

Settlement Agreement – Cheng Madison Home

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 Envogue International, LLC (hereafter “Envogue”). Cheng and Envogue 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 Envogue sold in the State of California, Envogue Shower Curtain RN 119737 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 Envogue Shower Curtain RN 119737 as an example of the One Pair of Tiers that are the subject of his allegation.

For purposes of this Private Settlement only, Envogue represents that the Shower Curtain RN 119737 is an item it had distributed to retailers in the state of California.

1.3 Product Description

The products that are covered by this Private Settlement are defined as all Shower Curtains and their packaging sold in California. All such items shall be referred to herein as the “Products.”

1.4 Notices of Violation

On or about April 16, 2019, Cheng served Envogue, The TJX Companies, Inc., Marshalls of MA, Inc., 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 Envogue 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 Envogue as to the allegations contained in the 60 day notice served on or about April 16, 2019, and that venue is proper in the County of San Diego.

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Envogue denies the material factual and legal allegations contained in the Notice and maintains that, to the best of its knowledge, all products that are or have been sold and distributed in California, including the Products, have been and are in compliance with all laws. 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 Envogue, 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 Envogue 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 Envogue 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, Envogue shall not ship for sale, sell, or offer for sale in California, Products that are manufactured, distributed or sold by Envogue 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, Envogue shall ship for sale, sell, or offer for sale in California only Products that are either (a) reformulated pursuant to Section 2.1 or (b) include a warning as provided in Section 2.3, except that Products currently offered for sale, set for distribution and/or manufactured prior to the Effective Date may sell through without a warning as provided in Section 2.3, even if not reformulated pursuant to section 2.1.

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 that is part of the Products or part of the packaging for the Products meet the following criteria: the soft plastic shall have a DEHP (Di[2--Ethylhexyl] Phthalate) content of no more than 0.1% (1,000 parts per million, or “1,000 ppm”). Envogue may comply with the above requirements by relying on information obtained from its suppliers regarding the content of the soft plastic, 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 Envogue ships for sale, sells or offers for sale in

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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, Envogue 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, Envogue 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; Envogue 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, and that, in lieu of the preceding warning content and methods set forth above, Envogue may use any warning content and method that complies with Title 27, California Code of Regulations, section 25600 et. seq., as amended August 30, 2016 and subsequently thereafter.

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 Envogue has taken in correcting the alleged violation, including expending great resources to reformulate the Products; Envogue 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

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the remaining 25% of the penalty remitted to Cheng, as provided by California Health & Safety Code § 25249.12(d) and the instructions directly below.

Envogue 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., \$150.00) made payable directly to Cheng. Envogue 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 codified at California Code of Civil Procedure § 1021.5, and principles of contract law, for all work performed through the mutual execution of this Private Settlement. Under these legal principles, Envogue shall reimburse Cheng's counsel for fees and costs incurred as a result of investigating, bringing this matter to Envogue's attention, and negotiating a settlement in the public interest. Envogue shall pay Cheng's counsel \$9,650.00 for all attorneys' fees, expert and investigation fees and related costs associated with this matter and the Notice. Envogue shall wire said monies to "Sy and Smith, PC" within ten (10) business days of the Effective Date. Sy and Smith, PC will provide Envogue 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.

It is Envogue's understanding that the commitments it has agreed to herein, and the actions to be taken by Envogue under this Private Settlement, would confer a significant benefit to the general public as set forth in California Code of Civil Procedure § 1021.5 and Cal. Admin. Code tit. 11, § 3201. As such, it is the intent of the Parties that, to the extent any other private party initiates an action alleging a violation of Proposition 65 with respect to Envogue failure to provide a warning concerning exposure to DEHP from the Products it has manufactured, distributed, sold, or offered for sale in California, or will manufacture, distribute, sell, or offer for sale in California, such private party action would not confer a significant benefit on the general public as to those Products addressed in this Private Settlement.

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5. RELEASE OF ALL CLAIMS

5.1 Release of Envogue and Downstream Customers

This Private Settlement is a full, final, and binding resolution between Cheng, on behalf of himself, his past and current agents, representatives, attorneys, and successors and/or assignees, and Envogue, of any violation of Proposition 65 that was or could have been asserted by Cheng or on behalf of Cheng's past and current agents, representatives, attorneys, successors, and/or assignees ("Releasors") for failure to provide warnings for alleged exposure to DEHP associated with the Products, and Releasors hereby release Envogue and all of its downstream distributors, wholesalers, licensors, licensees, auctioneers, retailers (including, but not limited to, The TJX Companies, Inc. and Marshalls of MA, Inc.), 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, including, without limitation, all actions and causes of action in law and in equity, all obligations, expenses (including, without limitation, all attorneys' fees, expert fees, and investigation fees and costs), damages, losses, liabilities and demands against any of the Releasees of any nature, character, or kind, whether known or unknown, suspected or unsuspected, arising out of alleged 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.

In addition to the foregoing, Cheng, on behalf of himself, his past and current agents, representatives, attorneys, and successors and/or assignees, hereby covenants not to sue and 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 Envogue or any other 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 OR RELEASING PARTY DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER FAVOR AT THE TIME OF EXECUTING THE RELEASE AND THAT, IF KNOWN BY HIM OR HER, WOULD HAVE MATERIALLY AFFECTED HIS OR HER SETTLEMENT WITH THE DEBTOR OR RELEASED PARTY.

5.2 Envogue's Release of Cheng

Envogue and The TJX Companies, Inc. 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.

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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 Envogue shall have no further obligations pursuant to this Private 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 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 Envogue:

Landon D. Bailey
Bailey PLC
641 Fulton Avenue, Suite 200
Sacramento, California 95825

and

For Cheng:

Parker A. Smith
Sy and Smith, PC
11622 El Camino Real, Suite 100
San Diego, CA 92130

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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, Envogue 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.

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
Kingpun Cheng

Date: 2019-8-15

IT IS HEREBY AGREED TO:

By: Manojchirani
On Behalf of: Envogue International, LLC
Title: OWNER & CEO

Date: 8/22/19