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6 CENTER FOR ENVIRONMENTAL HEALTH

ENDORSED  
FILED  
San Francisco County Superior Court

JAN 26 2005

GORDON PARK-LI, Clerk  
BY: AUDREY HUIE  
Deputy Clerk

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9 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
10 COUNTY OF SAN FRANCISCO

11 CENTER FOR ENVIRONMENTAL  
12 HEALTH, a non-profit corporation,

13 Plaintiff,

14 v.

15 TEKNI-PLEX, INC.; *et al.*,

16 Defendants.  
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) Case No. CGC-03-424940  
)  
) <sup>ak</sup>  
)

) ~~PROPOSED~~ CONSENT  
) JUDGMENT REGARDING  
) DEFENDANTS GILMOUR  
) MANUFACTURING COMPANY,  
) KMART CORPORATION and  
) SEARS, ROEBUCK AND CO.

1           **1. INTRODUCTION**

2           1.1 On September 30, 2003, on behalf of itself and the general public, plaintiff  
3 the Center for Environmental Health (“CEH”), a non-profit corporation, filed a complaint in San  
4 Francisco County Superior Court, entitled *Center for Environmental Health v. Tekni-Plex, Inc.,*  
5 *et al.*, (as amended, the “Complaint”) for civil penalties and injunctive relief pursuant to the  
6 provisions of Cal. Health & Safety Code §§ 25249.5 *et seq.* (“Proposition 65”) and Cal. Business  
7 & Professions Code §§ 17200 *et seq.* (the “Unfair Competition Law”) (the “Action”). CEH’s  
8 original Complaint named Sears, Roebuck and Co. (“Sears”) as one of the defendants in the  
9 Action.

10           1.2 On January 28, 2004, CEH filed a Doe Amendment to the Complaint  
11 naming Kmart Corporation (“Kmart”) and Martha Stewart Living Omnimedia, Inc. (“MSLO”)  
12 as Defendants to the Action. On or about November 10, 2004, CEH filed a Doe Amendment to  
13 the Complaint naming Gilmour Manufacturing Company (“Gilmour”) as a Defendant to the  
14 Action. Sears, Gilmour and Kmart are collectively referred to as “Settling Defendants” and  
15 CEH and the Settling Defendants are collectively referred to as the “Parties.”

16           1.3 On August 10, 2004, the Court entered a Consent Judgment agreed to  
17 between CEH and Tekni-Plex, Inc., Flexon Industries Corporation and Teknor Apex Company  
18 (collectively, the “Settling Manufacturers”). The Consent Judgment between CEH and the  
19 Settling Manufacturers required product reformulation, consumer health and safety warnings and  
20 a monetary payment.

21           1.4 Each of the Settling Defendants is a corporation that employs more than  
22 10 persons and that manufactured, distributed and/or sold water hoses made of materials  
23 containing lead and/or lead compounds in the State of California (the “Products”). With the  
24 exception of Gilmour, the Settling Defendants represent and warrant that they do not  
25 manufacture any of the Products but purchase them for resale from manufacturers and  
26 distributors of the Products. Lead is present in the flexible tubing and/or leaded brass  
27 components of the Products.

28

1           1.5   Kmart represents that MSLO does not manufacture, distribute or sell any of  
2 the Products and that the "Martha Stewart Everyday" brand and related brand names and/or  
3 trademarks found on certain Product packaging is licensed to Kmart by MSLO. Based on such  
4 representation, CEH has agreed to dismiss MSLO from the Complaint.

5           1.6   On or about June 19, 2003 (with respect to Settling Defendant Sears) and  
6 September 19, 2003 (with respect to Settling Defendants Gilmour and Kmart), CEH served  
7 Settling Defendants and the appropriate public enforcement agencies with the requisite 60-day  
8 notice that the Settling Defendants were in violation of Proposition 65. CEH's notices and its  
9 Complaint allege that Settling Defendants discharge and release lead and/or lead compounds  
10 (referred to interchangeably herein as "Lead"), chemicals known to the State of California to  
11 cause cancer, birth defects and other reproductive harm, into sources of drinking water through  
12 the sale and use of the Products, in violation of Cal. Health & Safety Code ("Health & Safety  
13 Code") § 25249.5.

14           1.7   CEH's notices and its Complaint also allege that Settling Defendants did  
15 not provide a clear and reasonable warning to purchasers of the Products regarding the  
16 carcinogenicity and reproductive toxicity of Lead, in violation of Health & Safety Code  
17 § 25249.6.

18           1.8   The Complaint further alleges that the violations of both Health & Safety  
19 Code § 25249.5 and Health & Safety Code § 25249.6 constitute unlawful acts and thus unfair  
20 competition in violation of Business & Professions Code §§ 17200 *et seq.*

21           1.9   For purposes of this Consent Judgment only, the Parties stipulate that this  
22 Court has jurisdiction over the allegations of violations contained in CEH's Complaint and  
23 personal jurisdiction over Settling Defendants as to the acts alleged in CEH's Complaint, that  
24 venue is proper in the County of San Francisco, and that this Court has jurisdiction to enter this  
25 Consent Judgment as a full and final resolution of all claims which were or could have been  
26 raised in the Complaint based on the facts alleged therein.

