

COPY

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18 SUPERIOR COURT OF THE STATE OF CALIFORNIA

19 CITY AND COUNTY OF SAN FRANCISCO
20 (Unlimited Jurisdiction)

21 MATEEL ENVIRONMENTAL JUSTICE
22 FOUNDATION,

23 Plaintiff,

24 vs.

25 KMART CORPORATION, et al.,

26 Defendants.

ENDORSED
FILED
San Francisco County Superior Court

JUL 20 2005

GORDON PARK-LI, Clerk
BY: PHILOMENA DIAS
Deputy Clerk

No. 429912

~~[PROPOSED]~~ CONSENT JUDGMENT
AS TO DEFENDANT KMART
CORPORATION

27 1. INTRODUCTION.

28 1.1 On or about December 30, 2003, plaintiff MATEEL ENVIRONMENTAL
JUSTICE FOUNDATION ("Mateel"), provided a 60-day notice of violation ("Notice") to
the California Attorney General, the District Attorneys of every county in California, the
City Attorneys of every California city with a population greater than 750,000, and
defendant Kmart Corporation. ("Defendant"), alleging that Defendant, through sales in

1 California of hand tools, the handles for which are coated with polyvinyl chloride (“PVC”),
2 including but not limited to pruners, pliers, hammers, bench clamps, wrenches,
3 screwdrivers, crimpers, and hacksaws, that are manufactured, distributed or sold by
4 Defendant (“Covered Products”), was in violation of certain provisions of the Safe
5 Drinking Water and Toxic Enforcement Act of 1986, Health and Safety Code sections
6 25249.5, et seq. (“Proposition 65”), by knowingly and intentionally exposing persons to
7 chemicals, including lead and lead compounds, lead phosphate, lead acetate and lead
8 subacetate, (collectively, “lead”), known to the State of California to cause cancer and/or
9 birth defects or other reproductive harm, without first providing a clear and reasonable
10 warning.

11 1.2 On or about August 27, 2004, plaintiff Mateel, acting in the public interest
12 pursuant to Health and Safety Code section 25249.7(d) and on behalf of the general public
13 pursuant to Business and Professions Code section 17204 (“Plaintiff”), filed a Complaint
14 for Civil Penalties and Injunctive Relief in San Francisco County Superior Court, Case No.
15 317279 (“Complaint”) against Defendant based on the allegations contained in the Notice.
16 In addition to asserting claims directly under Proposition 65, the Complaint also alleges that
17 the violations of Proposition 65 for which Defendant is allegedly responsible constitute
18 separate violations of Business and Professions Code sections 17200 et seq. (the “Unfair
19 Competition Act”).

20 1.3 For purposes of this Consent Judgment, the Mateel and Defendant stipulate
21 that this Court has jurisdiction over the allegations of violations contained in the Complaint
22 and personal jurisdiction over Defendant as to the acts alleged in the Complaint, that venue
23 is proper in the County of San Francisco and that this Court has jurisdiction to enter this
24 Consent Judgment as a full and final settlement and resolution of the allegations contained
25 in the Complaint and of all claims which were or could have been raised based on the facts
26 alleged therein or arising therefrom.

27 1.4 Mateel and Defendant enter into this Consent Judgment pursuant to a full
28 and final settlement of disputed claims between the parties for the purpose of avoiding

1 prolonged litigation. This Consent Judgment shall not constitute an admission with respect
2 to any allegation made in the Notice or the Complaint, each and every allegation of which
3 Defendant deny, nor may this Consent Judgment or compliance with it be used as evidence
4 of any wrongdoing, misconduct, culpability or liability on the part of Defendant.

5 2. INJUNCTIVE RELIEF-REFORMULATION.

6 2.1 Within two hundred and seventy (270) days after entry of this Consent
7 Agreement, Defendant shall cease sales in California of Covered Products with PVC coated
8 handles manufactured on or after January 1, 2005 unless the Covered Products meet the
9 following criteria:

- 10 (a) The formulation of PVC used shall have no intentionally added lead.
11 (b) A random sample of the bulk PVC used to manufacture the Covered
12 Products has been tested for lead content and shown lead content by
13 weight of less than 0.02%, or 200 parts per million (“ppm”), using a
14 test method of sufficient sensitivity to establish a limit of
15 quantification (as distinguished from detection) of less than 200 ppm.

16 2.2 Defendant may comply with the above requirements by relying on
17 information obtained from its suppliers of the tools and PVC utilized on the handles thereof
18 provided such reliance is in good faith.

19 3. MONETARY RELIEF.

20 3.1 Within fifteen (15) days after entry of this Consent Judgment by the Court,
21 Defendant shall pay eight thousand seven hundred fifty dollars (\$7,500) to the Ecological
22 Rights Foundation and eight thousand seven hundred fifty dollars (\$7,500) to Californians
23 for Alternatives to Toxics. Both groups are California non-profit organizations that
24 advocate for workers’ and consumers’ safety and for awareness and reduction of toxic
25 exposures. The foregoing settlement payments shall be mailed to the attention of William
26 Verick, Klamath Environmental Law Center, 424 First Street, Eureka, California 95501,
27 who shall provide them to the respective organizations within fifteen (15) days of receipt.
28

1 4. ATTORNEYS' FEES.

