

# CHENG\_SURE FIT SETTLEMENT AGREEMENT

---

## 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 Sure Fit, Inc. (hereafter "Sure Fit"). Sure Fit 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.

### 1.2 Allegations and Representations

Cheng alleges that Sure Fit sold in the State of California, Surefit Slipcover RN #15288 UPC047293465505 and "Manhattan Sheer One Rod Pocket Panel 52" X 84" UPC651348060906 (hereinafter referred to as "Covered Products"); each containing DEHP (Di[2--Ethylhexyl] Phthalate), and that such sales have not been accompanied by the requisite Proposition 65 warnings. DEHP (Di[2--Ethylhexyl] Phthalate) is listed under Proposition 65 as a chemical known to the State of California to cause cancer, birth defects and reproductive toxicity. Cheng has cited the Covered Products as examples of the slipcover zipper containers and one rod pocket panels that are the subjects of his allegations.

For purposes of this Private Settlement only, Sure Fit represents that the Covered Products are items it has distributed to retailers in the state of California.

### 1.3 Product Description

The products that are covered by this Private Settlement are defined as Surefit Slipcover RN #15288 UPC047293465505 and "Manhattan Sheer One Rod Pocket Panel 52" X 84" UPC651348060906 manufactured by Sure Fit. All such items shall be referred to herein as the "Covered Products."

### 1.4 Notices of Violation

On or about May 31, 2018 and on or about August 30, 2018, Cheng served Sure Fit and various public enforcement agencies with various documents entitled "60-Day Notice of Violation" pursuant to Health & Safety Code §25249.7(d) (the "Notices"), alleging that Sure Fit was in violation of Proposition 65 for failing to warn consumers and customers that the Covered Products exposed users in California to DEHP (Di[2--Ethylhexyl] Phthalate).

No public enforcer diligently prosecuted the claims threatened in any of the Notice within sixty days plus service time after service of the Notices to them by Cheng.

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

# CHENG\_SURE FIT SETTLEMENT AGREEMENT

---

Superior Court of California, County of San Diego has proper jurisdiction over Sure Fit as to the allegations contained in the Notices served on or about May 31, 2018 and August 30, 2018, and that venue is proper in the County of San Diego.

Nothing in this Private Settlement nor compliance with its terms, shall constitute or be construed, considered, offered or admitted as evidence of an admission or evidence of fault, wrongdoing, or liability by Sure Fit, its officers, directors, employees, or parents, subsidiaries or affiliated corporations, in any administrative or judicial proceeding or litigation in any court, agency or forum 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 Sure Fit of any fact, finding, conclusion, issue of law, or violation of law. However, this section shall not diminish or otherwise affect the obligations, responsibilities, and duties of Sure Fit 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: REFORMULATION OR WARNING

Commencing 30 days from the Effective Date, and continuing thereafter, any Covered Products that are imported, manufactured and/or shipped to be sold or offered for sale or purchase in or into California, shall be deemed to comply with Proposition 65, and be exempt from any Proposition 65 warning requirements with respect to DEHP if the Covered Product meets the standard of "Reformulated Products." "Reformulated Products" shall mean Covered Products containing less than or equal to 1,000 parts per million (0.1%) DEHP in each accessible component when analyzed pursuant to Environmental Protection Agency testing methodologies 3580A and 8270C or equivalent methodologies utilized by federal or state agencies for the purpose of determining DEHP content in a solid substance. With respect to existing Covered Products, meaning those that are currently in the channels of distribution, with distributors, retailers, and/or Sure Fit's storage facilities, Sure Fit may continue to sell-through those items. However, after the thirty (30) day period, no new Covered Products may be distributed by Sure Fit for sale to California that are not Reformulated Products or do not contain the warnings set forth in Section 2.2 below.

2.1 Warning Alternative. As an alternative to the warning exemption standard set forth in Section 2 above, commencing on the Effective Date, the Covered Products that Sure Fit ships for sale, sells or offers for sale in California shall be accompanied by a warning as described in Section 2.2 below. No Proposition 65 warning for DEHP shall be required as to any Covered Products that are already in the stream of commerce as of the Effective Date.

2.2 Warnings. Whenever a clear and reasonable warning is required under Section 2.1 for Products offered for sale in the State of California, it shall state one of the warnings described in Section 2.3 in such a conspicuous and prominent manner as to be likely to be read and understood by the consumer prior to or at the time of the sale or purchase.

## CHENG\_SURE FIT SETTLEMENT AGREEMENT

---

2.3 The Parties agree that any of the following warnings shall constitute a compliant warning for DEHP in the Covered Products:

(a) the text, "**WARNING:** This product can expose you to chemicals including Di(2-ethylhexyl)phthalate (DEHP), 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/)," accompanied by and placed to the right of a symbol consisting of a black exclamation point in a yellow equilateral triangle with a bold black outline sized to be no smaller than the word, "**WARNING**" as provided by regulations adopted on or about August 30, 2016;

OR

(b) the text "**WARNING:** Cancer and Reproductive Harm - [www.P65Warnings.ca.gov/](http://www.P65Warnings.ca.gov/)," accompanied by and placed to the right of a symbol consisting of a black exclamation point in a yellow equilateral triangle with a bold black outline sized to be no smaller than the word, "**WARNING**" as provided by regulations adopted on or about August 30, 2016.