27           1.10   The Parties enter into this Consent Judgment pursuant to a settlement of all  
28 disputed claims between the Parties as alleged in the Complaint and for the purpose of avoiding

1 prolonged and costly litigation between the Parties hereto. By execution of this Consent  
2 Judgment, the Parties and each of them do not admit any facts or conclusions of law, including,  
3 but not limited to, any facts or conclusions of law suggesting or demonstrating any violations of  
4 Proposition 65, the Unfair Competition Act or any other statutory, common law or equitable  
5 requirements relating to the Products. Nothing in this Consent Judgment shall be construed as  
6 an admission by any of the Parties; nor shall compliance with the Consent Judgment constitute  
7 or be construed as an admission by any of the Parties. Except as otherwise provided herein,  
8 nothing in this Consent Judgment shall prejudice, waive, or impair any right, remedy, argument  
9 or defense the Parties may have in this or any other or future legal proceedings unrelated to the  
10 matters covered by this Consent Judgment. This Consent Judgment is the product of negotiation  
11 and compromise and is accepted by the Parties and the Court for purposes of settling,  
12 compromising and resolving issues disputed in this Action, including future compliance by  
13 Settling Defendants with Paragraph 2 of this Consent Judgment.

14           **2.      INJUNCTIVE RELIEF - WARNINGS AND REFORMULATION**

15            2.1     As of November 1, 2004, Settling Defendants shall not manufacture,  
16 distribute, ship, or sell, or cause to be manufactured, distributed, or sold, any Products  
17 containing sufficient quantities or concentrations of Lead such that Lead: (a) leaches from the  
18 Products in concentrations greater than 25 parts per billion ("ppb") using the sampling and  
19 testing protocol attached hereto as Exhibit A ("Protocol"), or (b) is contained as an intentionally  
20 added ingredient in either the outer plastic jacket/skin of the Product or the surface contact layer  
21 of any brass components of the Product, unless such Products bear a label containing the  
22 following warning language:

23                     **WARNING:**            This hose contains chemical(s), including lead, known  
24    to the State of California to cause cancer, birth defects  
25    and other reproductive harm. ***Do not drink water from  
  this hose. Wash hands after use.***

26 Notwithstanding the foregoing with respect to warning language, as required by and previously  
27 approved by this court in Mateel Environmental Justice Foundation v. Gilmour Manufacturing  
28

1 Co., Inc., et al (San Francisco Case No. 315470), Gilmour shall use one of the following  
2 warnings:

3           **WARNING:** This product contains lead, a chemical known to the State of  
4 California to cause cancer and birth defects or other reproductive harm. Do not place  
5 your hands in your mouth after handling the product. Do not place the product in your  
6 mouth. *Wash your hands after touching this product.*

7           **WARNING:** This product contains one or more chemicals known to the State of  
8 California to cause cancer and birth defects or other reproductive harm. *Wash hands*  
9 *after handling.*

10 The warning statement shall be prominently displayed on the exterior of the package in which the  
11 Product is sold such that it is available to be read by the consumer prior to purchase with such  
12 conspicuousness, as compared with other words, statements, or designs as to render it likely to be  
13 read and understood by an ordinary individual. The warning statement shall not be preceded,  
14 followed, or surrounded by words, symbols, or other matter that introduces, modifies, qualifies,  
15 or explains the required text, such as “legal notice required by law.” The Parties agree that the  
16 sample labels attached hereto as Exhibit B satisfy the requirements of this Paragraph.

17           2.1.1 Notwithstanding the provisions of Paragraph 2.1 above, for  
18 Products manufactured prior to December 31, 2004, Settling Defendants may utilize packaging  
19 for which the art work is already in existence, provided that it contains and displays a warning  
20 statement sufficient to meet the requirements of 22 Cal. Code Regs. § 12601(b). The Parties  
21 agree that the sample labels attached hereto as Exhibit C satisfy the requirements of this  
22 subsection.

23           2.1.2 Notwithstanding the provisions of Paragraph 2.1 above, the phrase  
24 “Wash hands after use” may be deleted from the required warning statement for Products  
25 meeting the following requirements: (a) the surface contact layer of the brass components and  
26 outer plastic jacket/skin have no Lead as an intentionally added constituent; and (b) the surface  
27 contact layer of any brass components does not contain more than 0.03% (300 parts per million  
28

1 (“ppm”)) Lead as determined by a test method having a level of quantification of at least  
2 300 ppm.

