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CENTER FOR ENVIRONMENTAL HEALTH

ENDORSED
FILED
ALAMEDA COUNTY

MAR 07 2019

SUE PESKO

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF ALAMEDA

CENTER FOR ENVIRONMENTAL HEALTH,
a non-profit corporation,

Plaintiff,

v.

CONN-SELMER, INC.; AMERICAN WAY
MARKETING, LLC; GUITAR CENTER, INC.;
JODYJAZZ, INC.; SAM ASH MUSIC
CORPORATION; SCHILKE MUSIC
PRODUCTS, INC.; THEO WANNE
HOLDINGS, LLC; U.S. BAND &
ORCHESTRA SUPPLIES, INC.; WARBURTON
INDUSTRIES, INC.; and DOES 1 through 100,
inclusive,

Defendants.

Case No. RG19010030

**COMPLAINT FOR INJUNCTIVE
RELIEF AND CIVIL PENALTIES**

Health & Safety Code §25249.6, *et seq.*

(Other)

1 Plaintiff Center for Environmental Health, in the public interest, based on
2 information and belief and investigation of counsel, except for information based on knowledge,
3 hereby makes the following allegations:

4 **INTRODUCTION**

5 1. This Complaint seeks to remedy Defendants’ continuing failure to warn
6 individuals in California that they are being exposed to lead and lead compounds (collectively,
7 “Lead”), chemicals known to the State of California to cause cancer and birth defects and other
8 reproductive harm. Defendants manufacture, distribute and/or sell mouthpieces used with brass
9 instruments (the “Products”). Consumers, including children and pregnant women, have been
10 and continue to be exposed to Lead when they place the Products in their mouth while playing the
11 musical instruments with which they are intended to be used.

12 2. Under California’s Proposition 65, Health & Safety Code §25249.5, *et seq.*, it is
13 unlawful for businesses to knowingly and intentionally expose individuals in California to
14 chemicals known to the State to cause cancer, birth defects, or other reproductive harm without
15 providing clear and reasonable warnings to such individuals prior to their exposure. Defendants
16 introduce Products containing significant quantities of Lead into the California marketplace,
17 thereby exposing individuals who use their Products, many of whom are children and pregnant
18 women, to Lead.

19 3. Despite the fact that Defendants expose children, pregnant women and other
20 individuals who use the Products to Lead, Defendants provide no warnings whatsoever about the
21 carcinogenic or reproductive hazards associated with Lead exposure. Defendants’ conduct thus
22 violates the warning provision of Proposition 65. Health & Safety Code §25249.6.

23 **PARTIES**

24 4. Plaintiff CENTER FOR ENVIRONMENTAL HEALTH (“CEH”) is a non-profit
25 corporation dedicated to protecting the public from environmental health hazards and toxic
26 exposures. CEH is based in Oakland, California and incorporated under the laws of the State of
27 California. CEH is a “person” within the meaning of Health & Safety Code §25249.11(a) and
28 brings this enforcement action in the public interest pursuant to Health & Safety Code

1 §25249.7(d). CEH is a nationally recognized non-profit environmental advocacy group that has
2 prosecuted a large number of Proposition 65 cases in the public interest. These cases have
3 resulted in significant public benefit, including the reformulation of thousands of products to
4 remove toxic chemicals and to make them safer. CEH also provides information to Californians
5 about the health risks associated with exposure to hazardous substances, where manufacturers and
6 other responsible parties fail to do so.

7 5. Defendant AMERICAN WAY MARKETING, LLC is a person in the course of
8 doing business within the meaning of Health & Safety Code §25249.11. Defendant AMERICAN
9 WAY MARKETING, LLC manufactures, distributes and/or sells the Products for sale or use in
10 California.

11 6. Defendant CONN-SELMER, INC. is a person in the course of doing business
12 within the meaning of Health & Safety Code §25249.11. Defendant CONN-SELMER, INC.
13 manufactures, distributes and/or sells the Products for sale or use in California.

