

ENDORSED
FILED
ALAMEDA COUNTY

DEC 05 2019

CLERK OF THE SUPERIOR COURT
BY: TIM LOPEZ
Deputy

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF ALAMEDA

CENTER FOR ENVIRONMENTAL HEALTH,

Plaintiff,

v.

CONN-SELMER, INC., *et al.*,

Defendants.

Case No. RG 19010030,

Partial T.C.
~~PROPOSED~~ CONSENT JUDGMENT
AS TO AMERICAN WAY
MARKETING, LLC

1. INTRODUCTION

1.1 The Parties to this Consent Judgment are the Center for Environmental Health, a California non-profit corporation ("CEH") and American Way Marketing, LLC ("Settling Defendant"). CEH and Settling Defendant (the "Parties") enter into this Consent Judgment to settle certain claims asserted by CEH against Settling Defendant as set forth in the operative complaint ("Complaint") in the above-captioned matter.

1.2 On or about December 21, 2018, CEH provided a 60-day Notice of Violation of

1 Proposition 65 to the California Attorney General, the District Attorneys of every county in
2 California, the City Attorneys of every California city with a population greater than 750,000,
3 and to Settling Defendant, alleging that Settling Defendant violated Proposition 65 by exposing
4 persons to lead contained in mouthpieces used with brass instruments without first providing a
5 clear and reasonable Proposition 65 warning.

6 1.3 Settling Defendant is a corporation or other business entity that does not
7 manufacture, but distributes, sells, and offers for sale Covered Products that are sold in the State
8 of California and has done so in the past.

9 1.4 On March 7, 2019, CEH filed the original complaint in the above-captioned matter
10 naming Settling Defendant as a defendant.

11 1.5 For purposes of this Consent Judgment only, the Parties stipulate that this Court
12 has jurisdiction over the allegations of violations contained in the Complaint and personal
13 jurisdiction over Settling Defendant as to the acts alleged in the Complaint, that venue is proper
14 in the County of Alameda, and that this Court has jurisdiction to enter this Consent Judgment as a
15 full and final resolution of all claims which were or could have been raised in the Complaint
16 based on the facts alleged therein with respect to Covered Products manufactured, distributed,
17 and/or sold by Settling Defendant.

18 1.6 Nothing in this Consent Judgment is or shall be construed as an admission by the
19 Parties of any fact, conclusion of law, issue of law, allegation, or violation of law, nor shall
20 compliance with this Consent Judgment constitute or be construed as an admission by the Parties
21 of any fact, conclusion of law, issue of law, allegation, or violation of law. Nothing in this
22 Consent Judgment shall prejudice, waive or impair any right, remedy, argument, or defense the
23 Parties may have in any other pending or future legal proceedings. This Consent Judgment is the
24 product of negotiation and compromise and is accepted by the Parties solely for purposes of
25 settling, compromising, and resolving issues disputed in this Action.

26 2. DEFINITIONS

27 2.1 The "Complaint" means the operative complaint in the above-captioned matter.

1 2.2 “Covered Products” means brass mouthpieces used with musical instruments.

2 2.3 “Effective Date” means the date on which notice of entry of this Consent
3 Judgment by the Court is served upon Settling Defendant.


4 2.4 “Reformulation Level” means 100 parts per million (“ppm”) lead.

5 **3. INJUNCTIVE RELIEF**

6 3.1 **Specification to Suppliers.** No more than 30 days after the Effective Date,
7 Settling Defendant shall inform its suppliers of Covered Products that Settling Defendant will not
8 sell such products in California without the warning statement set forth in Section 3.2.1 unless
9 such Covered Products are reformulated to contain lead in amounts below the Reformulation
10 Level.

11 3.2 **Clear and Reasonable Warnings.**

12 3.2.1 **Warnings.** Subject to Section 3.2.2, as of ninety (90) days after the
13 Effective Date, no Covered Product may be sold or offered for sale directly by Settling Defendant
14 in California unless it meets the Reformulation Level or contains a Clear and Reasonable
15 Warning that complies with the provisions of this Section 3.2. Settling Defendant may use either
16 of the following warning statements to comply with this Section:

17 3.2.1.1  **WARNING:** This product can expose you to lead, which is
18 known to the State of California to cause cancer and birth defects or other reproductive harm.
19 For more information go to www.P65Warnings.ca.gov.

20 3.2.1.2  **WARNING:** Cancer and Reproductive Harm -
21 www.P65Warnings.ca.gov.