3                   2.1.3 Notwithstanding the provisions of Paragraph 2.1 above, the phrase  
4 “Do not drink water from this hose” may be deleted from the required warning statement for  
5 Products when Lead leaches from those Products in concentrations of 25 parts per billion  
6 (“ppb”) or less when measured pursuant to the Protocol.

7                   2.2 As of July 31, 2005, Settling Defendants shall not manufacture, distribute,  
8 ship, or sell, or cause to be manufactured, distributed, or sold, with or without the warning  
9 required by Paragraph 2.1 above, any Products containing sufficient quantities or concentrations  
10 of Lead such that Lead leaches from the Products in concentrations greater than 300 ppb when  
11 measured pursuant to the Protocol

12                   2.3 As of July 31, 2006, Settling Defendants shall not manufacture, distribute,  
13 ship, or sell, or cause to be manufactured, distributed, or sold, with or without the warning  
14 required by Paragraph 2.1 above, any Products containing sufficient quantities or concentrations  
15 of Lead such that Lead leaches from the Products in concentrations greater than 150 ppb when  
16 measured pursuant to the Protocol.

17                   2.4 As of July 31, 2007, Settling Defendants shall not manufacture, distribute,  
18 ship, or sell, or cause to be manufactured, distributed, or sold, with or without the warning  
19 required by Paragraph 2.1 above, any Products containing sufficient quantities or concentrations  
20 of Lead such that Lead leaches from the Products in concentrations greater than 50 ppb when  
21 measured pursuant to the Protocol.

22                   2.5 Sears and Kmart do not currently manufacture any of the Products, and  
23 each of them shall ensure compliance with the requirements of this Paragraph 2 prior to the sale  
24 of any of the Products by one of the following methods:

25                   2.5.1 If the Products are manufactured in a country other than the United  
26 States, the Products must be tested in a laboratory certified by a state or federal laboratory in the  
27 United States as compliant with the requirements set forth herein when measured using the  
28 Protocol.

1                   2.5.2 If the Products are manufactured in the United States, the Settling  
2 Defendant must receive a certification from the domestic manufacturer that the Products have  
3 been tested and are compliant with the requirements set forth herein when measured using the  
4 Protocol.

5                   2.5.3 If the Products are manufactured by one of the Settling  
6 Manufacturers in compliance with the Consent Judgment entered against such parties by the  
7 Court in this action on August 10, 2004 or by Gilmour, they shall be deemed compliant with the  
8 reformulation requirement of this paragraph 2.

9                   **3. SETTLEMENT PAYMENT**

10                  3.1 Within ten (10) days of entry of the Consent Judgment, Sears shall pay  
11 fifteen-thousand dollars (\$15,000) to CEH at the offices of the Lexington Law Group, LLP. The  
12 payment shall be apportioned by CEH, with one-thousand five hundred dollars (\$1,500)  
13 allocated as a monetary payment in lieu of penalties, and thirteen thousand five hundred dollars  
14 (\$13,500) being paid to reimburse attorneys fees and costs to the Lexington Law Group, LLP, as  
15 further set forth below.

16                  3.2 Within ten (10) days of entry of the Consent Judgment, Kmart shall pay  
17 twenty-one thousand dollars (\$21,000) to CEH at the offices of the Lexington Law Group, LLP.  
18 The payment shall be apportioned by CEH, with two thousand dollars (\$2,000) allocated as a  
19 monetary payment in lieu of penalties, and nineteen thousand dollars (\$19,000) being paid to  
20 reimburse attorneys fees and costs to the Lexington Law Group, LLP, as further set forth below.

21                  3.3 Within ten (10) days of entry of the Consent Judgment, Gilmour shall pay  
22 fifteen-thousand dollars (\$15,000) to CEH at the offices of the Lexington Law Group, LLP. The  
23 payment shall be apportioned by CEH, with one-thousand five hundred dollars (\$1,500)  
24 allocated as a monetary payment in lieu of penalties, and thirteen thousand five hundred dollars  
25 (\$13,500) being paid to reimburse attorneys fees and costs to the Lexington Law Group, LLP, as  
26 further set forth below.

27                  3.4 The funds allocated as a monetary payment in lieu of penalty shall be  
28 retained by CEH in lieu of any penalty pursuant to Health and Safety Code § 25249.7(b). CEH

1 shall use such funds to continue its work protecting people from exposures to toxic chemicals.  
2 Some of the projects CEH is currently working on include research and public education aimed  
3 at protecting children and other consumers from products that expose them to toxic chemicals;  
4 research and advocacy promoting public policies aimed at reducing exposures to persistent  
5 bioaccumulative toxins and heavy metals; supporting community-based organizations in their  
6 work protecting people from toxic chemicals; and participation in and leadership of national  
7 coalitions dedicated to protecting public health, such as the Collaboration on Health and the  
8 Environment, the Childproofing Our Communities Campaign, the Coming Clean Coalition, the  
9 Healthy Building Network and the Healthcare Without Harm coalition.

