein, all correspondence and notices required to be provided pursuant to this 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:

Rothco:

Meredith Jones-McKeown, Esq.
Hannah Worek
Perkins Coie LLP
505 Howard Street, Suite 1000
San Francisco, CA 94105
mjonesmckeown@perkinscoie.com
hworek@perkinscoie.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.

9. Counterparts; Facsimile Signatures

9.1 This 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.

10. 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). 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, which motion Cheng shall draft and file. Rothco shall reasonably cooperate with Cheng in connection with such noticed motion.

11. Modification

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

12. Attorney Fees

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

13. Authorization

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The undersigned are authorized to execute this 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 Settlement on behalf of the Party and legally bind that Party.


IT IS SO STIPULATED:

Dated: 11/27/17 Dated: _____

By:  By: _____

Parker A. Smith, Attorney for Plaintiff Meredith Jones-McKeown, Attorney for Defendant

Dated: 2017-11-24 Dated: _____

By:  By: _____

Kingpun Cheng On Behalf of Rothco

IT IS SO ORDERED, ADJUDGED AND DECREED:

Dated: _____


Judge of the Superior Court

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The undersigned are authorized to execute this 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 Settlement on behalf of the Party and legally bind that Party.

IT IS SO STIPULATED:


Dated: _____
By: _____

Dated: 10/27/17
By: 

Parker A. Smith, Attorney for Plaintiff

Meredith Jones-McKeown, Attorney for Defendant

Dated: _____
By: _____

Dated: 10/27/17
By: 

Kingpun Cheng

On Behalf of Rothco

IT IS SO ORDERED, ADJUDGED AND DECREED:

Dated: _____

Judge of the Superior Court