22 The word “**WARNING:**” shall be displayed in all capital letters and bold print and shall be
23 preceded by the yellow warning triangle symbol depicted above. This warning statement shall be
24 prominently displayed on the outer packaging of the Covered Product and shall be displayed with
25 such conspicuousness, as compared with other words, statements or designs as to render it likely
26 to be seen, read and understood by an ordinary individual prior to sale. For internet sites, or
27 catalogs owned and controlled by Settling Defendant, the warning statement shall be displayed in

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such a manner that it is likely to be read and understood by an ordinary individual prior to the authorization of or actual payment.

3.2.2 Sale of Covered Products Without a Warning. As of ninety (90) days after the Effective Date, Settling Defendant may only sell a Covered Product in California without a warning if Settling Defendant has received a certification from its supplier of the Covered Product together with a test report from an independent and certified laboratory that the specific Covered Product contains lead in an amount that is below the Reformulation Level. Further, CEH expressly understands that Covered Products are already in the stream of commerce and are not under Settling Defendant's control, and that such Covered Products may remain in the stream of commerce for several years.

4. ENFORCEMENT

4.1 General Enforcement Provisions. Either party may, by motion or application for an order to show cause before this Court, enforce the provisions contained in this Consent Judgment. It is the express intent of the Parties that this enforcement provision applies to the payment obligations set forth in Section 5 below in addition to all other obligations under this Consent Judgment. Prior to bringing any motion or application to enforce the requirements of Section 3 above, CEH shall provide Settling Defendant with a notice setting forth the factual basis for the alleged violation of Section 3 ("Notice of Violation"). The Parties shall then meet and confer regarding the basis for CEH's anticipated motion or application in an attempt to resolve it informally. Should such attempts at informal resolution fail, CEH may file its enforcement motion or application. The prevailing party on any motion to enforce this Consent Judgment shall be entitled to its fees and costs associated with the motion. In addition, should CEH prevail on a motion to enforce the Consent Judgment, Settling Defendant shall pay \$15,000 to be allocated between a civil penalty and Additional Settlement Payment as follows: 57% to civil penalties and 43% to ASP. In the event that Settling Defendant does not contest CEH's Notice of Violation, Settling Defendant shall pay \$5,000 to be divided between a Civil Penalty and Additional Settlement Payment in accordance with the allocation set forth above.

1 **5. PAYMENTS**

2 **5.1 Payments by Settling Defendant.** Within ten (10) calendar days of the Effective
3 Date, Settling Defendant shall pay the total sum of \$40,000.00 as a settlement payment as further
4 set forth in this Section.

5 **5.2 Allocation of Payments.** The total settlement amount for Settling Defendant shall
6 be paid in five (5) separate checks in the amounts specified below and delivered as set forth
7 below. The funds paid by Settling Defendant shall be allocated as set forth below between the
8 following categories and made payable as follows:

9 **5.2.1 \$5,360 as a civil penalty pursuant to Health & Safety Code § 25249.7(b).**
10 The civil penalty payment shall be apportioned in accordance with Health & Safety Code §
11 25249.12 (25% to CEH and 75% to the State of California’s Office of Environmental Health
12 Hazard Assessment (“OEHHA”)). Accordingly, the OEHHA portion of the civil penalty
13 payment for \$4,020 shall be made payable to OEHHA and associated with taxpayer identification
14 number 68-0284486. This payment shall be delivered as follows:

15 For United States Postal Service Delivery:

16 Attn: Mike Gyurics
17 Fiscal Operations Branch Chief
18 Office of Environmental Health Hazard Assessment
 P.O. Box 4010, MS #19B
 Sacramento, CA 95812-4010

19 For Non-United States Postal Service Delivery:

20 Attn: Mike Gyurics
21 Fiscal Operations Branch Chief
22 Office of Environmental Health Hazard Assessment
 1001 I Street, MS #19B
 Sacramento, CA 95814

23 The CEH portion of the civil penalty payment for \$1,340 shall be made
24 Payable to the Center for Environmental Health and associated with taxpayer identification
25 number 94-3251981. This payment shall be delivered to Lexington Law Group, 503 Divisadero
26 Street, San Francisco, CA 94117.

1 5.2.2 \$4,000 as an Additional Settlement Payment (“ASP”) to CEH pursuant to
2 Health & Safety Code § 25249.7(b), and California Code of Regulations, Title 11, § 3204. CEH
3 intends to place these funds in CEH’s Toxics and Youth Fund and use them to: (1) support CEH
4 programs and activities that seek to educate the public about lead and other toxic chemicals in
5 consumer products that are marketed to youth; (2) expand its use of social media to communicate
6 with Californians about the risks of exposures to lead in the products they and their children use
7 and about ways to reduce those exposures; and (3) work with industries that market products to
8 youth to reduce exposures to lead and other toxic chemicals, and thereby reduce the public health
9 impacts and risks of exposures to lead and other toxic chemicals in consumer products that are
10 marketed to youth in California. CEH shall obtain and maintain adequate records to document
11 that ASPs are spent on these activities and CEH agrees to provide such documentation to the
12 Attorney General and Settling Defendant within thirty (30) days of any request from the Attorney
13 General or Settling Defendant. The payment pursuant to this Section shall be made payable to
14 the Center for Environmental Health and associated with taxpayer identification number 94-
15 3251981. This payment shall be delivered to Lexington Law Group (“LLG”), 503 Divisadero
16 Street, San Francisco, CA 94117.

