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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,)	Case No. RG 19010030
)	
Plaintiff,)	<i>Pl.</i> <i>Partial J.C.</i>
)	[PROPOSED] CONSENT JUDGMENT
v.)	RE: U.S. BAND & ORCHESTRA
CONN-SELMER, INC., <i>et al.</i> ,)	SUPPLIES, INC.
)	
Defendants.)	
)	
)	

1. INTRODUCTION

1.1 The Parties to this Consent Judgment are the Center for Environmental Health, a California non-profit corporation ("CEH") and U.S. Band & Orchestra Supplies, Inc. ("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 manufactures,
7 distributes, sells, or offers for sale Covered Products that are sold in the State of California or has
8 done so in the past.

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

11 1.5 On May 31, 2019, Settling Defendant filed an Answer to the Amended Complaint,
12 denying the claims alleged in the Amended Complaint. In addition, Settling Defendant
13 performed tests and analysis to measure the exposure to lead in connection with the use of its
14 mouthpieces. The test results showed that the mouthpieces are under the safe harbor level of
15 migration set by Proposition 65.

16 1.6 For purposes of this Consent Judgment only, the Parties stipulate that this Court
17 has jurisdiction over the allegations of violations contained in the Complaint and personal
18 jurisdiction over Settling Defendant as to the acts alleged in the Complaint, that venue is proper
19 in the County of Alameda, and that this Court has jurisdiction to enter and enforce this Consent
20 Judgment as a full and final resolution of all claims which were or could have been raised in the
21 Complaint based on the facts alleged therein with respect to Covered Products manufactured,
22 distributed, and/or sold by Settling Defendant.

23 1.7 Nothing in this Consent Judgment is or shall be construed as an admission by the
24 Parties of any fact, conclusion of law, issue of law, or violation of law, nor shall compliance with
25 the Consent Judgment constitute or be construed as an admission by the Parties of any fact,
26 conclusion of law, issue of law, or violation of law. Nothing in this Consent Judgment shall
27 prejudice, waive or impair any right, remedy, argument, or defense the Parties may have in any
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1 other pending or future legal proceedings. This Consent Judgment is the product of negotiation
2 and compromise and is accepted by the Parties solely for purposes of settling, compromising, and
3 resolving issues disputed in this Action.

4 **2. DEFINITIONS**

5 2.1 The “Complaint” means the operative complaint in the above-captioned matter.

6 2.2 “Covered Products” means mouthpieces used with brass musical instruments.

7 2.3 “Effective Date” means the date on which notice of entry of this Consent
8 Judgment by the Court is served upon Settling Defendant.

9 2.4 “Reformulation Level” means 100 parts per million (“ppm”) lead.

10 **3. INJUNCTIVE RELIEF**

11 3.1 **Reformulation of Covered Products.** Commencing nine months after the
12 Effective Date (the “Compliance Date”), Settling Defendant shall not purchase, manufacture,
13 ship, sell, or offer for sale Covered Products that will be sold or offered for sale in California that
14 contain lead in excess the Reformulation Level.

15 3.2 **Clear and Reasonable Warnings.**

16 3.2.1 **Interim Warnings.** As of the Effective Date and up until the
17 Compliance Date, no Covered Product purchased, manufactured, shipped, sold or offered for sale
18 by Settling Defendant may be sold or offered for sale in California unless it contains a Clear and
19 Reasonable Warning that complies with the provisions of this Section 3.2. A Clear and
20 Reasonable Warning under this Agreement shall state:



23 **WARNING**

24 This product can expose you to lead, which is known to the State of California
25 to cause cancer, birth defects and other reproductive harm. For more
26 information go to www.P65Warnings.ca.gov.

27 OR

28



WARNING: Cancer and Reproductive Harm -

www.P65Warnings.ca.gov.

