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7 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 KINGSTON BRASS, INC.; et. al.
14 Defendants.

Case No. 37-2017-00031416-CU-NP-CTL

UNLIMITED JURISDICTION

**STIPULATION AND [PROPOSED]
ORDER RE ENTRY OF CONSENT
JUDGMENT AS TO KINGSTON
BRASS, INC.**

Complaint Filed: August 24, 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 Kingston Brass, Inc. (hereinafter "Kingston").
20 Kingston and Cheng shall be collectively referred to as the "Parties" and each of them as a
21 "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. Kingston employs ten or more persons as required
24 for purposes of Cal. Health & Safety Code §§ 25249.5 et seq. ("Proposition 65").

25 1.2 Cheng alleges that Kingston has offered for sale and sold in the State of California
26 hot water cartridges sold by Kingston, including but not limited to "Bridgewater Hot Water
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1 Cartridges” (“Covered Products”) containing lead, a chemical listed under Proposition 65 as a
2 chemical known to the State of California to cause cancer, birth defects, or other reproductive
3 harm, and that they did so without providing the warning Cheng alleges is required by
4 Proposition 65.

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6 1.3 For purposes of this Settlement only, Kingston represents that: Hot water
7 cartridges are items it distributed to retailers and consumers (online and storefront) in the state of
8 California.

9 1.4 On or about April 21, 2017, Cheng served Kingston, Orchard Supply Hardware,
10 and various public enforcement agencies with a document entitled "60-Day Notice of Violation"
11 pursuant to Health & Safety Code §25249.7(d) (the "Notice"), alleging that Kingston and Orchard
12 Supply Hardware were in violation of Proposition 65 for failing to warn consumers and
13 customers that the Covered Products exposed users in California to lead. No public enforcer
14 diligently prosecuted the claims threatened in the Notice within sixty days plus service time after
15 service of the Notice to them by Cheng.
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17 1.5 For purposes of this Settlement only, the Parties stipulate that in the event that
18 enforcement of this Settlement or a dispute arises regarding this Settlement, the Superior Court of
19 California, County of San Diego has proper jurisdiction over Kingston as to the allegations
20 contained in the 60 day notice served on or about April 21, 2017, and that venue is proper in the
21 County of San Diego.
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23 1.6 For purposes of this Private Settlement, the term “Effective Date” shall mean the
24 date on which notice of the approval and entry of this Consent Judgment by the Court is received
25 by Kingston.
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2. Injunctive Relief

Commencing on the Effective Date, Kingston 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.

2.1 Reformulation Option. The Covered 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 Covered 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”). Kingston shall comply with the above requirements by 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 and providing a copy of said results to Plaintiff.

2.2 Warning Alternative. As an alternative to reformulating the Covered Products, within 180 days of the Effective Date, Covered Products that Kingston 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, Kingston shall provide Proposition 65 warnings substantially as follows:

WARNING: This product can expose you to chemicals including 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.

Or

1 WARNING: This product contains chemicals known to the State of California to cause
2 cancer, birth defects or other reproductive harm.

3 2.4 Where utilized as an alternative to meeting the criteria set forth in Section 2.1,
4 Kingston shall provide the warning language set forth in Section 2.3 either with the unit package
5 of the Covered Products or affixed to the Covered Products. Such warning shall be prominently
6 affixed to or printed on each Product's label or package or the Product itself. If printed on the
7 label, the warning shall be contained in the same section that states other safety warnings, if any,
8 concerning the use of the Product.

9
10 2.5 The requirements for warnings, set forth in Section 2.3 above are imposed
11 pursuant to the terms of this Settlement. The Parties recognize that these are not the exclusive
12 methods of providing a warning under Proposition 65 and its implementing regulations and that
13 they may or may not be appropriate in other circumstances.

14
15 2.6 If Proposition 65 warnings for lead or lead compounds, or other specified
16 chemicals, should no longer be required, Kingston shall have no further warning obligations
17 pursuant to this Settlement. In the event that a change in the law requires modification of such
18 warnings, Kingston may cease to implement or may modify the warnings required under this
19 Settlement in compliance with the change in the law per Section 11 of this Settlement. In the
20 event that the Office of Environmental Health Hazard Assessment promulgates one or more
21 regulations requiring or permitting warning text and/or methods of transmission different than
22 those set forth above, Kingston shall be entitled to use, at its discretion, such other warning text
23 and/or method of transmission without being deemed in breach of this Settlement per Section 11
24 of this Settlement.
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26 3. Entry of Consent Judgment
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1 3.1 With regard to all claims that have been raised or which could be raised with
2 respect to failure to warn pursuant to Proposition 65 with regard to lead in the Covered Products
3 and because opportunities for exposure are minimal due to the nature and expected use of the
4 product, Kingston shall pay a civil penalty of \$1,000 pursuant to Health and Safety Code section
5 25249.7(b), to be apportioned in accordance with California Health & Safety Code § 25192, with
6 75% of these funds remitted to the State of California’s Office of Environmental Health Hazard
7 Assessment and the remaining 25% of the penalty remitted to Cheng, as provided by California
8 Health & Safety Code § 25249.12(d) and the instructions directly below.