17 5.2.3 \$30,640 as reimbursement for CEH’s attorneys’ fees and costs incurred as
18 a result of investigating, bringing this matter to Settling Defendant’s attention, litigating and
19 negotiating and obtaining judicial approval of this Consent Judgment in the public interest. The
20 attorneys’ fees and cost reimbursement shall be made in two separate checks as follows: (a)
21 \$25,460 payable to the Lexington Law Group and associated with taxpayer identification number
22 94-3317175; and (b) \$5,180 payable to the Center for Environmental Health and associated with
23 taxpayer identification number 94-3251981. Both of these payments shall be delivered to
24 Lexington Law Group, 503 Divisadero Street, San Francisco, CA 94117.

25 5.2.4 To summarize, Settling Defendant shall deliver checks made out to the
26 payees and in the amounts set forth below:
27
28

Payee	Type	Amount	Deliver To
OEHHA	Penalty	\$4,020	OEHHA per Section 5.2.1
Center For Environmental Health	Penalty	\$1,340	LLG
Center For Environmental Health	ASP	\$4,000	LLG
Lexington Law Group	Fee and Cost	\$25,460	LLG
Center For Environmental Health	Fee and Cost	\$5,180	LLG

6. MODIFICATION AND DISPUTE RESOLUTION

6.1 **Modification.** This Consent Judgment may be modified from time to time by express written agreement of the Parties, with the approval of the Court, or by an order of this Court upon motion and in accordance with law.

6.2 **Notice; Meet and Confer.** Any Party seeking to modify this Consent Judgment shall attempt in good faith to meet and confer with all affected Parties prior to filing a motion to modify the Consent Judgment.

7. CLAIMS COVERED AND RELEASE

7.1 Provided that Settling Defendant complies in full with its obligations under Section 5, Payments, hereof, this Consent Judgment is a full, final, and binding resolution between CEH on behalf of itself and the public interest and Settling Defendant and its parents, subsidiaries, affiliated entities that are under common ownership, directors, officers, employees, agents, shareholders, successors, assigns, and attorneys (“Defendant Releasees”), and all entities to which Settling Defendant directly or indirectly distributes or sells Covered Products, including but not limited to distributors, wholesalers, customers, retailers, franchisees, licensors, and licensees (“Downstream Defendant Releasees”), of any violation of Proposition 65 based on failure to warn about alleged exposure to lead contained in Covered Products that were sold, distributed or offered for sale by Settling Defendant prior to or within ninety (90) days after the Effective Date. It is the Parties’ intent that this Consent Judgment shall have preclusive effect such that no other person or entity purporting to act in the public interest shall be permitted to

1 pursue and/or take any action with respect to any violation of Proposition 65 that was alleged in
2 the Notice of Violation dated December 21, 2018 or the Complaint.

3 7.2 Provided that Settling Defendant complies in full with its obligations under
4 Section 5, Payments, hereof, CEH, for itself, its agents, successors and assigns, releases, waives,
5 and forever discharges any and all claims against Settling Defendant, Defendant Releasees, and
6 Downstream Defendant Releasees arising from any violation of Proposition 65 or any other
7 statutory or common law claims that have been or could have been asserted by CEH individually
8 or in the public interest regarding the failure to warn about exposure to lead arising in connection
9 with Covered Products distributed, sold, or offered for sale by Settling Defendant prior to or
10 within ninety (90) days after the Effective Date. With respect to the foregoing waivers and
11 releases in this paragraph, CEH hereby specifically waives any and all rights and benefits which
12 it now has, or in the future may have, conferred by virtue of the provisions of Section 1542 of the
13 California Civil Code, which provides as follows:

14
15 A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS THAT THE
16 CREDITOR OR RELEASING PARTY DOES NOT KNOW OR SUSPECT TO
17 EXIST IN HIS OR HER FAVOR AT THE TIME OF EXECUTING THE
18 RELEASE AND THAT, IF KNOWN BY HIM OR HER, WOULD HAVE
MATERIALLY AFFECTED HIS OR HER SETTLEMENT WITH THE
DEBTOR OR RELEASED PARTY.

