

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 Attorneys for Plaintiff, Kingpun Cheng

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

10 KINGPUN CHENG,
11 Plaintiff,
12 vs.
13 CY TOP, LTD.; et. al.
14 Defendants.

Case No. 37-2018-00046018-CU-PO-CTL

UNLIMITED JURISDICTION

STIPULATION AND [PROPOSED]
ORDER RE ENTRY OF CONSENT
JUDGMENT AS TO CY TOP, LTD.

Complaint Filed: September 13, 2018

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17 **1. Introduction**

18 1.1 This Settlement Agreement (hereinafter "Settlement") is hereby entered into by
19 and between Kingpun Cheng, as an individual, (hereinafter "Cheng") and CY Top, Ltd.
20 (hereinafter "CY Top"). CY Top and Cheng shall be collectively referred to as the "Parties" and
21 each of them as a "Party." Cheng is an individual residing in California who seeks to promote
22 awareness of exposures to toxic chemicals and improve human health by reducing or eliminating
23 hazardous substances contained in consumer products. CY Top employs ten or more persons as
24 required for purposes of Cal. Health & Safety Code §§ 25249.5 et seq. ("Proposition 65").

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26 1.2 Cheng alleges that CY Top has offered for sale and sold in the State of California
27 Outdoor Equipment Camp Cook and Dine Set sold by CY Top, including but not limited to
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1 “Ozark Trail Outdoor Equipment 10-Piece Camp Cook and Dine Set” (“Covered Products”)
2 containing DEHP, a chemical listed under Proposition 65 as a chemical known to the State of
3 California to cause cancer, birth defects, or other reproductive harm, and that they did so without
4 providing the warning Cheng alleges is required by Proposition 65.

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6 1.3 For purposes of this Settlement only, CY Top represents that: Ozark Trail
7 Outdoor Equipment 10-Piece Camp Cook and Dine Sets are items it distributed to retailers and
8 consumers (online and storefront) in the state of California.

9 1.4 On or about October 9, 2017, Cheng served CY Top, Wal-mart Stores, Inc., and
10 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 CY Top and Wal-
12 mart Stores, Inc. were in violation of Proposition 65 for failing to warn consumers and customers
13 that the Covered Products exposed users in California to DEHP. No public enforcer diligently
14 prosecuted the claims threatened in the Notice within sixty days plus service time after service of
15 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 CY Top as to the allegations
20 contained in the 60 day notice served on or about October 9, 2017, and that venue is proper in the
21 County of San Diego.

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23 1.6 CY Top denies the material, factual, and legal allegations made in the Notice and
24 Complaint, and maintains that all of the products it has sold or distributed for sale in California,
25 including the Covered Products, have been, and are, in compliance with all laws. Nothing in this
26 Consent Judgment shall be construed as an admission by CY Top of any fact, finding, conclusion,
27 issue of law, or violation of law, nor shall compliance with this Consent Judgment constitute or
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1 be construed as an admission by CY Top of any fact, finding, conclusion, issue of law, or
2 violation of law, the same being specifically denied by CY Top. This Section shall not, however,
3 diminish or otherwise affect CY Top's obligations, responsibilities, and duties under this Consent
4 Judgment.

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6 1.7 For purposes of this Settlement, the term "Effective Date" shall mean the date on
7 which the Court enters the Stipulation and Order re Entry of Consent Judgment as to CY Top,
8 Ltd.

9 **2. Injunctive Relief**

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

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14 2.1 Reformulation Option. The Covered Products shall be deemed to comply with
15 Proposition 65 with regard to DEHP and be exempt from any Proposition 65 warning
16 requirements for DEHP if the exposed components that are part of the Covered Products meet the
17 following criteria: the Covered Products shall have a DEHP content in concentrations of no more
18 than 0.1% (1,000 parts per million, or "1,000 ppm").

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20 2.2 Warning Alternative. As an alternative to reformulating the Covered Products,
21 within 180 days of the Effective Date, Covered Products that CY Top ships for sale, sells or
22 offers for sale in California that do not meet the Reformulation Option set forth in Section 2.1
23 above shall be accompanied by a warning as described in Section 2.3 below.

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25 2.3 Warnings. Where required under Section 2.2 above, CY Top shall provide
26 Proposition 65 warnings substantially as follows:
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1 WARNING: This product can expose you to chemicals including DEHP, which is known
2 to 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 2.4 Where utilized as an alternative to meeting the criteria set forth in Section 2.1, CY
5 Top shall provide the warning language set forth in Section 2.3 pursuant to 27 California Code of
6 Regulations § 25602.

7 2.5 The Parties recognize that the warning requirements imposed by this Settlement
8 are not the exclusive methods of providing a warning under Proposition 65. CY Top may provide
9 warnings in accordance with current Proposition 65 regulations even if not specifically stated in
10 this Settlement.

11 2.6 If Proposition 65 warnings for DEHP, or other specified chemicals, should no
12 longer be required, CY Top shall have no further warning obligations pursuant to this Settlement.
13 In the event that a change in the law requires modification of such warnings, CY Top may cease
14 to implement or may modify the warnings required under this Settlement in compliance with the
15 change in the law per Section 10 of this Settlement. In the event that the Office of Environmental
16 Health Hazard Assessment promulgates one or more regulations requiring or permitting warning
17 text and/or methods of transmission different than those set forth above, CY Top shall be entitled
18 to use, at its discretion, such other warning text and/or method of transmission without being
19 deemed in breach of this Settlement per Section 11 of this Settlement.