10 Kingston shall issue two separate checks for the penalty payment: (a) one check
11 made payable to “OEHHA” (tax identification number: 68-0284486) in an amount representing
12 75% of the total penalty (i.e., \$750; and (b) one check in an amount representing 25% of the total
13 penalty (i.e., \$250) made payable directly to Cheng. Kingston shall mail these payments within
14 fourteen (14) days after the Effective Date at which time such payments shall be mailed to the
15 following addresses respectively:

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

23 And

24 Mr. King Pun Cheng
25 C/O Sy and Smith, PC
26 11622 El Camino Real, Suite 100
27 San Diego, CA 92130

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

2 The parties reached an accord on the compensation due to Cheng and his counsel
3 under the private attorney general doctrine and principles of contract law. Under these legal
4 principles, Kingston shall reimburse Cheng’s counsel for fees and costs incurred as a result of
5 investigating, bringing this matter to Kingston’s attention, and negotiating a settlement. Kingston
6 shall pay Cheng’s counsel \$16,000 for all attorneys’ fees, expert and investigation fees, and
7 related costs associated with this matter and the Notice. Kingston shall wire said monies or send
8 a check payable to “Sy and Smith, PC” within fourteen (14) days of the Effective Date. Sy and
9 Smith, PC will provide Kingston with wire instruction and tax identification information on or
10 before the Effective Date if requested. Other than the payment required hereunder, each side is to
11 bear its own attorneys’ fees and costs.
12

13 5. **Release of all Claims**

14 5.1 Release of Kingston and Downstream Customers

15 Cheng, on behalf of himself and on behalf of the general public, releases Kingston and
16 their respective officers, directors, attorneys, representatives, shareholders, agents, and
17 employees, sister and parent entities, successors, and assigns, and each entity to whom it directly
18 or indirectly distributes or sells the Covered Products including, but not limited to, their
19 downstream distributors, wholesalers, licensors, licensees, auctioneers, retailers (including, but
20 not limited to, Orchard Supply Hardware and their affiliates and subsidiaries), franchisees,
21 dealers, customers, owners, purchasers, users, parent companies, corporate affiliates, subsidiaries,
22 (collectively “Releasees”) from all claims for violations of Proposition 65 up through the
23 Effective Date based on exposure to lead from the Covered Products as set forth in the Notice of
24 Violation. Compliance with the terms of this Private Settlement constitutes compliance with
25 Proposition 65 with respect to exposures to lead from the Covered Products.
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1 In addition to the foregoing, Cheng, on behalf of himself, his past and current agents,
2 representatives, attorneys, and successors and/or assignees, and not in his representative capacity,
3 hereby waives all rights to institute or participate in, directly or indirectly, any form of legal
4 action and releases any other claims that he could make against Kingston or the Releasees arising
5 prior to the Effective Date with respect to violations of Proposition 65 based upon the Covered
6 Products. The Parties acknowledge that the claims released above may include unknown claims,
7 and with respect to the foregoing waivers and releases in this paragraph, Cheng hereby
8 specifically waives any and all rights and benefits which he now has, or in the future may have,
9 conferred by virtue of the provisions of Section 1542 of the California Civil Code, which
10 provides as follows:

11
12 A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE
13 CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS FAVOR AT THE TIME OF
14 EXECUTING THE RELEASE, WHICH IF KNOWN BY HIM MUST HAVE MATERIALLY
15 AFFECTED HIS SETTLEMENT WITH THE DEBTOR.
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17 Cheng acknowledges and understands the significance and consequences of this specific
18 waiver of California Civil Code section 1542.

19 5.2 Kingston Release of Cheng

20 Kingston waives any and all claims against Cheng, his attorneys and other
21 representatives, for any and all actions taken or statements made (or those that could have been
22 taken or made) by Cheng and his attorneys and other representatives in the course of investigating
23 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 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 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 Kingston 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:

Kingston:

Ryan S. Landis, Esq.
Polsinelli LLP
2049 Century Park East, Suite 2900
Los Angeles, CA 90067
rlandis@polsinelli.com

and

1 For Cheng:

2 Parker A. Smith
3 Sy and Smith, PC
4 11622 El Camino Real, Suite 100
5 Del Mar, CA 92130
6 parker@sysmithlaw.com

7 Any party, from time to time, may specify in writing by the means set forth above to the
8 other party a change of address to which all notices and other communications shall be sent.

9 **9. Counterparts; Facsimile Signatures**

10 9.1 This Settlement may be executed in counterparts and by facsimile, each of which
11 shall be deemed an original, and all of which, when taken together, shall constitute one and the
12 same document.

13 **10. Compliance with Health & Safety Code § 25249.7(f)**

14 Cheng agrees to comply with the requirements set forth in California Health & Safety
15 Code §25249.7(f).

16 **11. Modification**

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

19 **12. Attorney Fees**

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

22 **13. Authorization**

23 The undersigned are authorized to execute this Settlement on behalf of their respective
24 Parties and have read, understood and agree to all of the terms and conditions of this document
25 and certifies that he or she is fully authorized by the Party he or she represents to execute the
26 Settlement on behalf of the Party and legally bind that Party.
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IT IS SO STIPULATED:

Dated: 9/22/17

Dated: 9/25/17

By: 

By: 

Parker A. Smith, Attorney for Plaintiff

Ryan Landis, Attorney for Defendant

Dated: 2017-9-21

Dated: 2017-9-22

By: Eddie Cheng

By: 

King Pun Cheng

On Behalf of Kingston Brass, Inc.

IT IS SO ORDERED, ADJUDGED AND DECREED:

Dated: _____

Judge of the Superior Court