10           3.5     The funds allocated to reimburse CEH for its attorneys fees and costs shall  
11 be paid to the Lexington Law Group, LLP, pursuant to Cal. Code Civ. Pro. § 1021.5 for the  
12 reasonable investigation fees and costs, attorneys' fees, and any other costs incurred as a result  
13 of investigating, bringing this matter to the Settling Defendants' attention, litigating and  
14 negotiating a settlement in the public interest.

15           **4.     MODIFICATION OF CONSENT JUDGMENT**

16           4.1     This Consent Judgment may be modified by written agreement of CEH and  
17 the Settling Defendant to whom the modification applies, after noticed motion, and upon entry of  
18 a modified consent judgment by the Court, or upon noticed motion of CEH or Settling  
19 Defendant as provided by law and upon entry of a modified consent judgment by the Court. The  
20 California Attorney General shall be served with any motion or application filed pursuant to this  
21 Paragraph.

22           **5.     ENFORCEMENT OF CONSENT JUDGMENT**

23           5.1     In the event CEH believes in good faith that a Settling Defendant is not in  
24 compliance with the terms of this Consent Judgment, CEH shall provide written notice to that  
25 Settling Defendant, pursuant to Paragraph 12.1 below, setting forth its belief and the reasons  
26 therefore. The Settling Defendant receiving such notice shall meet and confer with CEH within  
27 fifteen (15) days of receiving the written notice to attempt to address CEH's concerns. If CEH  
28 and the Settling Defendant which received the written notice are unable to resolve CEH's



1 concerns within the fifteen (15) day period, CEH may by motion or application for an order to  
2 show cause before the Superior Court of the County of San Francisco, enforce the terms and  
3 conditions contained in this Consent Judgment. Should CEH prevail in any such motion or  
4 application, CEH shall recover the attorneys' fees and costs.

5 **6. APPLICATION OF CONSENT JUDGMENT**

6 6.1 The obligations of this Consent Judgment shall apply to and be binding  
7 upon the Parties hereto, their divisions, subdivisions and subsidiaries, and the successors or  
8 assigns of any of them.

9 **7. CLAIMS COVERED/RELEASE OF LIABILITY**

10 7.1 This Consent Judgment is a full, final and binding resolution between  
11 CEH, acting on behalf of itself and the general public, and Settling Defendants of any violation  
12 of Proposition 65, the Unfair Competition Law or any other statutory or common law claim that  
13 was or could have been asserted in the Complaint against Settling Defendants or each of their  
14 parents, subsidiaries, affiliates, directors, officers, employees, agents, attorneys, distributors,  
15 retailers or customers (collectively, "Defendant Releasees") based on failure to warn about  
16 exposure to Lead contained in the Products, as well as any discharge of Lead into a source of  
17 drinking water from such Products, with respect to any Products manufactured, distributed or  
18 sold by any or all of the Settling Defendants on or prior to the date of entry of this Consent  
19 Judgment. Compliance with this Consent Judgment by a Settling Defendant shall hereinafter  
20 constitute compliance with Proposition 65 by that Settling Defendant and their Defendant  
21 Releasees with respect to Lead in that Settling Defendant's Products. Nothing in this Paragraph  
22 shall be read to limit the obligations of any Settling Defendant as set forth under this Consent  
23 Judgment.

24 **8. SEVERABILITY**

25 8.1 In the event that any of the provisions of this Consent Judgment are held  
26 by a court to be unenforceable, the validity of the enforceable provisions shall not be adversely  
27 affected.

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1           **9.     SPECIFIC PERFORMANCE**

2                   9.1    The Parties expressly recognize that Settling Defendants' obligations under  
3 this Consent Judgment are unique. In the event that any Settling Defendant is found to be in  
4 breach of this Consent Judgment for failure to comply with the provisions of Paragraph 2 hereof,  
5 the Parties agree that it would be extremely impracticable to measure the resulting damages.  
6 Accordingly, CEH, in addition to any other available rights or remedies, may, pursuant to  
7 Paragraph 5.1 above, seek specific performance, and Settling Defendants expressly waive the  
8 defense that a remedy in damages will be adequate.

9           **10.    GOVERNING LAW**

10                   10.1   The terms of this Consent Judgment shall be governed by the laws of the  
11 State of California and apply to Products sold in the State of California.

12           **11.    RETENTION OF JURISDICTION**

13                   11.1   This Court shall retain jurisdiction of this matter to implement this Consent  
14 Judgment and supervise the injunctive relief to be provided pursuant to Paragraph 2 above.

