

Am



21258536

FILED
ALAMEDA COUNTY

JUN 17 2020

CLERK OF THE SUPERIOR COURT

By [Signature]
Deputy

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

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

mc Partial mc
~~PROPOSED~~ CONSENT JUDGMENT
AS TO SCHILKE MUSIC PRODUCTS,
INC.

1. INTRODUCTION

1.1 The Parties to this Consent Judgment are the Center for Environmental Health, a California non-profit corporation ("CEH") and Schilke Music Products, 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 mouthpieces used with brass instruments without first providing a clear
5 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 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 and enforce this Consent
15 Judgment as a full and final resolution of all claims which were or could have been raised in the
16 Complaint based on the facts alleged therein with respect to Covered Products manufactured,
17 distributed, 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, or violation of law, nor shall compliance with
20 the Consent Judgment constitute or be construed as an admission by the Parties of any fact,
21 conclusion of law, issue of law, or violation of law. Nothing in this Consent Judgment shall
22 prejudice, waive or impair any right, remedy, argument, or defense the Parties may have in any
23 other pending or future legal proceedings. This Consent Judgment is the product of negotiation
24 and compromise and is accepted by the Parties solely for purposes of settling, compromising, and
25 resolving issues disputed in this Action.

26 **2. DEFINITIONS**

27 2.1 The "Complaint" means the operative complaint in the above-captioned matter.
28

1 2.2 "Covered Products" means mouthpieces used with brass 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 when analyzed
5 pursuant to a scientifically reliable digest method, such as CPSC-CH-E1001-08.3, "Standard
6 Operating Procedure for Determining Total Lead (Pb) in Children's Metal Products (Including
7 Children's Metal Jewelry), Revision November 15, 2012."

8 **3. INJUNCTIVE RELIEF**

9 3.1 **Reformulation of Covered Products.** Commencing one year after the Effective
10 Date (the "Compliance Date"), Settling Defendant shall not purchase, manufacture, ship, sell, or
11 offer for sale Covered Products that will be sold or offered for sale in California that contain lead
12 in excess of the Reformulation Level, unless those Covered Products provide a Clear and
13 Reasonable Warning as defined by Section 3.2.

14 3.2 **Clear and Reasonable Warnings.**

15 3.2.1 **Interim Warnings.** As of the Effective Date and up until the
16 Compliance Date, no Covered Product purchased, manufactured, shipped, sold or offered for sale
17 by Settling Defendant may be sold or offered for sale in the State of California unless it contains
18 a Clear and Reasonable Warning that complies with the provisions of this Section 3.2 and Title
19 27 California Code of Regulations section 25601, et seq. A Clear and Reasonable Warning under
20 this Agreement shall state either:

21  **WARNING:** This product can expose you to chemicals including lead, which
22 is known to the State of California to cause cancer, birth defects and other
23 reproductive harm. For more information go to www.P65Warnings.ca.gov.

24 or:

25  **WARNING:** Cancer and Reproductive Harm – www.P65Warnings.ca.gov.

26
27 The word "WARNING" shall be displayed in all capital letters and bold print and shall be

28

1 preceded by the yellow warning triangle symbol depicted above, provided however, the
2 symbol may be printed in black and white if the Covered Product label is produced without
3 using the color yellow. This warning statement shall be prominently displayed on the outer
4 packaging of the Covered Product and shall be displayed with such conspicuousness, as
5 compared with other words, statements or designs as to render it likely to be seen, read and
6 understood by an ordinary individual prior to sale. For internet, catalog or any other sale
7 where the consumer is not physically present, the warning statement shall be displayed in
8 such a manner that it is likely to be read and understood by an ordinary individual prior to
9 the authorization of or actual payment. The Parties agree that the specifications for Clear
10 and Reasonable Warnings in this Consent Judgment comply with Proposition 65 and its
11 regulations as of the date of this Consent Judgment, and with regulations adopted on or about
12 August 30, 2016 and which became effective August 30, 2018. If modifications or
13 amendments to Proposition 65 or its regulations after the Effective Date are inconsistent
14 with, or provide warning specifications or options different from, the specifications in this
15 Consent Decree, Settling Defendant may seek to modify the content and delivery methods of
16 its warnings to conform to the modified or amended provisions of Proposition 65 or its
17 regulations in accordance with Section 4.1 below.