The word “**WARNING**” shall be displayed in all capital letters and bold print and shall be preceded by the yellow warning triangle symbol depicted above. This warning statement shall be prominently displayed on the outer packaging of the Covered Product and shall be displayed with such conspicuousness, as compared with other words, statements or designs as to render it likely to be seen, read and understood by an ordinary individual prior to sale. The warning statement must be set off from other surrounding information and enclosed in a text box. For internet, catalog or any other sale where the consumer is not physically present, the warning statement shall be displayed in 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 **Election to Warn Permanently.** If Settling Defendant is unable to comply with the Reformulation provision set forth in Section 3.1 or otherwise elect to permanently avail themselves of the warning option provided by this Section 3.2, Settling Defendant shall provide written notice to CEH prior to the Compliance Date, and Settling Defendant concurrently shall make the additional payment specified in Section 5.2.4 below. Settling Defendant shall then continue to provide warnings in accordance with this Section 3.2 for each Covered Product sold in California.

4. ENFORCEMENT

4.1 **General Enforcement Provisions.** CEH may, by motion or application for an order to show cause before this Court, enforce the terms and conditions contained in 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 to resolve it informally. Should

1 such attempt at informal resolution fail, CEH may file its enforcement motion or application.
2 The prevailing party on any motion to enforce this Consent Judgment shall be entitled to its fees
3 and costs associated with the motion. In addition, should CEH prevail on a motion to enforce the
4 Consent Judgment, Settling Defendant shall pay \$10,000 to be allocated between a civil penalty
5 and Additional Settlement Payment as follows: 57% to civil penalties and 43% to ASP. If
6 Settling Defendant does not contest CEH's Notice of Violation, Settling Defendant shall pay
7 \$3,500 to be divided between a Civil Penalty and Additional Settlement Payment in accordance
8 with the allocation set forth above. In no event shall Settling Defendant be obligated to pay more
9 than \$25,000 for Notices of Violation not successfully contested or withdrawn in any calendar
10 year irrespective of the total number of Notices of Violation issued.

11 **5. PAYMENTS**

12 5.1 **Payments by Settling Defendant.** Within five (5) calendar days of the Effective
13 Date, Settling Defendant shall pay the total sum of \$38,000 as a settlement payment as further set
14 forth in this Section.

15 5.2 **Allocation of Payments.** The total settlement amount for Settling Defendant shall
16 be paid in five (5) separate checks in the amounts specified below and delivered as set forth
17 below. Any failure by Settling Defendant to comply with the payment terms herein shall be
18 subject to a joint and several stipulated late fee to be paid by Settling Defendant in the amount of
19 \$100 for each day the full payment is not received after the applicable payment due date set forth
20 in Section 5.1. The late fees required under this Section shall be recoverable, together with
21 reasonable attorneys' fees, in an enforcement proceeding brought pursuant to Section 4 of this
22 Consent Judgment. The funds paid by Settling Defendant shall be allocated as set forth below
23 between the following categories and made payable as follows:

24 5.2.1 \$4,000 as a civil penalty pursuant to Health & Safety Code § 25249.7(b).
25 The civil penalty payment shall be apportioned in accordance with Health & Safety Code §
26 25249.12 (25% to CEH and 75% to the State of California's Office of Environmental Health
27 Hazard Assessment ("OEHHA")). Accordingly, the OEHHA portion of the civil penalty

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1 payment for \$3,000 shall be made payable to OEHHA and associated with taxpayer identification
2 number 68-0284486. This payment shall be delivered as follows:

3 For United States Postal Service Delivery:

4 Attn: Mike Gyurics
5 Fiscal Operations Branch Chief
6 Office of Environmental Health Hazard Assessment
7 P.O. Box 4010, MS #19B
8 Sacramento, CA 95812-4010

9 For Non-United States Postal Service Delivery:

10 Attn: Mike Gyurics
11 Fiscal Operations Branch Chief
12 Office of Environmental Health Hazard Assessment
13 1001 I Street, MS #19B
14 Sacramento, CA 95814

15 The CEH portion of the civil penalty payment for \$1,000 shall be made
16 payable to the Center for Environmental Health and associated with taxpayer identification
17 number 94-3251981. This payment shall be delivered to Lexington Law Group, 503 Divisadero
18 Street, San Francisco, CA 94117.