14 7. Defendant GUITAR CENTER, INC. (“Guitar Center”) is a person in the course of
15 doing business within the meaning of Health & Safety Code §25249.11. Guitar Center is a
16 retailer that sells the Products in California. CEH’s allegations and claims against Guitar Center
17 in this action are limited to Products that are supplied to it by U.S. Band & Orchestra Supplies,
18 Inc., Curry Precision Mouthpieces, Denis Wick Products Limited, American Way Marketing,
19 LLC, Schilke Music Products, Inc., Theo Wanne Holdings, LLC, Warburton Industries, Inc., and
20 Asymmetric Mouthpiece (collectively, the “Guitar Center Suppliers”). Guitar Center has actual
21 knowledge of the Lead exposures caused by use of the Products supplied by the Guitar Center
22 Suppliers. For instance, Guitar Center continued to sell Lead-containing Products supplied by the
23 Guitar Center Suppliers more than five business days after receiving CEH’s 60-Day Notices of
24 Violation. Moreover, the Guitar Center Suppliers are companies that: (i) have fewer than ten
25 employees; and/or (ii) do not have a designated agent for service of process, or place of business,
26 in California. Thus, Guitar Center is responsible for providing clear and reasonable warnings for
27 the Products supplied by the Guitar Center Suppliers. *See* 27 Cal. Code of Regs. (“C.C.R.”)

28

1 §25600.2(e)5 & (f). As alleged herein, Guitar Center failed to provide such clear and reasonable
2 warnings.

3 8. Defendant JODYJAZZ, INC. is a person in the course of doing business within the
4 meaning of Health & Safety Code §25249.11. Defendant JODYJAZZ, INC. manufactures,
5 distributes and/or sells the Products for sale or use in California.

6 9. Defendant SAM ASH MUSIC CORPORATION (“Sam Ash”) is a person in the
7 course of doing business within the meaning of Health & Safety Code §25249.11. Sam Ash is a
8 retailer that sells the Products for sale or use in California. CEH’s allegations and claims against
9 Sam Ash in this action are limited to Products that are supplied to it by JodyJazz, Inc. Sam Ash
10 has actual knowledge of the Lead exposures caused by use of the Products supplied by JodyJazz,
11 Inc. For instance, Sam Ash continued to sell Lead-containing Products supplied by JodyJazz, Inc.
12 more than five business days after receiving CEH’s 60-Day Notice of Violation. Moreover, the
13 JodyJazz, Inc. is a company that: (i) has fewer than ten employees; and/or (ii) does not have a
14 designated agent for service of process, or place of business, in California. Thus, Sam Ash is
15 responsible for providing clear and reasonable warnings for the Products supplied by JodyJazz,
16 Inc. 27 C.C.R. §25600.2(e)5 & (f). As alleged herein, Sam Ash failed to provide such clear and
17 reasonable warnings.

18 10. Defendant SCHILKE MUSIC PRODUCTS, INC. is a person in the course of
19 doing business within the meaning of Health & Safety Code §25249.11. Defendant SCHILKE
20 MUSIC PRODUCTS, INC. manufactures, distributes and/or sells the Products for sale or use in
21 California.

22 11. Defendant THEO WANNE HOLDINGS, LLC is a person in the course of doing
23 business within the meaning of Health & Safety Code §25249.11. Defendant THEO WANNE
24 HOLDINGS, LLC manufactures, distributes and/or sells the Products for sale or use in
25 California.

26 12. Defendant U.S. BAND & ORCHESTRA SUPPLIES, INC. is a person in the
27 course of doing business within the meaning of Health & Safety Code §25249.11. Defendant
28

1 U.S. BAND & ORCHESTRA SUPPLIES, INC. manufactures, distributes and/or sells the
2 Products for sale or use in California.

3 13. Defendant Warburton Industries, Inc. is a person in the course of doing
4 business within the meaning of Health & Safety Code §25249.11. Defendant Warburton
5 Industries, Inc. manufactures, distributes and/or sells the Products for sale or use in
6 California.

7 14. DOES 1 through 100 are each a person in the course of doing business within the
8 meaning of Health & Safety Code §25249.11. DOES 1 through 100 manufacture, distribute, or
9 sell the Products for sale or use in California.

10 15. The true names of DOES 1 through 100 are either unknown to CEH at this time or
11 the applicable time period before which CEH may file a Proposition 65 action has not run. When
12 their identities are ascertained or the applicable time period before which CEH may file a
13 Proposition 65 action has run, the Complaint shall be amended to reflect their true names.

