

Wallboard Cheng Settlement

1. INTRODUCTION

1.1 The Parties

This Settlement Agreement (hereinafter "Settlement") is hereby entered into by and between Kingpun Cheng, as an individual ("Cheng"), Dixieline Lumber Company ("Dixieline") and Wallboard Tool Co., Inc. ("Wallboard"). Wallboard 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. Wallboard is a company that employs ten or more persons and is a person in the course of doing business for purposes of the Safe Drinking Water and Toxic Enforcement Act of 1986, California Health & Safety Code section 25249.6 et seq. ("Proposition 65").

1.2 Allegations and Representations

Cheng alleges that Wallboard has offered for sale and sold in the State of California, lightweight knock-down knives, including without limitation WAL-Board Tools Lightweight Knock-Down Knife Product No. 33-024 UOC049727330243, containing Diisononyl Phthalate ("DINP") and Di-isodecyl phthalate ("DIDP"), and that such sales have not been accompanied by Proposition 65 warnings. DINP and DIDP are listed under Proposition 65 as chemicals known to the State of California to cause cancer and reproductive harm. Cheng has cited WAL-Board Tools Lightweight Knock-Down Knife Product No. 33-024 UOC049727330243 as an example of the lightweight knock-down knives that are the subject of his allegation.

For purposes of this Settlement only, Wallboard represents that WAL-Board Tools Lightweight Knock-Down Knife Product No. 33-024 UOC049727330243 is an item it distributes to retailers and consumers (online and storefront) in the state of California.

1.3 Product Description

The products that are covered by this Settlement are defined as lightweight knock-down knives including WAL-Board Tools Lightweight Knock-Down Knife Product No. 33-024 UOC049727330243 that are distributed by Wallboard or others and 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 Wallboard, Dixieline Lumber Company, 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 Wallboard was in violation of Proposition 65 for failing to warn consumers and customers that the Products exposed users in California to DINP and DIDP. To the best of the Parties' knowledge, no public enforcer has commenced and is diligently prosecuting the claims alleged in the Notice within sixty days plus service time after service of the Notice to them by Cheng.

Wallboard Cheng Settlement

1.5 Stipulation as to Jurisdiction/No Admission

Nothing in this Settlement shall be construed as an admission by Wallboard of any fact, finding, issue of law, or violation of law; nor shall compliance with this Settlement constitute or be construed as an admission by Wallboard 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 Wallboard under this Settlement.

For purposes of this Settlement only, the Parties stipulate that in the event that enforcement of this Settlement or a dispute arises regarding this Settlement, the Superior Court of California, County of San Diego has proper jurisdiction over Wallboard as to the allegations contained in the Notice, and that venue is proper in the County of Los Angeles.

1.6 Effective Date

For purposes of this Settlement, the term "Effective Date" shall mean the date this Settlement shall mean the date in which this Settlement is executed by all Parties. For the period from the Effective date up to and including ninety (90) days thereafter, Wallboard may continue to distribute and/or sell Products not in compliance with this Settlement to allow sell through of existing Products.

2. INJUNCTIVE RELIEF: WARNINGS AND REFORMULATION

Commencing on the Effective Date, Wallboard shall not ship for sale, sell, or offer for sale in California Products that are manufactured, distributed or sold by Wallboard which contain DINP or DIDP containing more than 1,000 ppm DINP or DIDP unless they comply with this section. Commencing on the Effective Date, Wallboard 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 DINP and/or DIDP and be exempt from any Proposition 65 warning requirements for DINP and/or DIDP if the phthalate components that are part of the Products meet the following criteria: the phthalate components shall have a DINP or DIDP content by weight of no more than 1,000 parts per million ("ppm") in each Accessible Component. For purposes of this Settlement Agreement, "Accessible Component" means a component of a Product that can be touched by a person during normal, intended and foreseeable use of the Product. Wallboard may comply with the above requirements by relying on information in test results obtained from its suppliers regarding the content of the components used in the Product, provided such reliance is in good faith. Obtaining test results showing that the DINP or DIDP content is no more than 1,000 ppm, using EPA testing methodologies 3580A and 8270C or 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, Products that Wallboard ships for sale, sells or offers for sale in California that do not

Wallboard Cheng Settlement

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, Wallboard shall provide Proposition 65 warnings substantially as follows:

WARNING: This product can expose you to chemicals including (DINP) Diisononyl Phthalate, which are known to the State of California to cause cancer. For more information go to www.P65Warnings.ca.gov.