19 5.2.2 \$2,960 as an Additional Settlement Payment (“ASP”) to CEH pursuant to
20 Health & Safety Code § 25249.7(b), and California Code of Regulations, Title 11, § 3204. CEH
21 intends to place these funds in CEH’s Toxics and Youth Fund and use them to: (1) support CEH
22 programs and activities that seek to educate the public about lead and other toxic chemicals in
23 consumer products that are marketed to youth; (2) expand its use of social media to communicate
24 with Californians about the risks of exposures to lead in the products they and their children use
25 and about ways to reduce those exposures; and (3) work with industries that market products to
26 youth to reduce exposures to lead and other toxic chemicals, and thereby reduce the public health
27 impacts and risks of exposures to lead and other toxic chemicals in consumer products that are
28 marketed to youth in California. CEH shall obtain and maintain adequate records to document
that ASPs are spent on these activities and CEH agrees to provide such documentation to the
Attorney General within thirty (30) days of any request from the Attorney General. The payment

1 pursuant to this Section shall be made payable to the Center for Environmental Health and
2 associated with taxpayer identification number 94-3251981. This payment shall be delivered to
3 Lexington Law Group, 503 Divisadero Street, San Francisco, CA 94117.

4 5.2.3 \$31,040 as a reimbursement of a portion of CEH's reasonable attorneys'
5 fees and costs. The attorneys' fees and cost reimbursement shall be made in two separate checks
6 as follows: (a) \$26,100 payable to the Lexington Law Group and associated with taxpayer
7 identification number 94-3317175; and (b) \$4,940 payable to the Center for Environmental
8 Health and associated with taxpayer identification number 94-3251981. Both of these payments
9 shall be delivered to Lexington Law Group, 503 Divisadero Street, San Francisco, CA 94117.

10 5.2.4 To summarize, Settling Defendant shall deliver checks made out to the
11 payees and in the amounts set forth below:

13 Payee	Type	Amount	Deliver To
14 OEHHA	Penalty	\$3,000	OEHHA per Section 5.2.1
15 Center For Environmental Health	Penalty	\$1,000	LLG
16 Center For Environmental Health	ASP	\$2,960	LLG
17 Lexington Law Group	Fee and Cost	\$26,100	LLG
18 Center For Environmental Health	Fee and Cost	\$4,940	LLG

19
20 5.1.1 If Settling Defendant avails itself of the permanent warning option
21 provided for by Section 3.2 Settling Defendant shall make an additional payment of \$12,000 to
22 be split between a civil penalty and ASP as set forth herein, concurrently with its written notice as
23 provided in Section 3.2. Of the additional payment, \$6,840 shall be a civil penalty, which shall
24 be apportioned in accordance with Health & Safety Code § 25249.12 (25% to CEH and 75% to
25 the State of California's Office of Environmental Health Hazard Assessment ("OEHHA")).
26 Accordingly, the OEHHA portion of the civil penalty payment for \$5,130 shall be made payable
27 to OEHHA, associated with taxpayer identification number 68-0284486, and sent to the OEHHA
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1 address set forth in section 5.2.1 above. The CEH portion of the additional civil penalty payment
2 for \$1,710 shall be made payable to the Center for Environmental Health and associated with
3 taxpayer identification number 94-3251981. The remaining \$5,160 of the additional payment
4 shall be made payable to the Center for Environmental Health and associated with taxpayer
5 identification number 94-3251981 and shall be used as set forth in Section 5.2.2 above. Both
6 payments to CEH shall be delivered to Lexington Law Group, 503 Divisadero Street, San
7 Francisco, CA 94117.

8 5.2.5 Notwithstanding the provisions of the Enforcement of Judgments Law
9 and Code of Civil Procedure § 780.160, in the event that Settling Defendant does not comply
10 fully with its payment obligations under this Section 5, in addition to any other enforcement
11 mechanism available to CEH, CEH may seek an order requiring Settling Defendant to submit to a
12 debtor’s examination in the Alameda County Superior Court. In the event that Settling
13 Defendant fails to submit to any such debtor’s examination ordered by the Court, CEH may seek
14 an order holding Settling Defendant in contempt of Court.

