

# SETTLEMENT AGREEMENT

## 1. INTRODUCTION

### 1.1 Parties

This Settlement Agreement is entered into by and between Mark Moorberg (“Moorberg”) and Avedis Zildjian Co. (“Zildjian”), with Moorberg and Zildjian each individually referred to as a “Party” and collectively as the “Parties.” Moorberg is an individual residing in the State of California who seeks to promote awareness of exposures to toxic chemicals and to improve human health by reducing or eliminating hazardous substances used in consumer products. Zildjian employs ten or more persons and is a person in the course of doing business for purposes of the Safe Drinking Water and Toxic Enforcement Act of 1986, California Health and Safety Code section 25249.6 *et seq.* (“Proposition 65”).

### 1.2 General Allegations

Moorberg alleges that Zildjian manufactures, sells, and distributes for sale in California, musical instrument bags with Vinyl/PVC components (Instrument Bags) containing the phthalate chemical di(2-ethylhexyl)phthalate (“DEHP”). DEHP is listed pursuant to Proposition 65 as a chemical known to cause birth defects or other reproductive harm. Moorberg alleges that Zildjian failed to provide the health hazard warning required by Proposition 65 for exposures to DEHP from the Instrument Bags.

### 1.3 Product Description

The products covered by this Settlement Agreement are Instrument Bags containing DEHP that are manufactured, sold or distributed for sale in California by Zildjian, including, but not limited to, the Instrument Bags identified as *Zildjian Gig Cymbal Bag, #2010487000* (“Products”) and stick bags.

### 1.4 Notice of Violation

On July 13, 2015, Moorberg served Zildjian and the requisite public enforcement

agencies with a 60-Day Notice of Violation (“Notice”), alleging that Zildjian violated Proposition 65 when it failed to warn its customers and consumers in California of the health hazards associated with exposures to DEHP from its Products. To the best of the Parties’ knowledge, no public enforcer has commenced and is diligently prosecuting the allegations set forth in the Notice.

### **1.5 No Admission**

Zildjian denies the material, factual, and legal allegations contained in the Notice and maintains that all of the products that it has sold and distributed in California, including the Products, have been, and are, in compliance with all laws. Nothing in this Settlement Agreement shall be construed as an admission by Zildjian of any fact, finding, conclusion, issue of law, or violation of law, nor shall compliance with this Settlement Agreement constitute or be construed as an admission by Zildjian of any fact, finding, conclusion, issue of law, or violation of law, such being specifically denied by Zildjian. This Section shall not, however, diminish or otherwise affect Zildjian’s obligations, responsibilities, and duties under this Settlement Agreement.

### **1.6 Effective Date**

For purposes of this Settlement Agreement, the term “Effective Date” shall mean December 21, 2015.

## **2. INJUNCTIVE RELIEF: REFORMULATED PRODUCTS**

Commencing on May 15, 2016, and continuing thereafter, Zildjian agrees to only manufacture for sale or purchase for sale or distribute for sale in or into California, (a) “Reformulated Products,” or (b) Products that are sold with a clear and reasonable health hazard warning, pursuant to Section 2.2 below. For purposes of this Settlement Agreement, “Reformulated Products” shall mean Products containing less than or equal to 1,000 parts per million (0.1%) DEHP in each accessible component (i.e., any components that may be touched during use) when analyzed pursuant to Environmental Protection Agency testing methodologies 3580A and 8270C or equivalent methodologies

utilized by federal or state agencies for the purpose of determining DEHP content in a solid substance.

## **2.2 Clear and Reasonable Warnings**

Zildjian agrees that as of May 15, 2016, and continuing thereafter, all Products it sells and/or distributes for sale in California that do not qualify as Reformulated Products will bear a clear and reasonable warning pursuant to this Section. Zildjian further agrees that the warning will be prominently placed with such conspicuousness when compared with other words, statements, designs or devices as to render it likely to be read and understood by an ordinary individual under customary conditions before purchase or use. For purposes of this Settlement Agreement, a clear and reasonable warning for the Products shall consist of a warning affixed to the packaging, label, tag, or directly to a Product sold in California that contains one of the following statements:

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

Or

**WARNING:** This product contains a chemical known to the State of California to cause birth defects or other reproductive harm.

Or

**WARNING:** This product contains chemicals known to the State of California to cause cancer and birth defects or other reproductive harm.

## **3. MONETARY SETTLEMENT TERMS**

### **3.1 Civil Penalty Payments**

Pursuant to Health and Safety Code section 25249.7(b)(2), and in settlement of all claims alleged in the Notice or referred to in this Settlement Agreement, Zildjian agrees

to pay \$ 9,600 in civil penalties. Each penalty payment will be allocated in accordance with California Health and Safety Code section 25249.12(c)(1) and (d), with 75% of the penalty amount remitted to the California Office of Environmental Health Hazard Assessment (“OEHHA”) and the remaining 25% of the penalty amount paid to Moorberg. Moorberg’s counsel shall be responsible for delivering OEHHA’s portion of any civil penalty payment(s) made under this Settlement Agreement to OEHHA.

Within ten (10) business days of the Effective Date, Zildjian shall make this civil penalty payment in a single check made payable to “Mark Moorberg, Client Trust Account.”

### **3.2 Attorneys’ Fees and Costs**

The Parties acknowledge that Moore and his counsel offered to resolve this dispute without reaching an accord on the compensation due to Moorberg and his counsel under general contract principles and the private attorney general doctrine codified at Code of Civil Procedure section 1021.5 for all work performed in this matter. Under these legal principles, within ten (10) business days of the Effective Date, Zildjian agrees to pay \$23,700 in the form of a check made payable to “The Chanler Group” for all fees and costs incurred investigating, bringing this matter to the attention of Zildjian’s management, and negotiating a settlement in the public interest.