2 4.1 Within fifteen (15) days after entry of this Consent Judgment, Defendant
3 shall pay Seventeen thousand five hundred dollars (\$15,000) to the Klamath Environmental
4 Law Center to cover plaintiffs' attorneys' fees and costs. The above payment shall be
5 mailed to the attention of William Verick, Klamath Environmental Law Center, 424 First
6 Street, Eureka, California 95501.

7 4.2 Except as specifically provided in this Consent Judgment, plaintiff and
8 Defendant shall bear their own costs and attorneys' fees.

9 5. ENFORCEMENT OF JUDGMENT/STIPULATED REMEDIES.

10 5.1 The terms of this Consent Judgment are enforceable by and among the
11 parties hereto or, with respect to the injunctive relief provided for herein, by the California
12 Attorney General.

13 6. MATTERS COVERED BY THIS CONSENT JUDGMENT.

14 6.1 This Consent Judgment is a full, final and binding resolution between the
15 Plaintiff acting on behalf of itself and, (as to those matters referenced in the Notice Letters)
16 in the public interest pursuant to Health and Safety Code section 25249.7(d) and on behalf
17 of the general public pursuant to Business and Professions Code section 17204, and
18 Defendant concerning any violation of Proposition 65 and/or the Unfair Competition Act
19 regarding any claims made or which could have been made in the Notice and/or the
20 Complaint, or any other statutory or common law claim that could have been asserted
21 against Defendant and/or its affiliates, parent or subsidiary corporations, divisions,
22 successors, officers, directors, assigns, distributors, retailers, and/or customers for failure to
23 provide clear, reasonable, and lawful warnings of exposure to lead contained in or
24 otherwise associated with Covered Products manufactured, sold or distributed by, for, or on
25 behalf of, Defendant. Compliance with the terms of this Consent Judgment resolves any
26 issue, now and in the future, concerning compliance by Defendant and/or its affiliates,
27 parent or subsidiary corporations, divisions, successors, officers, directors, assigns,
28 distributors, retailers, and/or customers with the requirements of Proposition 65 and the

1 Unfair Competition Act with respect to lead contained in or otherwise associated with
2 Covered Products.

3 6.2 As to any claims, violations (except violations of this Consent Judgment),
4 actions, damages, costs, penalties or causes of action which may arise or have arisen after
5 the original date of entry of this consent judgment, compliance by Defendant with the terms
6 of this consent judgment shall be deemed to be full and complete compliance with
7 Proposition 65 and the Unfair Competition Act as to claims regarding exposure to lead in
8 Covered Products.

9 6.3 In furtherance of the foregoing, Plaintiff hereby waives any and all rights
10 and benefits which it now has, or in the future may have, conferred upon it with respect to
11 the Covered Products by virtue of the provisions of Section 1542 of the California Civil
12 Code, which provides as follows:

13 "A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS
14 WHICH THE CREDITOR DOES NOT KNOW OR SUSPECT TO
15 EXIST IN HIS FAVOR AT THE TIME OF EXECUTING THE
16 RELEASE, WHICH IF KNOWN BY HIM MUST HAVE
17 MATERIALLY AFFECTED HIS SETTLEMENT WITH THE
18 DEBTOR."

19 Plaintiff understands and acknowledges that the significance and consequence of this
20 waiver of California Civil Code Section 1542 is that even if Plaintiff suffers future damages
21 arising out of or resulting from, or related directly or indirectly to, in whole or in part, the
22 Covered Products, they will not be able to make any claim for those damages against
23 Defendant, or its parent, subsidiaries or affiliates, or any of its customers, distributors,
24 wholesalers, retailers or any other person in the course of doing business who may
25 manufacture, use, maintain, distribute, market or sell the Covered Products. Furthermore,
26 Plaintiff acknowledges that it intends these consequences for any such claims which may
27 exist as of the date of this release but which Plaintiff does not know exist, and which, if
28 known, would materially affect its decision to enter into this Consent Judgment, regardless

1 of whether its lack of knowledge is the result of ignorance, oversight, error, negligence, or
2 any other cause.

3 7. SERVICE ON THE CALIFORNIA ATTORNEY GENERAL.

4 7.1 Plaintiff shall serve a copy of this Consent Judgment, signed by both parties,
5 on the California Attorney General on behalf of the Parties so that the California Attorney
6 General may review this Consent Judgment at least forty five (45) days prior to its
7 submittal to the Court for approval. As soon as is feasible following the forty-fifth (45th)
8 day after the date on which the California Attorney General has been served with the
9 aforementioned copy of this Consent Judgment, and in the absence of any written objection
10 by the California Attorney General to the terms of this Consent Judgment or written request
11 by the California Attorney General for additional time, the Parties shall then submit
12 promptly this Consent Judgment to the Court for approval. Prior to submittal to the Court
13 for approval, Plaintiff shall attach a proof of service attesting that this Consent Judgment
14 has been served on the California Attorney General and the manner and date on which that
15 service was made.