15 **6. MODIFICATION AND DISPUTE RESOLUTION**

16 6.1 **Modification.** This Consent Judgment may be modified from time to time by
17 express written agreement of the Parties, with the approval of the Court, or by an order of this
18 Court upon motion and in accordance with law.

19 6.2 **Notice; Meet and Confer.** Any Party seeking to modify this Consent Judgment
20 shall attempt in good faith to meet and confer with all affected Parties prior to filing a motion to
21 modify the Consent Judgment.

22 **7. CLAIMS COVERED AND RELEASE**

23 7.1 Provided that Settling Defendant complies in full with its obligations under
24 Section 5 hereof, this Consent Judgment is a full, final, and binding resolution between CEH on
25 behalf of itself and the public interest and Settling Defendant and its parents, subsidiaries,
26 affiliated entities that are under common ownership, directors, officers, employees, agents,
27 shareholders, successors, assigns, and attorneys (“Defendant Releasees”), and all entities to

1 which Settling Defendant directly or indirectly distribute or sell Covered Products, including but
2 not limited to distributors, wholesalers, customers, retailers, franchisees, licensors, and licensees
3 (“Downstream Defendant Releasees”), of any violation of Proposition 65 based on failure to warn
4 about alleged exposure to lead contained in Covered Products that were sold, distributed or
5 offered for sale by Settling Defendant prior to the Compliance Date.

6 7.2 Provided that Settling Defendant complies in full with its obligations under
7 Section 5 hereof, CEH, for itself, its agents, successors and assigns, releases, waives, and forever
8 discharges any and all claims against Settling Defendant, Defendant Releasees, and Downstream
9 Defendant Releasees arising from any violation of Proposition 65 or any other statutory or
10 common law claims that have been or could have been asserted by CEH individually or in the
11 public interest regarding the failure to warn about exposure to lead arising in connection with
12 Covered Products manufactured, distributed or sold by Settling Defendant prior to the
13 Compliance Date.

14 7.3 Provided that Settling Defendant complies in full with its obligations under
15 Section 5 hereof, compliance with the terms of this Consent Judgment by Settling Defendant
16 shall constitute compliance with Proposition 65 by Settling Defendant, Defendant Releasees, and
17 Downstream Defendant Releasees with respect to any alleged failure to warn about lead in
18 Covered Products manufactured, distributed or sold by Settling Defendant after the Compliance
19 Date.

20 **8. PROVISION OF NOTICE**

21 8.1 When CEH is entitled to receive any notice under this Consent Judgment, the
22 notice shall be sent by first class and electronic mail to:

23 Mark N. Todzo
24 Lexington Law Group
25 503 Divisadero Street
26 San Francisco, CA 94117
27 mtodzo@lexlawgroup.com

28 8.2 When Settling Defendant is entitled to receive any notice under this Consent
Judgment, the notice shall be sent by first class and electronic mail to:

1 Ronald Kravitz
2 Shepard Finkelman Miller & Shah LLP
3 201 Filbert Street, Suite 201
4 San Francisco, CA 94133
5 rkravitz@sfmslaw.com

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

8 **9. COURT APPROVAL**

9 9.1 This Consent Judgment shall become effective upon the date signed by CEH and
10 Settling Defendant, whichever is later, provided however, that CEH shall prepare and file a
11 Motion for Approval of this Consent Judgment and Settling Defendant shall support entry of this
12 Consent Judgment by the Court.

13 9.2 If the California Attorney General objects to any term in this Consent Judgment,
14 the Parties shall use their best efforts to resolve the concern in a timely manner, and, if possible,
15 prior to the hearing on the Motion for Court Approval.

