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CENTER FOR ENVIRONMENTAL HEALTH

ENDORSED
FILED
ALAMEDA COUNTY

MAR 20 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., *et al.*,

Defendants.

Case No. RG19010030

**FIRST AMENDED 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 DENIS WICK PRODUCTS LIMITED is a person in the course of
15 doing business within the meaning of Health & Safety Code §25249.11. Defendant DENIS
16 WICK PRODUCTS LIMITED manufactures, distributes and/or sells the Products for sale or use
17 in California.

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

22 9. Defendant GUITAR CENTER, INC. (“Guitar Center”) is a person in the course of
23 doing business within the meaning of Health & Safety Code §25249.11. Guitar Center is a
24 retailer that sells the Products in California. CEH’s allegations and claims against Guitar Center
25 in this action are limited to Products that are supplied to it by U.S. Band & Orchestra Supplies,
26 Inc., Curry Precision Mouthpieces, Denis Wick Products Limited, American Way Marketing,
27 LLC, Schilke Music Products, Inc., Theo Wanne Holdings, LLC, Warburton Industries, Inc., and
28 Asymmetric Mouthpiece (collectively, the “Guitar Center Suppliers”). Guitar Center has actual

1 knowledge of the Lead exposures caused by use of the Products supplied by the Guitar Center
2 Suppliers. For instance, Guitar Center continued to sell Lead-containing Products supplied by the
3 Guitar Center Suppliers more than five business days after receiving CEH's 60-Day Notices of
4 Violation. Moreover, the Guitar Center Suppliers are companies that: (i) have fewer than ten
5 employees; and/or (ii) do not have a designated agent for service of process, or place of business,
6 in California. Thus, Guitar Center is responsible for providing clear and reasonable warnings for
7 the Products supplied by the Guitar Center Suppliers. *See* 27 Cal. Code of Regs. ("C.C.R.")
8 §25600.2(e)5 & (f). As alleged herein, Guitar Center failed to provide such clear and reasonable
9 warnings.

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

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

25 12. Defendant SCHILKE MUSIC PRODUCTS, INC. is a person in the course of
26 doing business within the meaning of Health & Safety Code §25249.11. Defendant SCHILKE
27 MUSIC PRODUCTS, INC. manufactures, distributes and/or sells the Products for sale or use in
28 California.

1 13. Defendant THEO WANNE HOLDINGS, LLC is a person in the course of doing
2 business within the meaning of Health & Safety Code §25249.11. Defendant THEO WANNE
3 HOLDINGS, LLC manufactures, distributes and/or sells the Products for sale or use in
4 California.

5 14. Defendant U.S. BAND & ORCHESTRA SUPPLIES, INC. is a person in the
6 course of doing business within the meaning of Health & Safety Code §25249.11. Defendant
7 U.S. BAND & ORCHESTRA SUPPLIES, INC. manufactures, distributes and/or sells the
8 Products for sale or use in California.

9 15. Defendant WARBURTON INDUSTRIES, INC. is a person in the course of doing
10 business within the meaning of Health & Safety Code §25249.11. Defendant WARBURTON
11 INDUSTRIES, INC. manufactures, distributes and/or sells the Products for sale or use in
12 California.

13 16. Defendant WOODWIND & BRASSWIND, INC. (“Woodwind”) is a person in the
14 course of doing business within the meaning of Health & Safety Code §25249.11. Woodwind is
15 a retailer that sells the Products for sale or use in California. CEH’s allegations and claims
16 against Woodwind in this action are limited to Products that are supplied to it by Best Brass
17 Corporation. Woodwind has actual knowledge of the Lead exposures caused by use of the
18 Products supplied by Best Brass Corporation. For instance, Woodwind continued to sell Lead-
19 containing Products supplied by Best Brass Corporation more than five business days after
20 receiving CEH’s 60-Day Notice of Violation. Moreover, Best Brass Corporation is a company
21 that: (i) has fewer than ten employees; and/or (ii) does not have a designated agent for service of
22 process, or place of business, in California. Thus, Woodwind is responsible for providing clear
23 and reasonable warnings for the Products supplied by Best Brass Corporation. 27 C.C.R.
24 §25600.2(e)5 & (f). As alleged herein, Woodwind failed to provide such clear and reasonable
25 warnings.

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

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

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

13 26. On October 1, 1992, the State of California officially listed lead and lead
14 compounds as chemicals known to cause cancer. On October 1, 1993, one year after they were
15 listed as chemicals known to cause cancer, lead and lead compounds became subject to the clear
16 and reasonable warning requirement regarding carcinogens under Proposition 65. 27 C.C.R.
17 §27001(b); Health & Safety Code §25249.10(b).