15           **12.    PROVISION OF NOTICE**

16                   12.1   All notices required pursuant to this Consent Judgment and correspondence  
17 shall be sent to the following:

18    For CEH:

19                   Eric S. Somers  
20                   Lexington Law Group, LLP  
21                   1627 Irving Street  
22                   San Francisco, CA 94122

22    For Kmart:

23                   Michael J. Steel  
24                   Pillsbury Winthrop LLP  
25                   50 Fremont Street  
26                   PO Box 7880  
27                   San Francisco, CA 94120  
28

1 For Sears:

2 David Wood  
3 Wood Smith Henning & Berman LLP  
4 355 S. Grand Avenue 25th Floor  
5 Los Angeles, CA 90071

6 For Gilmour:

7 Eileen M. Nottoli  
8 Allen Matkins Leck Gamble & Mallory LLP  
9 Three Embarcadero Center, 12th Floor  
10 San Francisco, CA 94111

11 12.2 CEH shall provide copies of this Consent Judgment and its motion for  
12 approval and entry by the Court to the California Attorney General as required by Health &  
13 Safety Code § 25249.7(f).

14 **13. COURT APPROVAL**

15 13.1 CEH shall file a noticed motion seeking the Court's approval and entry of  
16 this Consent Judgment as required by Health & Safety Code § 25249.7(f). If this Consent  
17 Judgment is not approved and entered by the Court, it shall be of no further force or effect.

18 **14. EXECUTION AND COUNTERPARTS**

19 14.1 The stipulations to this Consent Judgment may be executed in counterparts  
20 and by means of facsimile, which taken together shall be deemed to constitute one document.

21 **15. AUTHORIZATION**

22 15.1 Each signatory to this Consent Judgment certifies that he or she is fully  
23 authorized by the Party he or she represents to stipulate to this Consent Judgment and to enter  
24 into and execute the Consent Judgment on behalf of the Party represented and legally bind that  
25 Party. The undersigned have read, understand and agree to all of the terms and conditions of this  
26 Consent Judgment. Except as explicitly provided herein, each Party is to bear its own fees and  
27 costs.  
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1 **AGREED TO:**  
2 **CENTER FOR ENVIRONMENTAL HEALTH**

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Dated: 12/6/04

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Michael Green, Executive Director  
Center for Environmental Health

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8 **KMART CORPORATION**

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Dated: \_\_\_\_\_

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Printed Name

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Title

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**SEARS, ROEBUCK AND CO.**

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Dated: \_\_\_\_\_

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Printed Name

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Title

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22 **GILMOUR MANUFACTURING COMPANY**

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Dated: \_\_\_\_\_

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Printed Name

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Title

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1 **AGREED TO:**

2 **CENTER FOR ENVIRONMENTAL HEALTH**

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Michael Green, Executive Director  
Center for Environmental Health

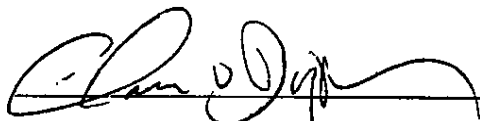
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8 **KMART CORPORATION**

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Dated: 11/16/04

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11 Claude V. Dykes  
Printed Name

12

13 Merchandise Mgr. - Lawn & Garden  
Title

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15 **SEARS, ROEBUCK AND CO.**

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Dated: \_\_\_\_\_

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Printed Name

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22 **GILMOUR MANUFACTURING COMPANY**

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Dated: \_\_\_\_\_

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1 **AGREED TO:**

2 CENTER FOR ENVIRONMENTAL HEALTH

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Michael Green, Executive Director  
Center for Environmental Health

Dated: \_\_\_\_\_

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8 KMART CORPORATION

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Dated: \_\_\_\_\_

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Printed Name

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SEARS, ROEBUCK AND CO.

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\_\_\_\_\_

Dated: 11/19/04

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*Michael W. Kier*  
\_\_\_\_\_

Printed Name

19

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*Assoc. Gen'l Counsel - Integration*  
\_\_\_\_\_

Title

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22 GILMOUR MANUFACTURING COMPANY

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\_\_\_\_\_

Dated: \_\_\_\_\_

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Printed Name

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1 **AGREED TO:**  
2 CENTER FOR ENVIRONMENTAL HEALTH

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5 \_\_\_\_\_  
Michael Green, Executive Director  
Center for Environmental Health

Dated: \_\_\_\_\_

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8 **KMART CORPORATION**

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Dated: \_\_\_\_\_

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12 \_\_\_\_\_  
Printed Name

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Title

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15 **SEARS, ROEBUCK AND CO.**

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Dated: \_\_\_\_\_

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19 \_\_\_\_\_  
Printed Name

20 \_\_\_\_\_  
Title

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22 **GILMOUR MANUFACTURING COMPANY**

23 *Thomas C Oyler*  
\_\_\_\_\_

Dated: \_\_\_\_\_

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25 *Thomas C Oyler*  
\_\_\_\_\_  
Printed Name

26 *V.P. Products*  
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\_\_\_\_\_ Title


**APPROVED AS TO FORM:**

For CENTER FOR ENVIRONMENTAL HEALTH

  
\_\_\_\_\_  
ERIC S. SOMERS  
LEXINGTON LAW GROUP LLP

Dated: 12/10/04

For KMART CORPORATION and MARTHA STEWART LIVING OMNIMEDIA, INC. :