16 9.3 This Consent Judgment shall not be effective until it is approved by the Court and
17 notice of entry of this Consent Judgment by the Court is served upon the Settling Defendant. If,
18 despite the Parties' best efforts, the Court does not approve this settlement and enter a Consent
19 Judgment thereon within nine (9) months of the date of the Consent Judgment is executed by the
20 Parties, the Parties shall meet to try to resolve the matter amicably. If such resolution cannot be
21 reached, the settlement between the Parties will be deemed null and void and of no force or effect
22 and shall not be introduced into evidence or otherwise used in any proceeding for any purpose
23 other than to allow the Court to determine if there was a material breach of Section 9.1.

24 **10. GOVERNING LAW AND CONSTRUCTION**

25 10.1 The terms of this Consent Judgment shall be governed by the laws of the State of
26 California.

27 **11. ATTORNEYS' FEES**

28 11.1 A Party who unsuccessfully brings or contests an action, motion, or application
arising out of this Consent Judgment shall be required to pay the prevailing Party's reasonable

1 attorneys' fees and costs.

2 11.2 Nothing in this Section 11 shall preclude a Party from seeking an award of
3 sanctions pursuant to law.

4 **12. ENTIRE AGREEMENT**

5 12.1 This Consent Judgment contains the sole and entire agreement and understanding
6 of the Parties with respect to the entire subject matter hereof, and any and all prior discussions,
7 negotiations, commitments, or understandings related thereto, if any, are hereby merged herein
8 and therein. There are no warranties, representations, or other agreements between the Parties
9 except as expressly set forth herein. No representations, oral or otherwise, express or implied,
10 other than those specifically referred to in this Consent Judgment have been made by any Party
11 hereto. No other agreements not specifically contained or referenced herein, oral or otherwise,
12 shall be deemed to exist or to bind any of the Parties hereto. Any agreements specifically
13 contained or referenced herein, oral or otherwise, shall be deemed to exist or to bind any of the
14 Parties hereto only to the extent that they are expressly incorporated herein. No supplementation,
15 modification, waiver, or termination of this Consent Judgment shall be binding unless executed in
16 writing by the Party to be bound thereby. No waiver of any of the provisions of this Consent
17 Judgment shall be deemed or shall constitute a waiver of any of the other provisions hereof
18 whether or not similar, nor shall such waiver constitute a continuing waiver.

19 **13. RETENTION OF JURISDICTION**

20 13.1 This Court shall retain jurisdiction of this matter to implement or modify the
21 Consent Judgment.

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

23 14.1 Each signatory to this Consent Judgment certifies that he or she is fully authorized
24 by the Party he or she represents to stipulate to this Consent Judgment and to enter into and
25 execute the Consent Judgment on behalf of the Party represented and legally to bind that Party.

26 **15. MOST FAVORED NATION**

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15.1 If CEH enters into any consent Judgment (“Settlement Document”) with any other similarly situated entity with respect to mouthpieces used with brass musical instruments, then CEH shall as soon as practicable provide notice thereof to Settling Defendant. If Settling Defendant believes that such Settlement Document contains provisions that are more favorable to the defendant than those contained herein, Settling Defendant may seek to modify this Consent Judgment in accordance with the provisions of Section 6 above. To avoid doubt, nothing in this Section 15.1 will apply to a monetary remedy contained or offered in any Settlement Document. 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 ORDERED, ADJUDGED,
AND DECREED.**

Dated: 12/5/19



Judge of the Superior Court

JO-LYNNE Q. LEE

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IT IS SO STIPULATED:

Dated: <u>9/12</u> , 2019	CENTER FOR ENVIRONMENTAL HEALTH  _____ Signature <u>Michael Green</u> _____ Printed Name <u>CEO</u> _____ Title
Dated: _____, 2019	U.S. BAND & ORCHESTRA SUPPLIES, INC. _____ Signature _____ Printed Name _____ Title

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IT IS SO STIPULATED:

Dated: _____, 2019	CENTER FOR ENVIRONMENTAL HEALTH _____ Signature _____ Printed Name _____ Title
Dated: <u>SEP 6</u> , 2019	U.S. BAND & ORCHESTRA SUPPLIES, INC.  _____ Signature <u>MARK RAGIN</u> _____ Printed Name <u>CEO - PRESIDENT</u> _____ Title