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11
12 SUPERIOR COURT OF THE STATE OF CALIFORNIA
13 COUNTY OF SAN FRANCISCO - UNLIMITED CIVIL JURISDICTION

14 ANTHONY E. HELD, PhD., P.E.,

15 Plaintiff,

16 v.

17 STEINWAY MUSICAL
18 INSTRUMENTS, INC.; CONN-
SELMER, INC.; and DOES 1 -20,
19 inclusive,

20 Defendants.

Case No. CGC-14-538880

[PROPOSED] CONSENT JUDGMENT

(Health & Safety Code § 25249.6 *et seq.*)

1 **1. INTRODUCTION**

2 **1.1 Parties**

3 This Consent Judgment is entered into by and between plaintiff, Anthony E. Held
4 (“Held”), and defendants Steinway Musical Instruments, Inc. (“Steinway”) and Conn-Selmer,
5 Inc. (“Conn-Selmer,” and, together with Steinway, collectively “Defendants”), with Held,
6 Steinway and Conn-Selmer each individually referred to as a “Party” and collectively as the
7 “Parties.”

8 **1.2 Plaintiff**

9 Held is an individual residing in California who seeks to promote awareness of exposures
10 to toxic chemicals and improve human health by reducing or eliminating hazardous substances
11 contained in consumer products.

12 **1.3 Defendants**

13 Defendants each employ ten or more persons and each is a “person in the course of doing
14 business” for purposes of the Safe Drinking Water and Toxic Enforcement Act of 1986, Health
15 and Safety Code section 25249.6 *et seq.* (“Proposition 65”).

16 **1.4 General Allegations**

17 Held alleges that Defendants sold drum thrones with vinyl/PVC seats containing di(2-
18 ethylhexyl)phthalate (“DEHP”), drum thrones with vinyl/PVC upholstery containing DEHP and
19 lead, torque wrenches with vinyl/PVC grips containing DEHP, and vinyl/PVC trumpet
20 mouthpiece pouches containing DEHP, all without first providing the exposure warning required
21 by Proposition 65. DEHP and lead are listed pursuant to Proposition 65 as chemicals known to
22 the State of California to cause cancer and birth defects (or other reproductive harm).

23 **1.5 Product Description**

24 The products that are covered by this Consent Judgment are: 1) drum thrones with
25 vinyl/PVC upholstery containing DEHP that are imported, manufactured, sold, or distributed for
26 sale by Steinway and/or Conn-Selmer in California, including, but not limited to, Ludwig Atlas
27 Pro Round Drum Throne, LAP51TH (the “Initial Noticed Products”); 2) drum thrones with
28 vinyl/PVC upholstery containing DEHP and lead that are imported, manufactured, sold, or

1 distributed for sale by Steinway and/or Conn-Selmer in California, including, but not limited to,
2 Ludwig Combo Throne – Single Brace, L247TH (the “Lead-Containing Products”); 3) tools with
3 vinyl/PVC grips containing DEHP that are imported, manufactured, sold, or distributed for sale
4 by Steinway and/or Conn-Selmer in California, including, but not limited to, Ludwig
5 Accessories Torque Wrench, L111,UPC #6 41064 12990 2; and 4) vinyl/PVC mouthpiece
6 pouches, containing DEHP, intended to carry or protect musical instrument mouthpieces and that
7 are imported, manufactured, sold, or distributed for sale by Steinway and/or Conn-Selmer in
8 California, including, but not limited to, C.G. Conn Trumpet Mouthpiece Pouch, #173S, UPC #6
9 48023 10032 3. The products described in clauses 2, 3, and 4 above are collectively referred to
10 as the “Subsequent Noticed Products,” and together with the Initial Noticed Products are
11 collectively referred to as the “Products.”

12 **1.6 Notice of Violation**

13 On or about October 25, 2013, Held served Steinway, Conn-Selmer and certain requisite
14 public enforcement agencies with a 60-Day Notice of Violation (the “Notice”) alleging that
15 Defendants were in violation of Proposition 65 for failing to warn their customers and consumers
16 in California that the Initial Noticed Products expose users to DEHP. On or about August 28,
17 2014, Held served Steinway, Conn-Selmer and certain requisite public enforcement agencies
18 with a Supplemental 60-Day Notice of Violation (the “Supplemental Notice,” collectively with
19 the Notice, the “Notices”) alleging that Defendants were in violation of Proposition 65 for failing
20 to warn their customers and consumers in California that the Subsequent Noticed Products
21 expose users to DEHP and/or lead.