  
\_\_\_\_\_  
MICHAEL STEEL  
PILLSBURY WINTHROP LLP

Dated: 11/29/04

For SEARS ROEBUCK AND CO.:

\_\_\_\_\_  
DAVID WOOD  
WOOD SMITH HENNING & BERMAN LLP


Dated: \_\_\_\_\_

For GILMOUR MANUFACTURING COMPANY

\_\_\_\_\_  
EILEEN M. NOTTOLI  
ALLEN MATKINS LECK GAMBLE & MALLORY LLP

Dated: \_\_\_\_\_



1 **APPROVED AS TO FORM:**  
2 For CENTER FOR ENVIRONMENTAL HEALTH  
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5 \_\_\_\_\_ Dated: \_\_\_\_\_  
6 ERIC S. SOMERS  
7 LEXINGTON LAW GROUP LLP  
8 For KMART CORPORATION:  
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11 \_\_\_\_\_ Dated: \_\_\_\_\_  
12 MICHAEL STEEL  
13 PILLSBURY WINTHROP LLP  
14 For SEARS ROEBUCK AND CO.:  
15  
16  
17  \_\_\_\_\_ Dated: 12/3/04  
18 DAVID WOOD  
19 WOOD SMITH HENNING & BERMAN LLP  
20 For GILMOUR MANUFACTURING COMPANY  
21  
22  
23 \_\_\_\_\_ Dated: \_\_\_\_\_  
24 EILEEN M. NOTTOLI  
25 ALLEN MATKINS LECK GAMBLE & MALLORY LLP  
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1 **APPROVED AS TO FORM:**

2 For CENTER FOR ENVIRONMENTAL HEALTH

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ERIC S. SOMERS  
LEXINGTON LAW GROUP LLP

Dated: \_\_\_\_\_

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8 For KMART CORPORATION:

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MICHAEL STEEL  
PILLSBURY WINTHROP LLP

Dated: \_\_\_\_\_

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14 For SEARS ROEBUCK AND CO.:

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DAVID WOOD  
WOOD SMITH HENNING & BERMAN LLP

Dated: \_\_\_\_\_

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20 For GILMOUR MANUFACTURING COMPANY

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23 \_\_\_\_\_  
EILEEN M. NOTTOLI  
ALLEN MATKINS LECK GAMBLE & MALLORY LLP

Dated: \_\_\_\_\_

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**JUDGMENT**

Based upon the stipulated Consent Judgment between CEH and Sears, Gilmour and Kmart, the settlement is approved and judgment is hereby entered according to the terms herein.

Dated: JAN 26 2005

**RONALD EVANS QUIDACHAY**

Judge, Superior Court of the State of California

**EXHIBIT A**

[Sampling method and testing protocol]

### Sampling Method for Assuring Compliance

1. This compliance assurance method will apply to all Products the Settling Defendants manufacture except those that are not manufactured with materials potentially capable of leaching lead into the internal water carrying cavity of the Product pursuant to the attached testing protocol (e.g., Products which do not have a material containing lead lying adjacent to their internal water carrying cavity).
2. The initial demonstration that a specified reformulation criterion has been achieved by the required date will be based on twelve months of test data collected pursuant to the attached protocol prior to the compliance date in question (the "Initial Demonstration"). Once compliance has initially been demonstrated at a level of <50 ppb (assuming a Proposition 65 warning will continue to be given) or <25 ppb (in the event that the Settling Defendant elects not to continue to provide a Proposition 65 warning), the compliance demonstration at that level will need to continue to be made for four (4) subsequent annual periods pursuant to a reduced testing schedule, at which point it will be deemed to be sustained (the "Confirmatory Demonstration").
3. Except as provided below, demonstration that a specified reformulation criterion has been achieved pursuant to the Initial Demonstration or sustained pursuant to the Confirmatory Demonstration will be based on a compilation of *all* test data from the Products tested within each annual period pursuant hereto.
4. For purposes of the Initial Demonstration and Confirmatory Demonstration, Products of the same materials composition whose internal water carrying cavity is manufactured in the same manner and which differ only in size or external appearance, will be deemed to be the same Product.
5. The Initial Demonstration. To ensure consistency in manufacturing and quality control, initially, for each reformulation compliance date (July 2005, 2006 and 2007), a minimum of five (5) samples per month will be collected during the preceding 12-month period. To further account for any differences in manufacturing variability, random samples will initially be collected during each four (4) month period in accordance with the schedule identified below. The same schedule will then be repeated for two (2)

ensuing four (4) month periods. When individual sampling dates fall on a “non-operating” day (including days on which sampling equipment or personnel are unavailable), samples for that date will be collected the next “operating” day, with no other change in the sampling schedule.