18 **3.2.2 Election to Warn Permanently.** If Settling Defendant is unable to
19 comply with the Reformulation provision set forth in Section 3.1 or otherwise elect to
20 permanently avail themselves of the warning option provided by this Section 3.2, Settling
21 Defendant shall provide written notice to CEH prior to the Compliance Date, and Settling
22 Defendant concurrently shall make the additional payment specified in Section 5.2.4 below.
23 Settling Defendant shall then continue to provide warnings in accordance with this Section 3.2
24 for each Covered Product sold in California.

25 **4. ENFORCEMENT**

26 **4.1 General Enforcement Provisions.** CEH may, by motion or application for an
27 order to show cause before this Court, enforce the terms and conditions contained in this Consent
28

1 Judgment. Prior to bringing any motion or application to enforce the requirements of Section 3
2 above, CEH shall provide Settling Defendant with a notice setting forth the factual basis for the
3 alleged violation of Section 3 ("Notice of Violation"). The Parties shall then meet and confer
4 regarding the basis for CEH's anticipated motion or application in an attempt to resolve it
5 informally. Should such attempts at informal resolution fail, CEH may file its enforcement
6 motion or application. The prevailing party on any motion to enforce this Consent Judgment
7 shall be entitled to its fees and costs associated with the motion. In addition, should CEH prevail
8 on a motion to enforce the Consent Judgment, Settling Defendant shall pay \$15,000 to be
9 allocated between a civil penalty and Additional Settlement Payment as follows: 57% to civil
10 penalties and 43% to ASP. In the event that Settling Defendant does not contest CEH's Notice of
11 Violation, Settling Defendant shall pay \$5,000 to be divided between a Civil Penalty and
12 Additional Settlement Payment in accordance with the allocation set forth above.

13 **5. PAYMENTS**

14 **5.1 Payments by Settling Defendant.** Within five (5) calendar days of the Effective
15 Date, Settling Defendant shall pay the total sum of \$32,500 settlement payment as further set
16 forth in this Section.

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

26 **5.2.1** \$3,200 as a civil penalty pursuant to Health & Safety Code § 25249.7(b).
27 The civil penalty payment shall be apportioned in accordance with Health & Safety Code §

28

1 25249.12 (25% to CEH and 75% to the State of California’s Office of Environmental Health
2 Hazard Assessment (“OEHHA”). Accordingly, the OEHHA portion of the civil penalty
3 payment for \$2,400 shall be made payable to OEHHA and associated with taxpayer identification
4 number 68-0284486. This payment shall be delivered as follows:

5 For United States Postal Service Delivery:

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

11 For Non-United States Postal Service Delivery:

12 Attn: Mike Gyurics
13 Fiscal Operations Branch Chief
14 Office of Environmental Health Hazard Assessment
15 1001 I Street, MS #19B
16 Sacramento, CA 95814

17 The CEH portion of the civil penalty payment for \$800 shall be made
18 payable to the Center for Environmental Health and associated with taxpayer identification
19 number 94-3251981. This payment shall be delivered to Lexington Law Group, 503 Divisadero
20 Street, San Francisco, CA 94117.

21 5.2.2 \$2,360 as an Additional Settlement Payment (“ASP”) to CEH pursuant to
22 Health & Safety Code § 25249.7(b), and California Code of Regulations, Title 11, § 3204. CEH
23 intends to place these funds in CEH’s Toxics and Youth Fund and use them to: (1) support CEH
24 programs and activities that seek to educate the public about lead and other toxic chemicals in
25 consumer products that are marketed to youth; (2) expand its use of social media to communicate
26 with Californians about the risks of exposures to lead in the products they and their children use
27 and about ways to reduce those exposures; and (3) work with industries that market products to
28 youth to reduce exposures to lead and other toxic chemicals, and thereby reduce the public health
impacts and risks of exposures to lead and other toxic chemicals in consumer products that are
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

1 Attorney General within thirty (30) days of any request from the Attorney General. The payment
 2 pursuant to this Section shall be made payable to the Center for Environmental Health and
 3 associated with taxpayer identification number 94-3251981. This payment shall be delivered to
 4 Lexington Law Group, 503 Divisadero Street, San Francisco, CA 94117.