22 **1.7 Complaint**

23 On April 23, 2014, Held filed the instant action (the “Complaint”), naming Steinway and
24 Conn-Selmer as defendants for the alleged violations of Health and Safety Code section 25249.6
25 that are the subject of the Notice. Following the expiration of the sixty-day notice period
26 following Plaintiff’s service of the Supplemental Notice, and upon entry of this Consent
27 Judgment, the Complaint shall be deemed amended *nunc pro tunc* to include all Products sold,
28 manufactured or distributed by Steinway and/or Conn-Selmer in California and the violations

1 alleged in the Supplemental Notice, provided that, as of the expiration of the sixty-day notice
2 period following Plaintiff's service of the Supplemental Notice, no public enforcer has diligently
3 prosecuted any of the allegations set forth in the Supplemental Notice.

4 **1.8 No Admission**

5 Defendants deny the material, factual, and legal allegations contained in the Notice, the
6 Supplemental Notice, and the Complaint, and maintain that all of their products sold and
7 distributed for sale in California, including the Products, have been, and are, in compliance with
8 all applicable laws. Nothing in this Consent Judgment shall be construed as an admission of any
9 fact, finding, conclusion of law, issue of law, or violation of law, nor shall compliance with this
10 Consent Judgment constitute or be construed as an admission of any fact, finding, conclusion of
11 law, issue of law, or violation of law. This Section 1.8 shall not, however, diminish or otherwise
12 affect Defendants' obligations, responsibilities, and duties under this Consent Judgment.

13 **1.9 Jurisdiction**

14 For purposes of this Consent Judgment only, the Parties stipulate that this Court has
15 jurisdiction over Defendants as to the allegations in the Complaint, that venue is proper in San
16 Francisco County, and that this Court has jurisdiction to enter and enforce the provisions of this
17 Consent Judgment.

18 **1.10 Effective Date**

19 For purposes of this Consent Judgment, the term "Effective Date" means the date on
20 which this Consent Judgment is approved by the Court.

21 **2. INJUNCTIVE RELIEF: REFORMULATION AND WARNINGS**

22 Defendants agree to sections 2.1 and 2.2 below with respect to the Products and
23 Reformulated Products.

24 **2.1 Reformulated Products**

25 Subject to section 2.2 below, commencing on December 1, 2014, and continuing
26 thereafter, Defendants shall only purchase for sale, manufacture for sale, or distribute for sale in
27 California "Reformulated Products." For purposes of this Consent Judgment, "Reformulated
28 Products" are defined as reformulated versions of the Products that: (a) contain a maximum of

1 1,000 parts per million (0.1%) DEHP content in any component analyzed pursuant to EPA
2 testing methodologies 3580A and 8270C or equivalent methodologies utilized by state or federal
3 agencies for the purpose of determining DEHP content in a solid substance; (b) contain a
4 maximum of 90 parts per million lead by weight in any accessible component (i.e., any part,
5 feature or aspect of a Product that may be touched during use) analyzed pursuant to EPA testing
6 methodologies 3050B and 6010B; and (c) yield a result no more that of 1.0 micrograms of lead
7 when sampled according to the NIOSH 9100 testing protocol, and analyzed pursuant to EPA
8 Test Methods 3050B and 6010B. In addition to the EPA lead testing methods authorized above,
9 the Parties may utilize equivalent methodologies employed by state or federal agencies to
10 determine lead content in a solid substance.

11 **2.2 Warnings on Products in Inventory**

12 Notwithstanding section 2.1 above, commencing on December 1, 2014, any Products
13 (which as defined herein does not include Reformulated Products as defined in paragraph 2.1,
14 *supra*) that are in, or manufactured and en route to, Defendants' inventory as of December 1,
15 2014, and that Defendants reasonably believe may be sold or distributed for sale in California,
16 shall contain one of the following clear and reasonable warnings, as appropriate, placed on the
17 packaging for the Product¹:

18 Products Noticed For DEHP:

19 **WARNING:** This product contains DEHP, a chemical known to
20 the State of California to cause cancer, and birth defects and
other reproductive harm.

21 Products Noticed for Lead:

22 **WARNING:** This product contains lead, a chemical known to
23 the State of California to cause cancer, and birth defects and
other reproductive harm.

24
25
26 ¹ Warnings containing a description or name for the product to which they are attached shall also
27 comply with this section (e.g., "WARNING: This mouthpiece pouch contains DEHP, a chemical
28 known to the State of California to cause cancer, and birth defects and other reproductive
harm.").

1 Products Noticed for DEHP and Lead:

2 **WARNING:** This product contains DEHP and lead, chemicals known to
3 the State of California to cause cancer, and birth defects and
4 other reproductive harm.