14 16. The defendants identified in paragraphs 5 through 14 and DOES 1 through 100 are
15 collectively referred to herein as “Defendants.”

16 **JURISDICTION AND VENUE**

17 17. The Court has jurisdiction over this action pursuant to Health & Safety Code
18 §25249.7, which allows enforcement in any court of competent jurisdiction, and pursuant to
19 California Constitution Article VI, Section 10, because this case is a cause not given by statute to
20 other trial courts.

21 18. This Court has jurisdiction over Defendants because each is a business entity that
22 does sufficient business, has sufficient minimum contacts in California, or otherwise intentionally
23 avails itself of the California market through the sale, marketing, or use of the Products in
24 California or by having such other contacts with California so as to render the exercise of
25 jurisdiction over it by the California courts consistent with traditional notions of fair play and
26 substantial justice.

27 19. Venue is proper in Alameda County Superior Court because one or more of the
28 violations arise in the County of Alameda.

1 **BACKGROUND FACTS**

2 20. The People of the State of California have declared by initiative under Proposition
3 65 their right “[t]o be informed about exposures to chemicals that cause cancer, birth defects, or
4 other reproductive harm.” Proposition 65, §1(b).

5 21. To effectuate this goal, Proposition 65 prohibits exposing people to chemicals
6 listed by the State of California as known to cause cancer, birth defects, or other reproductive
7 harm without a “clear and reasonable warning” unless the business responsible for the exposure
8 can prove that it fits within a statutory exemption. Health & Safety Code §25249.6 states, in
9 pertinent part:

10 No person in the course of doing business shall knowingly and
11 intentionally expose any individual to a chemical known to the state to
12 cause cancer or reproductive toxicity without first giving clear and
reasonable warning to such individual

13 22. On February 27, 1987, the State of California officially listed lead as a chemical
14 known to cause reproductive toxicity. Lead is specifically identified as a reproductive toxicant
15 under three subcategories: “developmental reproductive toxicity,” which means harm to the
16 developing fetus, “female reproductive toxicity,” which means harm to the female reproductive
17 system, and “male reproductive toxicity,” which means harm to the male reproductive system. 27
18 C.C.R. §27001(c). On February 27, 1988, one year after it was listed as a chemical known to
19 cause reproductive toxicity, lead became subject to the clear and reasonable warning requirement
20 regarding reproductive toxicants under Proposition 65. *Id.*; Health & Safety Code §25249.10(b).

21 23. On October 1, 1992, the State of California officially listed lead and lead
22 compounds as chemicals known to cause cancer. On October 1, 1993, one year after they were
23 listed as chemicals known to cause cancer, lead and lead compounds became subject to the clear
24 and reasonable warning requirement regarding carcinogens under Proposition 65. 27 C.C.R.
25 §27001(b); Health & Safety Code §25249.10(b).

26 24. There is no safe level of exposure to Lead and even minute amounts of Lead have
27 been proven harmful to children and adults. *See, e.g.*, Report of the Advisory Committee on
28 Childhood Lead Poisoning Prevention of the U.S. Centers for Disease Control and Prevention,

1 “Low Level Lead Exposure Harms Children: A Renewed Call For Primary Prevention,” January
2 4, 2012. A study performed by the California Office of Environmental Health Hazard
3 Assessment determined that exposures to Lead even at levels previously considered safe have
4 now been shown to cause adverse health effects, including reduced cognitive ability and
5 significant diminution of intellectual potential. Carlisle, J., *et al.*, “A Blood Lead Benchmark for
6 Assessing Risks from Childhood Lead Exposure,” *Journal of Environmental Science & Health*,
7 44, 2009. This conclusion is based on a meta-study of 1,333 children who participated in seven
8 international studies. *See* Lanphear, B., *et al.*, “Low-Level Environmental Lead Exposure and
9 Children’s Intellectual Function: An International Pooled Analysis,” *Environmental Health*
10 *Perspectives*, 113:7, 2005.