19 7.3 Provided that Settling Defendant complies in full with its obligations under
20 Section 5, Payments, hereof, then compliance with the terms of this Consent Judgment by
21 Settling Defendant shall constitute compliance with Proposition 65 by Settling Defendant and
22 Defendant Releasees with respect to any alleged failure to warn about lead in Covered Products
23 distributed, sold, or offered for sale by Settling Defendant.

24 **8. PROVISION OF NOTICE**

25 8.1 When CEH is entitled to receive any notice under this Consent Judgment, the
26 notice shall be sent by first class and electronic mail to:

1 Mark N. Todzo
2 Lexington Law Group
3 503 Divisadero Street
4 San Francisco, CA 94117
5 mtodzo@lexlawgroup.com

6 8.2 When Settling Defendant is entitled to receive any notice under this Consent
7 Judgment, the notice shall be sent by first class and electronic mail to:

8 Sarah Quiter
9 Hunton Andrews Kurth LLP
10 50 California Street
11 Suite 1700
12 San Francisco, CA 94111
13 SQuiter@hunton.com

14 With a copy to:

15 Malcolm Weiss
16 Hunton Andrews Kurth LLP
17 550 South Hope Street, Suite 2000
18 Los Angeles, CA 90071
19 mweiss@HuntonAK.com

20 Any Party may modify the person and/or address to whom the notice is to be sent by sending the
21 other Party notice by first class and electronic mail.

22 **9. COURT APPROVAL**

23 9.1 This Consent Judgment shall become effective upon the Effective Date.

24 9.2 If this Consent Judgment is not entered by the Court within one (1) year after
25 being signed by CEH and Settling Defendant, it shall be of no force or effect and shall not be
26 introduced into evidence or otherwise used in any proceeding for any purpose other than to allow
27 the Court to determine if there was a material breach of Section 9.1.

28 **10. GOVERNING LAW AND CONSTRUCTION**

10.1 The terms of this Consent Judgment shall be governed by the laws of the State of
California.

11. ATTORNEYS' FEES

11.1 A Party who unsuccessfully brings or contests an action, motion, or application

1 arising out of this Consent Judgment shall be required to pay the prevailing Party's reasonable
2 attorneys' fees and costs.

3 11.2 Nothing in this Section 11 shall preclude a Party from seeking an award of
4 sanctions pursuant to law.

5 **12. ENTIRE AGREEMENT**

6 12.1 This Consent Judgment contains the sole and entire agreement and understanding
7 of the Parties with respect to the entire subject matter hereof, and any and all prior discussions,
8 negotiations, commitments, or understandings related thereto, if any, are hereby merged herein
9 and therein. There are no warranties, representations, or other agreements between the Parties
10 except as expressly set forth herein. No representations, oral or otherwise, express or implied,
11 other than those specifically referred to in this Consent Judgment have been made by any Party
12 hereto. No other agreements not specifically contained or referenced herein, oral or otherwise,
13 shall be deemed to exist or to bind any of the Parties hereto. Any agreements specifically
14 contained or referenced herein, oral or otherwise, shall be deemed to exist or to bind any of the
15 Parties hereto only to the extent that they are expressly incorporated herein. No supplementation,
16 modification, waiver, or termination of this Consent Judgment shall be binding unless executed in
17 writing by the Party to be bound thereby. No waiver of any of the provisions of this Consent
18 Judgment shall be deemed or shall constitute a waiver of any of the other provisions hereof
19 whether or not similar, nor shall such waiver constitute a continuing waiver.

20 **13. RETENTION OF JURISDICTION**

21 13.1 This Court shall retain jurisdiction of this matter to implement or modify the
22 Consent Judgment.

23 **14. AUTHORITY TO STIPULATE TO CONSENT JUDGMENT**

24 14.1 Each signatory to this Consent Judgment certifies that he or she is fully authorized
25 by the Party he or she represents to stipulate to this Consent Judgment and to enter into and
26 execute the Consent Judgment on behalf of the Party represented and legally to bind that Party.

27 **15. NO EFFECT ON OTHER SETTLEMENTS**

15.1 Nothing in this Consent Judgment shall preclude CEH from resolving any claim against an entity that is not Settling Defendant on terms that are different from those contained in this Consent Judgment.


16. EXECUTION IN COUNTERPARTS

16.1 The stipulations to this Consent Judgment may be executed in counterparts and by means of facsimile or portable document format (pdf), which taken together shall be deemed to constitute one document.

IT IS SO STIPULATED:

Dated: July 25, 2019

CENTER FOR ENVIRONMENTAL HEALTH


Signature

Michael Green
Printed Name

CEO
Title

1 Dated: July 25, 2019

AMERICAN WAY MARKETING, LLC

Signature

Printed Name

Title

11 IT IS SO ORDERED, ADJUDGED,
12 AND DECREED.

13 Dated: 12/5/14

Judge of the Superior Court

JO-LYNNE Q. LEE