<u>Month</u>	<u>Calendar Dates</u>
First	1, 5, 12, 18, 24
Second	2, 6, 13, 19, 25
Third	3, 8, 14, 20, 26
Fourth	4, 9, 15, 22, 27

[Same Sampling Cycle Repeats for Months 5-8 and 9-12]

6. The Confirmatory Demonstration. To ensure ongoing consistency in manufacturing and quality control, following the Initial Demonstration relative to achievement of the <50 ppb compliance level (assuming a Proposition 65 warning will continue to be given) or the <25 ppb compliance level (in the event that the Settling Defendant elects not to continue to provide a Proposition 65 warning), a minimum of four (4) random samples per month will be collected during at least three (3) non-consecutive months of each subsequent 12-month period for the next four (4) years.
7. Compliance with the applicable reformulation criterion will be deemed initially achieved when at least 90% of twelve prior months of test data produces a concentration of not greater than the reformulation criterion specified for the forthcoming time period in question. Further testing under this Sampling Method will not be required when at least 90% of each of five (5) prior years of test data (collected from the Initial and Confirmatory Demonstrations described above) produces a concentration of not greater than the reformulation criterion in question. However, a Settling Defendant will still required to ensure through their own quality assurance method/program that the Products will continue to be compliant with the lead leaching limit set forth in Paragraph 2.4 or 2.1 of this Consent Judgment, as applicable.
8. If, subsequent to completing this effort, a Settling Defendant intends to introduce a Product which is not of the same materials composition as

Products for which compliance has already been assured, they will assess such Product(s) separately pursuant to this Sampling Method to ensure that the applicable reformulation criteria will be met. Also if a Settling Defendant ever wishes to sell a Product without a Proposition 65 warning, they will initially need to assess such Product(s) pursuant to the above to ensure that it consistently meets a criterion of <25 ppb for at least twelve prior months; once the warning is discontinued, the Settling Defendant will need to sustain that showing for four (4) subsequent years pursuant to the Confirmatory Demonstration.

9. This compliance assurance program may be discontinued for any Product (or family of Products) for which data has demonstrated that the requirements set forth in Paragraph 7 above has been met at a level of <50 ppb (assuming a Proposition 65 warning will continue to be given) or <25 ppb (in the event that the Settling Defendant elects not to continue to provide a Proposition 65 warning).
10. Settling Defendants shall maintain records concerning their compliance with the terms of this method, including all test data and associated laboratory reports, for at least 3 years following the date on which compliance has been deemed sustained.

## Testing Protocol

- I. **Objective:** To standardize the evaluation of lead concentration resulting in water that remains standing in water hoses. This protocol does not produce data that characterizes lead content in water that flows freely through water hoses.
- II. **Method:**
- A. **Length of Hose** - Approximately 1 liter of water is desired for laboratory analysis. Difficulty in filling test hoses is likely when the test water used is not introduced under pressure. A 5/8" inner diameter hose of 25 feet has the potential to produce approximately 1.5 liters of test water, and will be used under this protocol. If excess test water is produced, it may be discarded.
- B. **Hose Preparation** - Pre-conditioning of test hoses will be accomplished as follows:
1. Flush the hose to be tested for thirty minutes with tap water.
  2. Fill the hose, and hold for one hour. Hoses and test water are to be tested at 90° F ( $\pm 4^\circ$  F allowing for variability within the lab) during the holding period.
  3. Flush the hose again for thirty minutes again.
  4. Repeat steps 1 - 3 twice more, for a total of three complete flush cycles.
  5. Fill the hose with distilled or de-ionized water having a pH of  $7.5 \pm 0.5$  ("test water"), discard, and proceed to step C below.
- C. **Test Sample** - Immediately following the pre-conditioning steps described above, a test sample will be obtained as follows:
1. Begin the test by filling the hose with test water. Hoses and test water are to be tested at 90° F ( $\pm 4^\circ$  F allowing for variability within the lab). Record the time that filling has been completed ("test start time").
  2. Cap both ends of the hose. To avoid having an influence on test results, end caps should be of a material that is "lead free."
  3. At sixteen (16) hours after test start time, drain the test water from the hose into a laboratory-supplied sample container. If a



funnel or other device is used to facilitate transfer into the sample container, ensure that it is “lead free” and that it has been thoroughly rinsed and cleaned with distilled or de-ionized water prior to use.

- D. Test Parameter - Laboratory analysis will be for lead.
- E. Test Method - The analytical test procedures employed will be EPA approved test methods for determining lead concentrations in drinking water supplies [ASTM D 3559-96D (furnace atomic absorption), SM 3113.B (electro thermal atomic absorption spectrometry or EPA Method 200.8 (ICP-MS)]. Test results are to be reported as parts per billion (ppb) of lead.

**EXHIBIT B**

[Sample Warning Labels]

Form of warning to be used only with hoses that are made from lead-free virgin PVC where the brass fixtures are the only source of lead.