5 5.2.3 \$26,940 as a reimbursement of a portion of CEH’s reasonable attorneys’
 6 fees and costs. The attorneys’ fees and cost reimbursement shall be made in two separate checks
 7 as follows: (a) \$22,660 payable to the Lexington Law Group and associated with taxpayer
 8 identification number 94-3317175; and (b) \$4,280 payable to the Center for Environmental
 9 Health and associated with taxpayer identification number 94-3251981. Both of these payments
 10 shall be delivered to Lexington Law Group, 503 Divisadero Street, San Francisco, CA 94117.

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

14 Payee	Type	Amount	Deliver To
15 OEHHA	Penalty	\$2,400	OEHHA per Section 5.2.1
16 Center For Environmental Health	Penalty	\$800	LLG
17 Center For Environmental Health	ASP	\$2,360	LLG
18 Lexington Law Group	Fee and Cost	\$22,660	LLG
19 Center For Environmental Health	Fee and Cost	\$4,280	LLG

20 5.2.1 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 \$12,500 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, \$7,200 shall be a civil penalty, apportioned
 24 in accordance with Health & Safety Code § 25249.12 (25% to CEH and 75% to the State of
 25 California’s Office of Environmental Health Hazard Assessment (“OEHHA”). Accordingly, the
 26 OEHHA portion of the civil penalty payment of \$5,400 shall be made payable to OEHHA,
 27 associated with taxpayer identification number 68-0284486, and sent to the OEHHA address set
 28

1 forth in section 5.2.1 above. The CEH portion of the additional civil penalty payment of \$1,800
2 shall be made payable to the Center for Environmental Health and associated with taxpayer
3 identification number 94-3251981. The remaining \$5,300 of the additional payment shall be
4 made payable to the Center for Environmental Health and associated with taxpayer identification
5 number 94-3251981 and shall be used as set forth in Section 5.2.2 above. Both payments to CEH
6 shall be delivered to Lexington Law Group, 503 Divisadero Street, San Francisco, CA 94117.

7 5.2.2 Notwithstanding the provisions of the Enforcement of Judgments Law
8 and Code of Civil Procedure § 780.160, in the event that Settling Defendant does not comply
9 fully with its payment obligations under this Section 5, in addition to any other enforcement
10 mechanism available to CEH, CEH may seek an order requiring Settling Defendant to submit to a
11 debtor's examination in the Alameda County Superior Court. In the event that Settling
12 Defendant fails to submit to any such debtor's examination ordered by the Court, CEH may seek
13 an order holding Settling Defendant in contempt of Court.

14 6. MODIFICATION AND DISPUTE RESOLUTION

15 6.1 **Modification.** This Consent Judgment may be modified from time to time by
16 express written agreement of the Parties, with the approval of the Court, or by an order of this
17 Court upon motion and in accordance with law.

18 6.2 **Notice; Meet and Confer.** Any Party seeking to modify this Consent Judgment
19 shall attempt in good faith to meet and confer with all affected Parties prior to filing a motion to
20 modify the Consent Judgment.

21 7. CLAIMS COVERED AND RELEASE

22 7.1 Provided that Settling Defendant complies in full with its obligations under
23 Section 5 hereof, this Consent Judgment is a full, final, and binding resolution between CEH on
24 behalf of itself and the public interest and Settling Defendant and its parents, subsidiaries,
25 affiliated entities that are under common ownership, directors, officers, employees, agents,
26 shareholders, successors, assigns, and attorneys ("Defendant Releasees"), and all entities to
27 which Settling Defendant directly or indirectly distribute or sell Covered Products, including but

28

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

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

13 7.3 Provided that Settling Defendant complies in full with its obligations under
14 Section 5 hereof, compliance with the terms of this Consent Judgment by Settling Defendant
15 shall constitute compliance with Proposition 65 by Settling Defendant, Defendant Releasees, and
16 Downstream Defendant Releasees with respect to any alleged failure to warn about lead in
17 Covered Products manufactured, distributed or sold by Settling Defendant after the Compliance
18 Date.

19 **8. PROVISION OF NOTICE**

20 8.1 When CEH is entitled to receive any notice under this Consent Judgment, the
21 notice shall be sent by first class and electronic mail to:

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

27 8.2 When Settling Defendant is entitled to receive any notice under this Consent
28 Judgment, the notice shall be sent by first class and electronic mail to:

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Emily Lyons
Husch Blackwell LLP
750 17th Street NW, Suite 900
Washington, DC 20006
emily.lyons@huschblackwell.com

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

9. COURT APPROVAL

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

9.2 If this Consent Judgment is not entered by the Court, it shall be of no force or effect and shall not be introduced into evidence or otherwise used in any proceeding for any purpose other than to allow the Court to determine if there was a material breach of Section 9.1.