11 25. Young children are especially susceptible to the toxic effects of Lead. Children
12 show a greater sensitivity to Lead’s effects than do adults. Adverse health impacts from Lead
13 exposure generally occur in children at lower blood Lead levels than in adults. Children absorb
14 and retain more Lead in proportion to their weight than do adults. Young children also show a
15 greater prevalence of iron deficiency, a condition that can increase gastrointestinal absorption of
16 Lead. The body accumulates Lead over a lifetime and releases it slowly, so even small doses
17 received in childhood, over time, can cause adverse health impacts, including but not limited to
18 reproductive toxicity, later in life. For example, in times of physiological stress, such as
19 pregnancy, the body can mobilize accumulated stores of Lead in tissue and bone, thereby
20 increasing the level of Lead in the blood and increasing the risk of harm to the fetus.

21 26. Lead exposures for pregnant women are also of particular concern in light of
22 evidence that even short term lead exposures *in utero* may have long-term harmful effects. *See*,
23 *e.g.*, Hu, H., *et al.*, “Fetal Lead Exposure at Each State of Pregnancy as a Predictor of Infant
24 Mental Development,” *Environmental Health Perspectives*, 114:11, 2006; Schnaas, L., *et al.*,
25 “Reduced Intellectual Development in Children with Prenatal Lead Exposure,” *Environmental*
26 *Health Perspectives*, 114:5, 2006. Increased lead exposure during pregnancy has also been
27 shown to cause increased risk of premature birth and increased blood pressure in both the mother
28 during pregnancy and the child after birth. *See, e.g.*, Vigeh, M., *et al.*, “Blood Lead at Currently

1 Acceptable Levels May Cause Preterm Labour,” *Occupational & Environmental Medicine*,
2 68:231-234, 2010; Zhang, A., *et al.*, “Association Between Prenatal Lead Exposure and Blood
3 Pressure in Children,” *Environmental Health Perspectives*, 120:3, 2012; Wells, E., *et al.*, “Low-
4 Level Lead Exposure and Elevations in Blood Pressure During Pregnancy,” *Environmental*
5 *Health Perspectives*, 119:5, 2011.

6 27. Defendants’ Products contain sufficient quantities of Lead such that individuals,
7 including children and pregnant women, who use the Products are exposed to a significant
8 amount of Lead. The primary routes of exposure for the violations are direct ingestion when
9 consumers place the Products in their mouth while playing the musical instruments for which the
10 Products are intended to be used, and ingestion via hand-to-mouth contact after consumers touch
11 or handle the Products. These exposures occur in homes, workplaces, and everywhere else
12 throughout California where the Products are used.

13 28. No clear and reasonable warning is provided with Defendants’ Products regarding
14 the carcinogenic or reproductive hazards of Lead.

15 29. Any person acting in the public interest has standing to enforce violations of
16 Proposition 65 provided that such person has supplied the requisite public enforcers with a valid
17 60-Day Notice of Violation and such public enforcers are not diligently prosecuting the action
18 within such time. Health & Safety Code §25249.7(d).

19 30. More than sixty days prior to naming each Defendant in this lawsuit, CEH
20 provided a 60-Day “Notice of Violation” of Proposition 65 to the California Attorney General, to
21 the District Attorneys of every county in California, to the City Attorneys of every California city
22 with a population greater than 750,000 and to each of the named Defendants. In compliance with
23 Health & Safety Code §25249.7(d) and 27 C.C.R. §25903(b), each Notice included the following
24 information: (1) the name and address of each violator; (2) the statute violated; (3) the time period
25 during which violations occurred; (4) specific descriptions of the violations, including (a) the
26 routes of exposure to Lead from the Products, and (b) the specific type of Products sold and used
27 in violation of Proposition 65; and (5) the name of the specific Proposition 65-listed chemical that
28 is the subject of the violations described in each Notice.

