

# Diamond Tech Cheng Settlement

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## 1. INTRODUCTION

### 1.1 The Parties

This Settlement Agreement (hereinafter "Settlement") is hereby entered into by and between Kingpun Cheng, as an individual, ("Cheng"), on the one hand, and Diamond Tech International ("Diamond Tech"), on the other hand. Diamond Tech 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. Diamond Tech is a company 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 Diamond Tech has offered for sale, and sold in the State of California, quick-light torches including the "Fireworks Quick-Light Torch" containing lead and lead compounds, and that such sales have not been accompanied by Proposition 65 warnings. Lead is listed under Proposition 65 as a chemical known to the State of California to cause cancer, birth defects, and other reproductive harm. Cheng has cited the "Fireworks Quick-Light Torch" as an example of the quick-light torches that are the subject of his allegation.

For purposes of this Settlement only, Diamond Tech represents that the "Fireworks Quick-Light Torch" was an item it distributed 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 the "Fireworks Quick-Light Torch" that is distributed by Diamond Tech and sold in California. All such items shall be referred to herein as the "Covered Products".

### 1.4 Notices of Violation

On or about December 19, 2019, Cheng served Diamond Tech International, Hobby Lobby Stores, 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 Diamond Tech was in violation of Proposition 65 for failing to warn consumers and customers that the Covered Products exposed users in California to lead and lead compounds. To the best of the Parties' knowledge, no public enforcer has commenced and is diligently prosecuting the claims alleged in the Notice within 60 days plus service time after service of the Notice to them by Cheng.

### 1.5 Stipulation as to Jurisdiction/No Admission

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Nothing in this Settlement shall be construed as an admission by Diamond Tech 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 Diamond Tech 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 Diamond Tech 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 Diamond Tech as to the allegations contained in the Notice, and that venue is proper in the County of San Diego.

## 1.6 Effective Date

For purposes of this Settlement, the term “Effective Date” shall mean the date this Settlement is signed by all Parties.

## 2. INJUNCTIVE RELIEF

### 2.1 Defendant’s Duties

Commencing on the Effective Date, Diamond Tech shall only sell or offer for sale in California Covered Products exhibiting a warning in compliance with Proposition 65 (“Compliant Warning”) to the extent necessary.

Whenever a clear and reasonable warning is required under Section 2 for Covered Product offered for sale in the State of California, it shall state one of the warnings described in Section 2.2 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.

2.2 The Parties agree that any of the following warnings shall constitute a Compliant Warning for the Listed Chemical in the Covered Product:

- a) the text, **“WARNING: This product can expose you to chemicals including lead, 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

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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 2.2(a) and 2.2(b) shall be in yellow with a black exclamation mark; *provided however*, the symbol may be printed in black and white if the Covered Product label is not printed against a yellow background.

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 August 30, 2018.

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 failure to warn pursuant to Proposition 65 with regard to lead and lead compounds in the Covered Products and taking into consideration the prompt and cooperative manner with which Diamond Tech has undertaken correcting the violation, Diamond Tech shall pay a civil penalty of \$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 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.

Diamond Tech 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. Diamond Tech 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



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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, Diamond Tech shall reimburse Cheng's counsel for fees and costs incurred as a result of investigating, bringing this matter to Diamond Tech's attention, and negotiating a settlement in the public interest. Diamond Tech shall pay Cheng's counsel \$3,000 for all attorneys' fees, expert and investigation fees and related costs associated with this matter and the Notice. Diamond Tech shall wire said monies to "Sy and Smith, PC" within five (5) days of the Effective Date. Sy and Smith, PC will provide Diamond Tech 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 Diamond Tech, Hobby Lobby Stores, Inc., and Other Downstream Entities

This Settlement Agreement is a full, final and binding resolution as between Cheng, on behalf of himself only, and Diamond Tech, individually and on behalf of the downstream and other entities identified as Releasees herein, 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 Diamond Tech and each of its downstream distributors, wholesalers, retailers, licensors, licensees, auctioneers, and each entity to which Diamond Tech directly or indirectly distributes or sells the Covered Products including but not limited to Hobby Lobby Stores, Inc., and their respective parents, subsidiaries and affiliates and their respective employees, agents, and assigns, affiliates and subsidiaries, franchisees, and dealers (collectively "Releasees"), based on the alleged failure of Diamond Tech to warn about exposures to lead contained in the Covered Products manufactured, sold and/or distributed for sale by Diamond Tech 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 lead in 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, 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 Diamond Tech 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:

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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 DIAMOND TECH RELEASE OF CHENG

Diamond Tech 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

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 Diamond Tech shall have no further obligations pursuant to this Settlement with respect to the Covered 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 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 Diamond Tech:

David Daniels  
Controller/HR Director

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Daniels Management  
david@danielscorporation.com

and

For Cheng:

Parker A. Smith, Esq.  
Sy and Smith, PC  
11622 El Camino Real, Suite 100  
San Diego, CA 92130  
parker@sysmithlaw.com

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

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.

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

## 13. ATTORNEYS' FEES

13.1 A party who unsuccessfully brings or contests an action arising out of this Settlement shall be required to pay the prevailing party's reasonable attorneys' fees and costs.

## 14. 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:

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By: Kingpun Cheng  
Kingpun Cheng

Date: 2020-2-20

IT IS HEREBY AGREED TO:

By: [Signature]  
On Behalf of Diamond Tech International

Date: 2/20/20