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

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

12. ENTIRE AGREEMENT

12.1 This Consent Judgment contains the sole and entire agreement and understanding of the Parties with respect to the entire subject matter hereof, and any and all prior discussions, negotiations, commitments, or understandings related thereto, if any, are hereby merged herein and therein. There are no warranties, representations, or other agreements between the Parties

1 except as expressly set forth herein. No representations, oral or otherwise, express or implied,
2 other than those specifically referred to in this Consent Judgment have been made by any Party
3 hereto. No other agreements not specifically contained or referenced herein, oral or otherwise,
4 shall be deemed to exist or to bind any of the Parties hereto. Any agreements specifically
5 contained or referenced herein, oral or otherwise, shall be deemed to exist or to bind any of the
6 Parties hereto only to the extent that they are expressly incorporated herein. No supplementation,
7 modification, waiver, or termination of this Consent Judgment shall be binding unless executed in
8 writing by the Party to be bound thereby. No waiver of any of the provisions of this Consent
9 Judgment shall be deemed or shall constitute a waiver of any of the other provisions hereof
10 whether or not similar, nor shall such waiver constitute a continuing waiver.

11 **13. RETENTION OF JURISDICTION**

12 13.1 This Court shall retain jurisdiction of this matter to implement or modify the
13 Consent Judgment.

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

15 14.1 Each signatory to this Consent Judgment certifies that he or she is fully authorized
16 by the Party he or she represents to stipulate to this Consent Judgment and to enter into and
17 execute the Consent Judgment on behalf of the Party represented and legally to bind that Party.

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

19 15.1 Nothing in this Consent Judgment shall preclude CEH from resolving any claim
20 against an entity that is not Settling Defendant on terms that are different from those contained in
21 this Consent Judgment.

22 **16. EXECUTION IN COUNTERPARTS**

23 16.1 The stipulations to this Consent Judgment may be executed in counterparts and by
24 means of facsimile or portable document format (pdf), which taken together shall be deemed to
25 constitute one document.

26
27
28

1 **IT IS SO ORDERED, ADJUDGED,**
2 **AND DECREED.**

3
4 Dated: _____
5 _____
6 Judge of the Superior Court

7 **IT IS SO STIPULATED:**

<p>8 Dated: _____, 2019</p> <p>9</p> <p>10</p> <p>11</p> <p>12</p> <p>13</p> <p>14</p> <p>15</p> <p>16</p>	<p>CENTER FOR ENVIRONMENTAL HEALTH</p> <p>_____ Signature</p> <p>_____ Printed Name</p> <p>_____ Title</p>
--	---

<p>17</p> <p>18 Dated: <u>October 1st</u>, 2019</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p> <p>26</p>	<p>SCHILKE MUSIC PRODUCTS, INC.</p> <p> Signature</p> <p>_____ Andrew Naumann Printed Name</p> <p>_____ Owner/President Title</p>
---	--

27
28

1 **IT IS SO ORDERED, ADJUDGED,**
2 **AND DECREED.**

3
4 Dated: June 17 2020



Judge of the Superior Court
RICHARD L. SEBOLT

6 **IT IS SO STIPULATED:**

7
8 Dated: 10/3, 2019

CENTER FOR ENVIRONMENTAL HEALTH

9
10
11 
Signature

12 Michael Green
Printed Name

13 CEO
Title

14
15
16
17 Dated: _____, 2019

SCHILKE MUSIC PRODUCTS, INC.

18
19
20
21 Signature

22
23 Printed Name

24
25 Title

Superior Court of California, County of Alameda
Hayward Hall of Justice

Case Number: RG19010030

DECLARATION OF SERVICE BY MAIL

I certify that I am not a party to this cause and that a true and correct copy of the foregoing document was mailed first class, postage pre-paid, in a sealed envelope, addressed as shown on the foregoing document or on the attached, and that the mailing of the foregoing and execution of this certificate occurred at 24405 Amador Street, Hayward, CA. Copies were provided to parties attending hearing.

Executed on: 06/18/2020

Lexington Law Group
Attn: Todzo, Mark N.
503 Divisadero Street
San Francisco, CA 94117 _____

Chad Finke Executive Officer / Clerk of the Superior Court

By



Deputy Clerk