16 8. APPLICATION OF JUDGMENT.

17 8.1 The obligations of this Consent Judgment shall apply to and be binding upon
18 any and all plaintiffs, acting in the public interest pursuant to Health and Safety Code
19 section 25249.7(d) and on behalf of the general public pursuant to Business and Professions
20 Code section 17204, and Defendant and the successors or assigns of any of them.

21 9. MODIFICATION OF JUDGMENT.

22 9.1 This Consent Judgment may be modified only upon written agreement of the
23 parties and upon entry of a modified Consent Judgment by the Court thereon, or upon
24 motion of any party as provided by law and upon entry of a modified Consent Judgment by
25 the Court.

26 10. NOTICE.

27 10.1 When any Party is entitled to receive any notice or report under this Consent
28 Judgment, the notice or report shall be sent by U.S. mail or overnight courier service to:

- 1 (a) For Mateel: William Verick, Esq., Klamath Environmental Law
2 Center, 424 First Street, Eureka, California 95501; and
3 (b) For Kmart: Susan M. Senopole, Legal Division, Kmart Corporation,
4 Resource Center, International Headquarters, Troy, MI 48084-3163;
5 with a copy to: Michael J. Steel, Pillsbury Winthrop, LLP, Mail: P.O.
6 Box 7880, San Francisco, CA 94120-7880, Delivery: 50 Fremont
7 Street, San Francisco, 94105.

8 10.2 Any Party may modify the person and address to whom notice is to be sent
9 by sending each other Party notice in accordance with this Paragraph.

10 11. AUTHORITY TO STIPULATE.

11 11.1 Each signatory to this Consent Judgment certifies that he or she is fully
12 authorized by the party he or she represents to enter into this Consent Judgment and to
13 execute it on behalf of the party represented and legally to bind that party.

14 12. RETENTION OF JURISDICTION.

15 12.1 This Court shall retain jurisdiction over the matters covered herein and the
16 enforcement and/or application of this Consent Judgment.

17 13. ENTIRE AGREEMENT.

18 13.1 This Consent Judgment contains the sole and entire, agreement and
19 understanding of the parties with respect to the entire subject matter hereof, and any and all
20 prior discussions, negotiations, commitments and understandings related hereto. No
21 representations, oral or otherwise, express or implied, other than those contained herein
22 have been made by any party hereto. No other agreements not specifically referred to
23 herein, oral or otherwise, shall be deemed to exist or to bind any of the parties.

24 14. GOVERNING LAW.

25 14.1 The validity, construction and performance of this Consent Judgment shall
26 be governed by the laws of the State of California.

27

28

1 15. COURT APPROVAL.

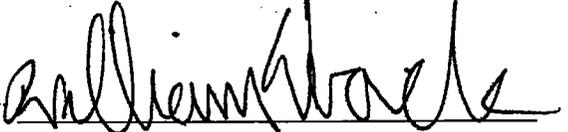
2 15.1 If this Consent Judgment is not approved by the Court, it shall be of no force
3 or effect, and cannot be used in any proceeding for any purpose.

4 IT IS SO STIPULATED:

5 DATED: 5/24/05

By: 
6 Defendant Kmart Corporation

7
8 DATED:

By: 
9 William Verick
10 Klamath Environmental Law Center

11 IT IS SO ORDERED, ADJUDGED AND DECREED:

12 Dated:

JUL 20 2005

RONALD E. QUIDACHAY,

13 JUDGE OF THE SUPERIOR COURT
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GORDON PARK-LI, Clerk
BY: PHILOMENA DIAS
Deputy Clerk

13 Attorneys for Plaintiff
14 MATEEL ENVIRONMENTAL JUSTICE FOUNDATION

15 SUPERIOR COURT OF THE STATE OF CALIFORNIA

16 COUNTY OF SAN FRANCISCO

17 MATEEL ENVIRONMENTAL JUSTICE
18 FOUNDATION,

CASE NO. 429912

19 Plaintiff,

~~[PROPOSED]~~ ORDER APPROVING
20 CONSENT JUDGMENT AS TO
21 DEFENDANT KMART CORP.

22 vs.

23 KMART CORPORATION, et al.,

Date: July 18, 2005

Time: 9:30 a.m.

Dept. No.: 302

24 Defendants.

25 Plaintiff's motion for approval of settlement and entry of Consent Judgment as to
26 Defendant Panacea Products Corp. was heard on noticed motion on July 18, 2005. The court
27 finds that:

28 1. The warnings and reformulation the Consent Judgment requires comply with the
requirements of Proposition 65.

1 2. The payments in lieu of civil penalties specified in the Consent Judgment are
2 reasonable and conform to the criteria of Health & Safety Code § 25249.7(b)(2).

3 3. The attorneys fees awarded under the Consent Judgment are reasonable as are the
4 rates awarded the attorneys.

5 Based on these findings, the settlement and the Consent Judgment are approved.

6 IT IS SO ORDERED.

7 Dated: JUL 20 2005

RONALD E. QUIDACHAY

Judge of the Superior Court