### **3.3 Payment Address**

All payments under this Settlement Agreement shall be delivered to the following address:

The Chanler Group  
Attn: Proposition 65 Controller  
2560 Ninth Street  
Parker Plaza, Suite 214  
Berkeley, CA 94710

#### 4. CLAIMS COVERED AND RELEASED

##### 4.1 Moorberg's Release of Zildjian

This Settlement Agreement is a full, final and binding resolution between Moorberg, as an individual and not on behalf of the public, and Zildjian, of any violation of Proposition 65 that was or could have been asserted by Moorberg on his own behalf or on behalf of his past and current agents, representatives, attorneys, successors, and assignees, against Zildjian, its parents, subsidiaries, affiliated entities under common ownership, directors, officers, employees, attorneys (collectively "Releasees"), and each entity to whom Zildjian directly or indirectly distributes or sells Products, including its downstream distributors, wholesalers, customers, retailers, franchisees, cooperative members, licensors, and licensees ("Downstream Releasees"), based on the alleged or actual failure to warn about exposures to DEHP from Products manufactured, sold or distributed for sale by Zildjian in California before the Effective Date. Compliance with the terms of this Settlement Agreement constitutes compliance with Proposition 65 by Zildjian, Releasees and Downstream Releasees with regard to the alleged or actual failure to warn about exposures to DEHP from Products manufactured, sold or distributed for sale after the Effective Date. Releasees hereby release any such claims against Zildjian, Releasees and Downstream Releasees

In further consideration of the promises and agreements herein, Moorberg, on his own behalf and on behalf of his past and current agents, representatives, attorneys, successors, and/or assignees, hereby waives any right to institute or participate in, directly or indirectly, any form of legal action and releases all claims that he may have, including, without limitation, all actions and causes of action in law and in equity, all suits, liabilities, demands, obligations, damages, costs, fines, penalties, losses, or expenses including, but not exclusively, investigation fees, expert fees, and attorneys' fees arising under Proposition 65 with respect to exposures to DEHP from Products manufactured, distributed, sold and/or offered for sale by Zildjian, Releasees and

Downstream Releasees before the Effective Date. The releases provided by Moorberg under this Settlement Agreement are provided solely on Moorberg's own behalf and not on behalf of the public in California.

**4.2 Zildjian's Release of Moorberg**

Zildjian, on its own behalf, and on behalf of its past and current agents, representatives, attorneys, successors, and/or assignees, hereby waives any and all claims against Moorberg and his attorneys and other representatives, for any and all actions taken or statements made by Moorberg and his attorneys and other representatives, whether in the course of investigating claims, seeking to enforce Proposition 65 against it in this matter, or with respect to the Products.

**5. SEVERABILITY**

If, subsequent to the execution of this Settlement Agreement, any provision of this Settlement Agreement is deemed by a court to be unenforceable, the validity of the remaining provisions shall not be adversely affected.

**6. GOVERNING LAW**

The terms of this Settlement Agreement shall be governed by the laws of the State of California and apply within the State of California. In the event that Proposition 65 is repealed or is otherwise rendered inapplicable by reason of law generally, or as to the Products, then Zildjian may provide written notice to Moorberg of any asserted change in the law, and shall have no further obligations pursuant to this Settlement Agreement with respect to, and to the extent that, the Products are so affected.

**7. NOTICE**

Unless specified herein, all correspondence and notice required to be provided pursuant to this Settlement Agreement shall be in writing and sent by: (a) personal delivery; (b) first-class, registered or certified mail, return receipt requested; or (c) a recognized overnight courier on any Party by the other at the following addresses:

For Zildjian:

Mark Sapienza, COO  
Avedis Zildjian Co.  
22 Longwater Drive  
Norwell, MA 02061

For Moorberg:

Proposition 65 Coordinator  
The Chanler Group  
2560 Ninth Street  
Parker Plaza, Suite 214  
Berkeley, CA 94710-2565

With a copy to:

Lauren Michals  
Nixon Peabody  
One Embarcadero Center  
Suite 1800  
San Francisco, CA 94111-3600

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

**8. COUNTERPARTS; FACSIMILE SIGNATURES**

This Settlement Agreement 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.

**9. COMPLIANCE WITH HEALTH & SAFETY CODE § 25249.7(f)**

Moorberg and his attorneys agree to comply with the reporting form requirements referenced in California Health and Safety Code section 25249.7(f).

**10. MODIFICATION**

This Settlement Agreement may be modified only by written agreement of the Parties.

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11. AUTHORIZATION

The undersigned are authorized to execute this Settlement Agreement on behalf of their respective Parties and have read, understand, and agreed to all of the terms and conditions of this Settlement Agreement.

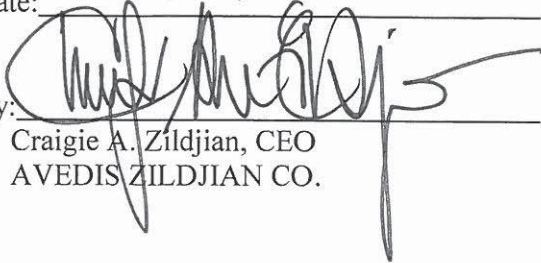
AGREED TO:

Date: 12/18/2015

By:   
MARK MOORBERG

AGREED TO:

Date: 12/17/15

By:   
Craigie A. Zildjian, CEO  
AVEDIS ZILDJIAN CO.