18 27. There is no safe level of exposure to Lead and even minute amounts of Lead have
19 been proven harmful to children and adults. *See, e.g.*, Report of the Advisory Committee on
20 Childhood Lead Poisoning Prevention of the U.S. Centers for Disease Control and Prevention,
21 “Low Level Lead Exposure Harms Children: A Renewed Call For Primary Prevention,” January
22 4, 2012. A study performed by the California Office of Environmental Health Hazard
23 Assessment determined that exposures to Lead even at levels previously considered safe have
24 now been shown to cause adverse health effects, including reduced cognitive ability and
25 significant diminution of intellectual potential. Carlisle, J., *et al.*, “A Blood Lead Benchmark for
26 Assessing Risks from Childhood Lead Exposure,” *Journal of Environmental Science & Health*,
27 44, 2009. This conclusion is based on a meta-study of 1,333 children who participated in seven
28 international studies. *See* Lanphear, B., *et al.*, “Low-Level Environmental Lead Exposure and

1 Children's Intellectual Function: An International Pooled Analysis," *Environmental Health*
2 *Perspectives*, 113:7, 2005.

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

13 29. Lead exposures for pregnant women are also of particular concern in light of
14 evidence that even short term lead exposures *in utero* may have long-term harmful effects. *See,*
15 *e.g.,* Hu, H., *et al.*, "Fetal Lead Exposure at Each State of Pregnancy as a Predictor of Infant
16 Mental Development," *Environmental Health Perspectives*, 114:11, 2006; Schnaas, L., *et al.*,
17 "Reduced Intellectual Development in Children with Prenatal Lead Exposure," *Environmental*
18 *Health Perspectives*, 114:5, 2006. Increased lead exposure during pregnancy has also been
19 shown to cause increased risk of premature birth and increased blood pressure in both the mother
20 during pregnancy and the child after birth. *See, e.g.,* Vigeh, M., *et al.*, "Blood Lead at Currently
21 Acceptable Levels May Cause Preterm Labour," *Occupational & Environmental Medicine*,
22 68:231-234, 2010; Zhang, A., *et al.*, "Association Between Prenatal Lead Exposure and Blood
23 Pressure in Children," *Environmental Health Perspectives*, 120:3, 2012; Wells, E., *et al.*, "Low-
24 Level Lead Exposure and Elevations in Blood Pressure During Pregnancy," *Environmental*
25 *Health Perspectives*, 119:5, 2011.

26 30. Defendants' Products contain sufficient quantities of Lead such that individuals,
27 including children and pregnant women, who use the Products are exposed to a significant
28 amount of Lead. The primary routes of exposure for the violations are direct ingestion when

1 consumers place the Products in their mouth while playing the musical instruments for which the
2 Products are intended to be used, and ingestion via hand-to-mouth contact after consumers touch
3 or handle the Products. These exposures occur in homes, workplaces, and everywhere else
4 throughout California where the Products are used.

5 31. No clear and reasonable warning is provided with Defendants' Products regarding
6 the carcinogenic or reproductive hazards of Lead.

7 32. Any person acting in the public interest has standing to enforce violations of
8 Proposition 65 provided that such person has supplied the requisite public enforcers with a valid
9 60-Day Notice of Violation and such public enforcers are not diligently prosecuting the action
10 within such time. Health & Safety Code §25249.7(d).

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

21 34. CEH also sent a Certificate of Merit for each Notice to the California Attorney
22 General, to the District Attorneys of every county in California, to the City Attorneys of every
23 California city with a population greater than 750,000, and to each of the named Defendants. In
24 compliance with Health & Safety Code §25249.7(d) and 11 C.C.R. §3101, each Certificate
25 certified that CEH's counsel: (1) has consulted with one or more persons with relevant and
26 appropriate experience or expertise who reviewed facts, studies, or other data regarding the
27 exposures to Lead alleged in each Notice; and (2) based on the information obtained through such
28 consultations, believes that there is a reasonable and meritorious case for a citizen enforcement

1 action based on the facts alleged in each Notice. In compliance with Health & Safety Code
2 §25249.7(d) and 11 C.C.R. §3102, each Certificate served on the Attorney General included
3 factual information – provided on a confidential basis – sufficient to establish the basis for the
4 Certificate, including the identity of the person(s) consulted by CEH’s counsel and the facts,
5 studies, or other data reviewed by such persons.

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

10 36. Defendants both know and intend that individuals, including children and pregnant
11 women, will use the Products, thus exposing them to Lead.

12 37. Nevertheless, Defendants continue to expose consumers, including children and
13 pregnant women, to Lead without prior clear and reasonable warnings regarding the carcinogenic
14 or reproductive hazards of Lead.

15 38. CEH has engaged in good-faith efforts to resolve the claims alleged herein prior to
16 filing this Complaint.

17 39. Any person “violating or threatening to violate” Proposition 65 may be enjoined in
18 any court of competent jurisdiction. Health & Safety Code §25249.7. “Threaten to violate” is
19 defined to mean “to create a condition in which there is a substantial probability that a violation
20 will occur.” Health & Safety Code §25249.11(e). Proposition 65 provides for civil penalties not
21 to exceed \$2,500 per day for each violation of Proposition 65.

22 **FIRST CAUSE OF ACTION**
23 **(Violations of Health & Safety Code §25249.6)**

24 40. CEH realleges and incorporates by reference as if specifically set forth herein
25 Paragraphs 1 through 39, inclusive.

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

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Dated: March 20, 2019

Respectfully submitted,

LEXINGTON LAW GROUP



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CENTER FOR ENVIRONMENTAL HEALTH