The triangular warning symbol specified in Section 2.3 shall be in yellow with a black exclamation mark; *provided however*, the symbol may be printed in black and white if the warning symbol is not printed against a yellow background.

2.4 The Parties agree that the specifications for Compliant Warnings in this Settlement Agreement comply with Proposition 65 and its regulations as of the date of this Settlement Agreement, and with regulations adopted on or about August 30, 2016, and which became effective on August 30, 2018.

2.5 If modifications or amendments to Proposition 65 or its regulations after the Effective Date are inconsistent with, or provide warning specifications or options different from, the specifications in this Settlement Agreement, Defendant may modify the content and delivery methods of its warnings to conform to the modified or amended provisions of Proposition 65 or its regulations.

### 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 the alleged failure to warn pursuant to Proposition 65 with regard to DEHP (Di[2--Ethylhexyl] Phthalate) in the Covered Products and taking into consideration the prompt and cooperative manner with which Sure Fit has taken in correcting the alleged violation, Sure Fit shall pay a civil penalty of \$600.00 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.

Sure Fit 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., \$450.00); and (b) one check in an amount representing 25% of the total penalty (i.e., \$150) made

## CHENG\_SURE FIT SETTLEMENT AGREEMENT

---

payable directly to Cheng. Sure Fit shall mail these payments within ten (10) business days after the Effective Date at which time such payments shall be mailed to the following addresses respectively:

Mike Gyurics  
Office of Environmental Health Hazard Assessment  
Fiscal Operations  
1001 "I" Street  
Mail Stop 12-B  
Sacramento, CA 95814

Mr. Kingpun Cheng  
C/O Sy and Smith, PC  
11622 El Camino Real, Suite 100  
San Diego, 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, Sure Fit shall reimburse Cheng's counsel for fees and costs incurred as a result of investigating, bringing this matter to Sure Fit's attention, and negotiating a settlement in the public interest. Sure Fit shall pay Cheng's counsel \$11,000.00 for all attorneys' fees, expert and investigation fees and related costs associated with this matter and the Notice. Sure Fit shall issue a check for fees and cost, payable to "Sy and Smith, PC" within ten (10) business days of the Effective Date. Sure Fit shall mail this payment to Sy and Smith, PC, 11622 El Camino Real, Suite 100, San Diego, CA 92130. Sy and Smith, PC will provide Sure Fit with a W-9 form within five (5) business days of 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 Full, Final and Binding Resolution of Proposition 65 Allegations

Cheng, on behalf of himself, his past and current agents, representatives, attorneys, and successors and/or assignees, releases Sure Fit and any of its downstream or upstream distributors, wholesalers, licensors, licensees, auctioneers, retailers, manufacturers, their parent, and all subsidiaries and affiliates thereof and their respective employees, agents, and assigns, 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, including but not limited to Spencer N Enterprises, Inc., Big Lots Stores, Inc., and Bed Bath and Beyond, Inc. (collectively "Releasees") from all claims for violations of Proposition 65 up through the Effective Date based on exposure to DEHP from the Covered Products as set forth in the Notice of Violation. Compliance with the terms of this Private Settlement

# CHENG\_SURE FIT SETTLEMENT AGREEMENT

---

constitutes compliance with Proposition 65 with respect to exposures to DEHP (Di[2--Ethylhexyl] Phthalate) from the Covered Products.

In addition to the foregoing, Cheng, on behalf of himself, his past and current agents, representatives, attorneys, and successors and/or assignees, 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 Sure Fit, Spencer N. Enterprises, Inc., Big Lots Stores, Inc., Bed Bath and Beyond, Inc., or the Releasees arising prior to the Effective Date with respect to violations of Proposition 65 based upon the Covered 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 Sure Fit's Release of Cheng

Sure Fit 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 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

## CHENG\_SURE FIT SETTLEMENT AGREEMENT

---

generally, or as to the Covered Products, then Big Lots shall have no further obligations pursuant to this Private Settlement with respect to the products to the extent the Covered 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 Sure Fit:

Carol R. Brophy  
Jerome F. Pierce  
Steptoe & Johnson LLP  
1 Market Street  
Steuart Tower, Suite 1800  
San Francisco, CA 94105

and

For Cheng:

Parker A. Smith  
Sy and Smith, PC  
11622 El Camino Real, Suite 100  
San Diego, 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.

### 10. COUNTERPARTS; FACSIMILE SIGNATURES; BINDING EFFECT

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. This Private Settlement shall apply to, be binding upon, and inure to the benefit of, Cheng, Big Lots and the Releasees identified above.

### 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

## CHENG\_SURE FIT SETTLEMENT AGREEMENT

---

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.

IT IS HEREBY AGREED TO:

By: \_\_\_\_\_

Kingpun Cheng

Date: \_\_\_\_\_

2019-5-30

IT IS HEREBY AGREED TO:

By: \_\_\_\_\_

On Behalf of: Sure Fit, Inc.

Title: \_\_\_\_\_

SR VP

Date: \_\_\_\_\_

5/30/19