

Arlee Home Fashions Cheng Settlement

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 Arlee Home Fashions (hereafter "Arlee"). Arlee 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 Arlee sold in the State of California, Pawslife Reversible Sofa Cover, 69" x 69" RN 100350 UPC444600015512, containing DEHP (Di[2--Ethylhexyl] Phthalate), and that such sales have not been accompanied by 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 Pawslife Reversible Sofa Cover, 69" x 69" RN 100350 UPC444600015512 as an example of the Reversible Sofa Covers that are the subject of his allegation.

For purposes of this Private Settlement only, Arlee represents that the Pawslife Reversible Sofa Cover, 69" x 69" RN 100350 UPC444600015512 is an item it had distributed to retailers in the state of California. Arlee denies all allegations that its Products required warnings under Proposition 65.

1.3 Product Description

The products that are covered by this Private Settlement are defined as all Pawslife Reversible Sofa Cover, 69" x 69" RN 100350 UPC444600015512 sold in California. All such items shall be referred to herein as the "Products."

1.4 Notices of Violation

On or about August 30, 2018, Cheng served Arlee, Liberty Procurement (hereafter "Liberty"), Bed Bath & Beyond, Inc. ("BBB"), and various public enforcement agencies with a document entitled "60-Day Notice of Violation" pursuant to Health & Safety Code §25249.7(d) (the "Notice"), alleging that Arlee was in violation of Proposition 65 for failing to warn consumers and customers that the Products exposed users in California to DEHP (Di[2--Ethylhexyl] Phthalate). No public enforcer diligently prosecuted the claims threatened in the Notice within sixty days plus service time after service of the Notice to them by Cheng.

1.5 Stipulation as to Jurisdiction/No Admission

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 Superior Court of California, County of San Diego has proper jurisdiction over Arlee as to the allegations

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contained in the 60 day notice served on or about 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 Arlee, 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 Arlee 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 Arlee 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: WARNINGS AND REFORMULATION


Commencing on the Effective Date, Arlee shall not ship for sale, sell, or offer for sale in California, Products that are manufactured, distributed or sold by Arlee containing more than 0.1% (1,000 parts per million, or "1,000 ppm") DEHP (Di[2--Ethylhexyl] Phthalate), excluding any Products currently offered for sale, set for distribution and/or manufactured prior to the Effective Date, unless they comply with this section. Commencing on the Effective Date, Arlee shall ship for sale, sell, or offer for sale in California 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 Products shall be deemed to comply with Proposition 65 with regard to DEHP (Di[2--Ethylhexyl] Phthalate) and be exempt from any Proposition 65 warning requirements for DEHP (Di[2--Ethylhexyl] Phthalate) if the soft plastic container bag that is part of the Products meet the following criteria: the plastic container bag shall have a DEHP (Di[2--Ethylhexyl] Phthalate) content of no more than 0.1% (1,000 parts per million, or "1,000 ppm"). ("ppm"). Arlee may comply with the above requirements by relying on information obtained from its suppliers regarding the content of the plastic container bag, provided such reliance is in good faith. Obtaining test results showing that the DEHP (Di[2--Ethylhexyl] Phthalate) content is no more than 1,000 ppm, using a method of sufficient sensitivity to establish a limit of quantification (as distinguished from detection) of less than 1,000 ppm shall be deemed to establish good faith reliance.


2.2 Warning Alternative. As an alternative to reformulating the Products, commencing on the Effective Date and excluding any product currently offered for sale, set for distribution and/or manufactured prior to the Effective Date, Products that Arlee 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.

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2.3 Warnings. Where required under Section 2.2 above, Arlee shall provide Proposition 65 warnings substantially as follows:

 **WARNING:** This product can expose you to chemicals including Di(2-ethylhexyl)phthalate (DEHP), which are 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

 **WARNING:** Cancer and Reproductive Harm - www.P65Warnings.ca.gov/product.

2.4 Where utilized as an alternative to meeting the criteria set forth in Section 2.1, Arlee shall provide the warning language set forth in Section 2.3 either:

With the unit package of the Products or affixed to the Products. Such warning shall be prominently affixed to or printed on each Product's label or package or the Product itself. If printed on the label, the warning shall be contained in the same section that states other safety warnings, if any, concerning the use of the Product; Arlee may continue to utilize, on an ongoing basis, unit packaging containing not identical but substantively the same Proposition 65 warnings as those set forth in Section 2.3 above, but only to the extent such packaging materials have already been printed within ninety days after the Effective Date. Plaintiff agrees any such warnings comply with both Proposition 65 and the terms of this Settlement Agreement

2.5 The requirements for warnings, set forth in Section 2.3 above are imposed pursuant to the terms of this Settlement Agreement. The Parties recognize that these are not the exclusive methods of providing a warning under Proposition 65 and its implementing 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 Products and taking into consideration the prompt and cooperative manner with which Arlee has taken in correcting the alleged violation, including expending great resources to reformulate the Products; Arlee shall pay a civil penalty of \$1,000.00 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.

Arlee 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., \$750.00); and (b) one check in an amount representing 25% of the total penalty (i.e., \$250.00)

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made payable directly to Cheng. Arlee shall mail these payments within fifteen (15) 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, Arlee shall reimburse Cheng's counsel for fees and costs incurred as a result of investigating, bringing this matter to Arlee's attention, and negotiating a settlement in the public interest. Arlee shall pay Cheng's counsel \$19,000.00 for all attorneys' fees, expert and investigation fees and related costs associated with this matter and the Notice. Arlee shall wire said monies to "Sy and Smith, PC" within fifteen (15) days of the Effective Date. Sy and Smith, PC will provide Arlee with wire instruction and tax identification information on or before 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 Release of Arlee, Liberty, BBB, and Downstream Customers

Cheng, on behalf of himself, his past and current agents, representatives, attorneys, and successors and/or assignees, releases Arlee and of its downstream distributors, wholesalers, licensors, licensees, auctioneers, retailers (including, but not limited to, Liberty and BBB), 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 (collectively "Releasees") from all claims for violations of Proposition 65 up through the Effective Date based on exposure to DEHP from the Products as set forth in the Notice of Violation. Compliance with the terms of this Private Settlement constitutes compliance with Proposition 65 with respect to exposures to DEHP (Di[2--Ethylhexyl] Phthalate) from the Products.

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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 Arlee or the Releasees arising prior to the Effective Date with respect to violations of Proposition 65 based upon the 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 Arlee, Liberty, and BBB's Release of Cheng

Arlee, Liberty, and BBB waive 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 generally, or as to the Products, then Arlee shall have no further obligations pursuant to this Private Settlement with respect to the products to the extent the Products are so affected.

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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 Arlee:

Mortimer H. Hartwell, Esq.
Vinson & Elkins
555 Mission Street
Suite 2000
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, Arlee 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

This Private Settlement may be modified only by further written agreement of the Parties.

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13. 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: 2018-11-16

IT IS HEREBY AGREED TO:

By: 
On Behalf of: Arlee
Title: PRESIDENT

Date: Nov. 15, 2018