5 For Products that also contain one or more other Proposition 65-listed chemicals, the warning
6 shall state:

7 **WARNING:** This product contains chemicals, including [DEHP and/or lead]²,
8 known to the State of California to cause cancer, and birth defects
9 and other reproductive harm.

10 Each warning in the preceding sentence shall be prominently placed with such
11 conspicuousness as compared with other words, statements, designs, or devices as to render it
12 likely to be read and understood by an ordinary individual under customary conditions before
13 purchase, and each such warning shall be provided in a manner such that the consumer or user
14 understands to which specific Product the warning applies, so as to minimize the risk of
15 consumer confusion.

16 **3. MONETARY SETTLEMENT TERMS**

17 **3.1 Payments Pursuant to Health & Safety Code § 25249.7(b)**

18 In settlement of all the claims referred to in this Consent Judgment, Defendants have
19 been assessed a cumulative total of \$24,500 in civil penalties. Each civil penalty payment shall
20 be allocated according to Health and Safety Code section 25249.12(c)(1) and (d) with seventy-
21 five percent (75%) of the funds paid to the California Office of Environmental Health Hazard
22 Assessment (“OEHHA”) and twenty-five percent (25%) of the funds remitted to Held. All civil
23 penalty payments shall be delivered to the payment addresses provided in Section 3.3.1.

24 **3.1.1 Initial Civil Penalty**

25 Within five days of the Effective Date, Defendants shall make an initial civil penalty
26 payment of \$14,500. Defendants shall provide the initial payment in two checks for the
27 following amounts made payable to: (a) “OEHHA” in the amount of \$10,875; and (b) “Anthony
28 Held, Client Trust Account” in the amount of \$3,625.

² This warning may be adjusted, as appropriate, to identify both DEHP and lead, only lead, or only DEHP.

1 **3.1.2 Final Civil Penalty**

2 On or before April 15, 2015, Defendants shall make a final civil penalty payment of
3 \$10,000. Defendants shall provide the final civil penalty payment in two checks for the
4 following amounts made payable to: (a) "OEHHA" in the amount of \$7,500; and (b) "Anthony
5 Held, Client Trust Account" in the amount of \$2,500. The final civil penalty shall be waived in
6 its entirety, however, if an officer of each of the Defendants provides Held with written
7 certification that, as of the date of the certification, in compliance with section 2.1 of this
8 Consent Judgment, unrefromulated Products as they are defined in section 1.5 of this Consent
9 Judgment are no longer being shipped, sold or offered for sale in the State of California as of
10 April 15, 2015 and they have no intention of shipping, selling or offering for sale Products in the
11 State of California in the future. Held must receive any such certifications on or before April 1,
12 2015, and time is of the essence.

13 **3.2 Reimbursement of Fees and Costs**

14 The parties acknowledge that Held and his counsel offered to resolve this dispute without
15 reaching terms on the amount of fees and costs to be reimbursed to them, thereby leaving the
16 issue to be resolved after the material terms of this Consent Judgment had been settled. Shortly
17 after the other settlement terms had been finalized Defendants expressed a desire to resolve the
18 fee and cost issue. The Parties then attempted to (and did) reach an accord on the compensation
19 due to Held and his counsel under general contract principles and the private attorney general
20 doctrine codified at California Code of Civil Procedure section 1021.5 for all work performed
21 through the mutual execution of this Consent Judgment. Specifically, Defendants shall pay a
22 cumulative total of \$50,000 for the fees and costs incurred by Held in investigating and bringing
23 this matter to Defendants' attention, preparing and filing a complaint and negotiating a
24 settlement in the public interest. Defendants shall pay the full payment required under this
25 Section 3.2 to Plaintiff's counsel in accordance with the payment procedures set forth below in
26 Section 3.3 within two (2) days after the Effective Date.

27 **3.3 Payment Procedures**

28 **3.3.1 Payment Addresses**

1 (a) All payments and tax documentation for Held and his counsel shall be
2 delivered to:

3 Moscone Emblide Sater & Otis LLP
4 Attn: Proposition 65 Controller
5 220 Montgomery Street, Suite 2100
6 San Francisco, CA 94104

7 (b) All payments to OEHHA, shall be delivered directly to OEHHA (Memo
8 line “Prop 65 Penalties”) at one of the following addresses, as appropriate:

9 For United States Postal Service Delivery:

10 Mike Gyurics
11 Fiscal Operations Branch Chief
12 Office of Environmental Health Hazard Assessment
13 P.O. Box 4010
14 Sacramento, CA 95812-4010

15 For Non-United States Postal Service Delivery or Courier:

16 Mike Gyurics
17 Fiscal Operations Branch Chief
18 Office of Environmental Health Hazard Assessment
19 1001 I Street
20 Sacramento, CA 95812-4010

21 with a copy of the checks payable to OEHHA mailed to the payment address provided in section
22 3.3.1(a), as proof of payment to OEHHA.