OR

WARNING: This product can expose you to chemicals including (DIDP) Di-isodecyl phthalate, which are known to the State of California to cause cancer and reproductive harm. For more information go to www.P65Warnings.ca.gov.

OR

WARNING: This product contains a chemical known to the State of California to cause cancer.

OR

WARNING: This product contains a chemical known to the State of California to cause cancer and reproductive harm.

2.4 Where utilized as an alternative to meeting the criteria set forth in Section 2.1, Wallboard 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. 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 failure to warn pursuant to Proposition 65 with regard to DINP and DIDP in the Products and taking into consideration the prompt and cooperative manner with which Wallboard has taken in correcting the violation, Wallboard shall pay a civil penalty of Five Hundred Dollars (\$500.00) 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

Wallboard Cheng Settlement

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.

Wallboard 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., \$375.00); and (b) one check in an amount representing 25% of the total penalty (i.e., \$125.00) made payable directly to Cheng. Wallboard shall mail these payments within five (5) 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, Wallboard shall reimburse Cheng's counsel for fees and costs incurred as a result of investigating, bringing this matter to Wallboard's attention, and negotiating a settlement in the public interest. Wallboard shall pay Cheng's counsel Seven Thousand Dollars (\$7,000) for all attorneys' fees, expert and investigation fees and related costs associated with this matter and the Notice. Wallboard shall wire said monies to "Sy and Smith, PC" within five (5) days of the Effective Date. Sy and Smith, PC will provide Wallboard with wire instructions 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 Wallboard, Dixieline Lumber Company, and Downstream Customers

This Settlement Agreement is a full, final and binding resolution as between Cheng, on behalf of himself only, and Wallboard of any claims for violation of Proposition 65 that were or could have been asserted by Cheng on behalf of himself, his past and current agents, representatives, attorneys, successors and/or assignees only (and not on behalf of the public interest) against Wallboard and each of its downstream distributors, wholesalers, licensors, licensees, auctioneers, and each entity to whom Wallboard directly or indirectly distributes or sells the Products including, but not limited to including

Wallboard Cheng Settlement

Dixieline Lumber Company and their respective parents, subsidiaries and affiliates and their respective employees, agents, and assigns, affiliates and subsidiaries, franchisees, dealers, (collectively "Releasees") based on the alleged failure of Wallboard to warn about exposures to DINP and DIDP contained in the Products manufactured, sold and/or distributed for sale by Wallboard in California before the Effective Date as set forth in the Notice. . Compliance with the terms of this Settlement constitutes compliance with Proposition 65 with respect to exposures to DINP and DIDP from the Products.

In addition to the foregoing, Cheng, on behalf of himself, his past and current agents, representatives, attorneys, and successors and/or assignees, and not in his representative capacity, 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 Wallboard 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 Wallboard Release of Cheng

Wallboard 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 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.

8. GOVERNING LAW

Wallboard Cheng Settlement

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 Products, then Wallboard shall have no further obligations pursuant to this Settlement with respect to the products to the extent the Products are so affected.

9. NOTICES

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 Wallboard:

Timothy L. Salazar
Law Offices of Timothy L. Salazar
10614 Mldge Dr.
Bakersfield, CA 93314

and

For Cheng:

Parker A. Smith
Sy and Smith, PC
11622 El Camino Real, Suite 100
Del Mar, 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. COOPERATION

Should Wallboard and/or Dixieline receive a Prop 65 Notice and/or lawsuit from another claimant/plaintiff concerning the product identified in paragraphs 1.2 and 1.3 of this Settlement Agreement, Cheng and his attorney agree to cooperate with Wallboard and/or Dixieline in having this Settlement and terms approved by court order.

11. COUNTERPARTS; FACSIMILE SIGNATURES

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.

12. COMPLIANCE WITH HEALTH & SAFETY CODE § 25249.7(f)

Wallboard Cheng Settlement

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

13. MODIFICATION

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

14. ATTORNEY'S 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.

15. AUTHORIZATION

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.

[Signatures Follow]

IT IS HEREBY AGREED TO:-

By: 

Kingpun Cheng

Date: 3-19-19.

By: 

Parker A. Smith
Sy and Smith, PC
Attorneys for Kingpun Cheng

Date: 3/19/19.

IT IS HEREBY AGREED TO:

By: 

Debra Fults, Vice-President
On Behalf of Wallboard Tool Co. Inc.

Date: 3/20/19