20 2.7 Sell through period. CY Top's Covered Products that were manufactured,
21 distributed, shipped, sold or that are otherwise in the stream of commerce prior to the Effective
22 Date shall be subject to the release of liability pursuant to Section 5 of this Consent Judgment,
23 without regard to when the Covered Products were, or are in the future, sold to consumers. As a
24 result, the obligations of CY Top as set forth in this Consent Judgment, including but not limited
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1 Section 2.3, do not apply to these products. This Consent Judgement covers any sale of these
2 Products by Wal-Mart, or any of its subsidiaries or affiliates, and any other retail distributors that
3 were shipped or distributed in the stream of commerce prior to the Effective Date.

4 **3. Entry of Consent Judgment**

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6 3.1 With regard to all claims that have been raised or which could be raised with
7 respect to failure to warn pursuant to Proposition 65 with regard to DEHP in the Covered
8 Products and because opportunities for exposure are minimal due to the nature and expected use
9 of the product, CY Top shall pay a civil penalty of \$1,000.00 pursuant to Health and Safety Code
10 section 25249.7(b), to be apportioned in accordance with California Health & Safety Code §
11 25192, with 75% of these funds remitted to the State of California's Office of Environmental
12 Health Hazard Assessment and the remaining 25% of the penalty remitted to Cheng, as provided
13 by California Health & Safety Code § 25249.12(d) and the instructions directly below.
14

15 CY Top shall issue two separate checks for the penalty payment: (a) one check made
16 payable to "OEHHA" (tax identification number: 68-0284486) in an amount representing 75% of
17 the total penalty (i.e., \$750.00; and (b) one check in an amount representing 25% of the total
18 penalty (i.e., \$250.00) made payable directly to Cheng. CY Top shall mail these payments within
19 five (5) days after the Effective Date at which time such payments shall be mailed to the
20 following addresses respectively:
21

22 Mike Gyurics
23 Fiscal Operations Branch Chief
24 Office of Environmental Health Hazard Assessment
25 P.O. Box 4010
26 Sacramento, CA 95812-4010

27 And

28 Mr. Kingpun Cheng
C/O Sy and Smith, PC
11622 El Camino Real, Suite 100
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 under
3 the private attorney general doctrine and principles of contract law. Under these legal principles,
4 CY Top shall reimburse Cheng’s counsel for fees and costs incurred as a result of investigating,
5 bringing this matter to CY Top’s attention, and negotiating a settlement. CY Top shall pay
6 Cheng’s counsel \$12,375.00 for all attorneys’ fees, expert and investigation fees, and related costs
7 associated with this matter and the Notice. CY Top shall wire said monies or send a check
8 payable to “Sy and Smith, PC” within ten business (10) days of the Effective Date. Sy and Smith,
9 PC will provide CY Top with wire instruction and tax identification information on or before the
10 Effective Date if requested. Other than the payment required hereunder, each side is to bear its
11 own attorneys’ fees and costs.
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13 5. **Release of all Claims**

14 5.1 Release of CY Top and Downstream Customers

15 Cheng, on behalf of himself and on behalf of the general public, releases CY Top 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, Wal-mart and its affiliates and subsidiaries), franchisees, dealers, customers,
21 owners, purchasers, users, parent companies, corporate affiliates, subsidiaries, (collectively
22 “Releasees”) from all claims for violations of Proposition 65 up through the Effective Date based
23 on exposure to DEHP from the Covered Products as set forth in the Notice of Violation.
24 Compliance with the terms of this Settlement constitutes compliance with Proposition 65 with
25 respect to exposures to DEHP 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 CY Top 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:
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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 CY Top Release of Cheng

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

For CY Top:

Mark E. Elliott
Pillsbury Winthrop Shaw Pittman LLP
725 South Figueroa Street, Suite 2800
Los Angeles, CA 90017
mark.elliott@pillsburylaw.com

1 Rebecca M. Lee
2 Pillsbury Winthrop Shaw Pittman LLP
3 725 South Figueroa Street, Suite 2800
4 Los Angeles, CA 90017
5 rebecca.lee@pillsburylaw.com

6 and

7 For Cheng:

8 Parker A. Smith
9 Sy and Smith, PC
10 11622 El Camino Real, Suite 100
11 San Diego, CA 92130
12 parker@sysmithlaw.com

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

15 **9. Counterparts; Facsimile Signatures**

16 9.1 This Settlement may be executed in counterparts and by facsimile, each of which
17 shall be deemed an original, and all of which, when taken together, shall constitute one and the
18 same document.

19 **10. Modification**

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

22 **11. Attorney Fees**

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

25 **12. Authorization**

26 The undersigned are authorized to execute this Settlement on behalf of their respective
27 Parties and have read, understood and agree to all of the terms and conditions of this document
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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: Kingpun Cheng

Dated: 11/27/18

By: 2018-12-6

By: *[Signature]*

Kingpun Cheng

On Behalf of CY Top, Ltd.

IT IS SO ORDERED, ADJUDGED AND DECREED:

Dated: _____

Judge of the Superior Court