23 **4. CLAIMS COVERED AND RELEASED**

24 **4.1 Held’s Public Release of Proposition 65 Claims**

25 Held, acting on his own behalf and in the public interest, releases Defendants and their
26 parents, subsidiaries, affiliated entities under common ownership, directors, officers,
27 employees, and attorneys (“Releasees”) and each entity to whom they directly or indirectly
28 distribute or sell the Products, including but not limited to its downstream distributors,
wholesalers, customers, retailers, franchisers, cooperative members, licensors and licensees
 (“Downstream Releasees”) for any violations arising under Proposition 65 for unwarned
 exposures to DEHP and/or lead from the Products sold by Steinway and Conn-Selmer prior to
 the Effective Date, as set forth in the Notices. Compliance with the terms of this Consent
 Judgment constitutes compliance with Proposition 65 with respect to exposures to DEHP

1 and/or lead from the Products. Plaintiff agrees that any and all claims in the Complaint are
2 resolved by this Consent Judgment.

3 **4.2 Held's Individual Release of Claims**

4 Held, in his individual capacity only and *not* in his representative capacity, also provides
5 a release to Steinway, Conn-Selmer, Releasees, and Downstream Releasees which shall be
6 effective as a full and final accord and satisfaction, as a bar to all actions, causes of action,
7 obligations, costs, expenses, attorneys' fees, damages, losses, claims, liabilities and demands of
8 Held of any nature, character or kind, whether known or unknown, suspected or unsuspected,
9 arising out of alleged or actual exposures to DEHP and/or lead in the Products sold or distributed
10 for sale by Steinway and/or Conn-Selmer before the Effective Date.

11 **4.3 Defendants' Release of Held**

12 Defendants, on their own behalf, and on behalf of their past and current agents,
13 representatives, attorneys, successors, and assignees, hereby waive any and all claims against
14 Held and his attorneys and other representatives, for any and all actions taken or statements
15 made by Held and his attorneys and other representatives, whether in the course of
16 investigating claims, otherwise seeking to enforce Proposition 65 against them in this matter, or
17 with respect to the Products.

18 **4.4 Section 1542 Release**

19 Held, in his individual capacity only and *not* in his representative capacity, and
20 Defendants, by signature of this Consent Judgment, hereby waive any rights as set forth in
21 paragraphs 4.1, 4.2, or 4.3 above under California Civil Code Section 1542 with full knowledge
22 and intent of doing so. California Civil Code Section 1542 states:

23 1542. A general release does not extend to claims which the creditor does not
24 know or suspect to exist in his or her favor at the time of executing the release,
25 which if known by him or her must have materially affected his or her settlement
26 with the debtor.
27
28

1 **5. COURT APPROVAL**

2 This Consent Judgment is not effective until it is approved and entered by the Court and
3 shall be null and void if, for any reason, it is not approved and entered by the Court within one
4 year after it has been fully executed by the Parties.

5 The Parties acknowledge that, pursuant to California Health and Safety Code section
6 25249.7(f), a noticed motion is required for judicial approval of this Consent Judgment, which
7 motion Held shall draft and file and Defendants shall support, appearing at the hearing if so
8 requested. In furtherance of obtaining such approval, Held, Steinway and Conn-Selmer agree to
9 mutually employ their best efforts, and that of their counsel, to support the entry of this
10 agreement as judgment, and to obtain judicial approval of their settlement in a timely manner.
11 For purposes of this Section, “best efforts” shall include, at a minimum, cooperating on the
12 drafting and filing of the necessary moving papers and supporting the motion for judicial
13 approval. If any third-party objection to the motion is filed, Held and Defendants agree to work
14 together to file a response and appear at any hearing. This provision is a material component of
15 the Consent Judgment and shall be treated as such in the event of a breach.