1 31. CEH also sent a Certificate of Merit for each Notice to the California Attorney
2 General, to the District Attorneys of every county in California, to the City Attorneys of every
3 California city with a population greater than 750,000, and to each of the named Defendants. In
4 compliance with Health & Safety Code §25249.7(d) and 11 C.C.R. §3101, each Certificate
5 certified that CEH’s counsel: (1) has consulted with one or more persons with relevant and
6 appropriate experience or expertise who reviewed facts, studies, or other data regarding the
7 exposures to Lead alleged in each Notice; and (2) based on the information obtained through such
8 consultations, believes that there is a reasonable and meritorious case for a citizen enforcement
9 action based on the facts alleged in each Notice. In compliance with Health & Safety Code
10 §25249.7(d) and 11 C.C.R. §3102, each Certificate served on the Attorney General included
11 factual information – provided on a confidential basis – sufficient to establish the basis for the
12 Certificate, including the identity of the person(s) consulted by CEH’s counsel and the facts,
13 studies, or other data reviewed by such persons.

14 32. None of the public prosecutors with the authority to prosecute violations of
15 Proposition 65 has commenced or is diligently prosecuting a cause of action against Defendants
16 under Health & Safety Code §25249.5, *et seq.*, based on the claims asserted in any of CEH’s
17 Notices regarding Lead in the Products.

18 33. Defendants both know and intend that individuals, including children and pregnant
19 women, will use the Products, thus exposing them to Lead.

20 34. Nevertheless, Defendants continue to expose consumers, including children and
21 pregnant women, to Lead without prior clear and reasonable warnings regarding the carcinogenic
22 or reproductive hazards of Lead.

23 35. CEH has engaged in good-faith efforts to resolve the claims alleged herein prior to
24 filing this Complaint.

25 36. Any person “violating or threatening to violate” Proposition 65 may be enjoined in
26 any court of competent jurisdiction. Health & Safety Code §25249.7. “Threaten to violate” is
27 defined to mean “to create a condition in which there is a substantial probability that a violation
28

1 will occur.” Health & Safety Code §25249.11(e). Proposition 65 provides for civil penalties not
2 to exceed \$2,500 per day for each violation of Proposition 65.

3 **FIRST CAUSE OF ACTION**
4 **(Violations of Health & Safety Code §25249.6)**

5 37. CEH realleges and incorporates by reference as if specifically set forth herein
6 Paragraphs 1 through 36, inclusive.

7 38. By placing the Products into the stream of commerce, each Defendant is a person
8 in the course of doing business within the meaning of Health & Safety Code §25249.11.

9 39. Lead is a chemical listed by the State of California as known to cause cancer, birth
10 defects, and other reproductive harm.

11 40. Defendants know that average use of their Products will expose users of these
12 Products to Lead. Defendants intend that their Products be used in a manner that results in
13 exposures to Lead from these Products.

14 41. Defendants have failed, and continue to fail, to provide clear and reasonable
15 warnings regarding the carcinogenicity and reproductive toxicity of Lead to consumers of their
16 Products.

17 42. By committing the acts alleged above, Defendants have at all times relevant to
18 this Complaint violated Proposition 65 by knowingly and intentionally exposing individuals to
19 Lead without first giving clear and reasonable warnings to such individuals regarding the
20 carcinogenicity and reproductive toxicity of Lead.

21 **PRAYER FOR RELIEF**

22 CEH prays for judgment against Defendants as follows:

23 1. That the Court, pursuant to Health & Safety Code §25249.7(a), preliminarily and
24 permanently enjoin Defendants from offering the Products for sale in California without either
25 reformulating the Products such that no Proposition 65 warnings are required or providing prior
26 clear and reasonable warnings, as CEH shall specify in further application to the Court;

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2. That the Court, pursuant to Health & Safety Code §25249.7(b), assess civil penalties against each of the Defendants in the amount of \$2,500 per day for each violation of Proposition 65 according to proof;

3. That the Court, pursuant to Health & Safety Code §25249.7(a), order Defendants to take action to stop ongoing unwarned exposures to Lead resulting from use of Products sold by Defendants, as CEH shall specify in further application to the Court;

4. That the Court, pursuant to Code of Civil Procedure §1021.5 or any other applicable theory, grant CEH its reasonable attorneys' fees and costs of suit; and

5. That the Court grant such other and further relief as may be just and proper.

Dated: March 6, 2019

Respectfully submitted,

LEXINGTON LAW GROUP



Mark N. Todzo
Attorneys for Plaintiff
CENTER FOR ENVIRONMENTAL HEALTH