16 If the Court does not approve the Consent Judgment, the Parties agree to meet and confer
17 as to whether to modify the language or appeal the ruling. If the Parties do not jointly agree on a
18 course of action to take, then the case shall proceed in its normal course on the Court’s trial
19 calendar. If the Court’s approval is ultimately overturned by an appellate court, the Parties shall
20 meet and confer as to whether to modify the terms of this Consent Judgment. If the Parties do
21 not jointly agree on a course of action to take, then the case shall proceed in its normal course on
22 the Court’s trial calendar. In the event that this Consent Judgment is entered by the Court and
23 subsequently overturned by any appellate court, any monies that have been provided to Held or
24 his counsel under this Consent Judgment shall be refunded within 15 days of the appellate
25 decision becoming final and the Parties shall reasonably cooperate to obtain a timely refund of
26 monies paid to OEHHA under this Consent Judgment. If the Court does not approve and enter
27 the Consent Judgment within one year of the Effective Date, any monies that have been provided
28 to or held in trust for Held or his counsel pursuant to Section 4 shall be refunded to Defendants

1 within 15 days, and the Parties shall reasonably cooperate to obtain a timely refund of monies
2 provided to OEHHA pursuant to Section 4.

3 **6. SEVERABILITY**

4 If, subsequent to the Court's approval and entry of this Consent Judgment as a judgment,
5 any provision is held by a court to be unenforceable, the validity of the remaining provisions
6 shall not be adversely affected.

7 **7. GOVERNING LAW**

8 The terms of this Consent Judgment shall be governed by the laws of the state of
9 California and apply within the state of California. In the event that Proposition 65 is repealed,
10 preempted, or is otherwise rendered inapplicable by reason of law generally, or as to the
11 Products, then Steinway and Conn-Selmer may provide written notice to Held of any asserted
12 change in the law, and shall have no further obligations pursuant to this Consent Judgment with
13 respect to, and to the extent that, the Products are so affected. Nothing in this Consent Judgment
14 shall be interpreted to relieve Steinway and/or Conn-Selmer from any obligation to comply with
15 any pertinent state or federal toxics control laws.

16 **8. NOTICE**

17 Unless specified herein, all correspondence and notice required by this Consent Judgment
18 shall be in writing and sent by: (i) personal delivery; (ii) first-class, registered, or certified mail,
19 return receipt requested; or (iii) a recognized overnight courier to the following addresses:

20 For Steinway:

21 Dennis Hanson
22 Kimberly Kirk
23 Steinway Musical Instruments
24 800 South Street, Suite 305
25 Waltham, MA 02453

with a copy to:

24 Vanessa C. Adriance
25 Patrick W. Dennis
26 Gibson, Dunn & Crutcher LLP
27 333 South Grand Ave.
28 Los Angeles, CA 90071

1 John Gaffney
2 Gibson, Dunn & Crutcher LLP
3 200 Park Avenue
4 New York, NY 10166

5 For Conn-Selmer:

6 John Stoner
7 Judy Minik
8 Conn-Selmer Inc.
9 600 Industrial Ave.
10 Elkhart, IN 46515

11 with a copy to:

12 Vanessa C. Adriance
13 Patrick W. Dennis
14 Gibson, Dunn & Crutcher LLP
15 333 South Grand Ave.
16 Los Angeles, CA 90071

17 John Gaffney
18 Gibson, Dunn & Crutcher LLP
19 200 Park Avenue
20 New York, NY 10166

21 For Held:

22 Moscone Emblide Sater & Otis LLP
23 Attn: Proposition 65 Controller
24 220 Montgomery Street, Suite 2100
25 San Francisco, CA 94104

26 Any Party may, from time to time, specify in writing to the other Party a change of address to
27 which all notices and other communications shall be sent.

28 **9. COUNTERPARTS; FACSIMILE SIGNATURES**

This Consent Judgment may be executed in counterparts and by facsimile or portable document format (PDF) signature, each of which shall be deemed an original, and all of which, when taken together, shall constitute one and the same document.

10. COMPLIANCE WITH REPORTING REQUIREMENTS

Held agrees to comply with the reporting form requirements referenced in Health and Safety Code section 25249.7(f).

11. MODIFICATION

This Consent Judgment may be modified only by: (i) a written agreement of the Parties and entry of a modified consent judgment by the Court thereon; or (ii) a successful motion or application of any Party, and the entry of a modified consent judgment by the Court.

1 **12. AUTHORIZATION**

2 The undersigned are authorized to execute this Consent Judgment and have read,
3 understood, and agree to all of the terms and conditions contained herein.

4 **AGREED TO:**

5 ANTHONY E. HELD

6 **APPROVED**
By Tony Held at 12:02 pm, Nov 12, 2014

7 Date: _____

8 By: Anthony E Held

9 **AGREED TO:**

10 STEINWAY MUSICAL INSTRUMENTS, INC.

11 Date: 11/10/14

12 By: Dennis M. Hanson
13 Name: DENNIS M. HANSON
14 Title: Sa. E.V.P.

15 CONN-SELMER, INC.

16 Date: 11/10/14

17 By: Dennis M. Hanson
18 Name: DENNIS M. HANSON
19 Title: E.V.P.