9004

**KGRO**

**1/2" x 50'**  
**(1.27cm x 15.24m)**  
**ALL-WEATHER HOSE**

**2 Year Warranty**

*Nylon couplings*

*Double spiral reinforcing*

*100% Prime materials -  
no recycled materials used*

**WARNING:**  
This garden hose is NOT intended for drinking water use or hot water use.

**PROP 65 WARNING:** These couplings contain chemicals known in the State of California to cause cancer, birth defects or other reproductive harm.

This warranty does not extend to hoses used for commercial purposes and will be void if the hose has been abused or misused.



SHOP WWW.KMART.COM  
Kmart Retail Corporation  
Troy, MI 48068-1000



**1/2" x 50'**  
**(1.27cm x 15.24m)**  
**ALL-WEATHER HOSE**

Form of warning to be used only with hoses that are made from lead-free virgin PVC where the brass fixtures are the only source of lead.



**5/8in x 150ft**  
**(1.59cm X 38.1m)**  
**ALL-WEATHER HOSE**

**2 Year Warranty**

**Round brass couplings**

**150ft (38.1m) for larger yards**

**WARNING:**

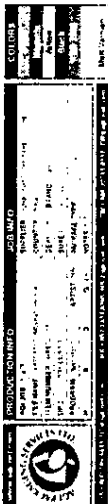
This hose contains chemical(s), including lead, known to the state of California to cause cancer, birth defects and other reproductive harm. Do not drink from this hose. Wash hands after use.



SHOP [WWW.KMART.COM](http://WWW.KMART.COM)

Made for Kmart Corporation  
 Troy, MI 48064, in China

**5/8in x 150ft**  
**(1.59cm X 38.1m)**  
**ALL-WEATHER HOSE**



## EXHIBIT C

[Sample warning labels – existing versions]

MARTELL  
**everyday**  
garden

# Standard Hose

DOUBLE-SPIRAL CONSTRUCTION FOR IMPROVED FLEXIBILITY

- $\frac{5}{8}$ " DIAMETER (1.5cm) for efficient water flow
- crush-proof BRASS COUPLINGS
- PROTECTIVE COLLAR at faucet end eliminates wear
- LIGHTWEIGHT for safe, easy portability

NONCOMMERCIAL WARRANTY

CODE : 0-501341-119



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**[7-YEAR] NONCOMMERCIAL WARRANTY**

This garden hose is not intended for hot water use.  
Do not drink from this hose.

Made in China. Hecho en China.

CODE : 0-501341-119



**MARTIN**  
**STEEL**  
**everyday**  
**garden**

# Standard Hose

DOUBLE-SPIRAL  
CONSTRUCTION FOR  
IMPROVED FLEXIBILITY

**[7-YEAR] NONCOMMERCIAL WARRANTY**

# 80'

5/8"

80' x 5/8" dia.  
(24.3m x 1.5cm)

## [7-YEAR] NONCOMMERCIAL WARRANTY

If this hose, when used for residential, noncommercial purposes, fails within 7 years from the date of purchase due to any defect in workmanship or materials, please return hose with proof of purchase and original packaging to place of purchase.

Except as expressly stated, Kmart Corporation makes no warranty, express or implied, whether of merchantability or fitness, for a particular use. Some states do not allow limitations on how long an implied warranty lasts, so the above limitation may not apply to you.

In no event shall Kmart Corporation be liable for any special, indirect, incidental, or consequential damages. Some states do not allow the exclusion or limitation of incidental or consequential damages, so the above limitation or exclusion may not apply to you.

This warranty gives you specific legal rights, and you may also have other rights, which vary from state to state.

The manufacturer will, at its discretion, replace this product if any defect in workmanship or materials prevents its ordinary use despite reasonable care.



express or implied, whether of merchantability or fitness, for a particular use. Some states do not allow limitations on how long an implied warranty lasts, so the above limitation may not apply to you.

In no event shall Kmart Corporation be liable for any special, indirect, incidental, or consequential damages. Some states do not allow the exclusion or limitation of incidental or consequential damages, so the above limitation or exclusion may not apply to you.

This warranty gives you specific legal rights, and you may also have other rights, which vary from state to state.

The manufacturer will, at its discretion, replace this product if any defect in workmanship or materials prevents its ordinary use despite reasonable care.



## Standard Hose

80' (24.3m)

This hose is for use with all Martha Stewart Everyday™ Garden nozzles and accessories, including our Quick-Connect Conversion Set (sold separately) for an instant snap-on connection. For a watertight connection, be sure the washer inside faucet end is positioned properly before connecting to water supply.

### CARE

Drain hose before winter storage. Do not use in freezing temperatures.

**PROP 65 WARNING:** Brass contains lead, a chemical known to the State of California to cause cancer, birth defects, or other reproductive harm.

Look online for our Encyclopedia of Plants at [marthastewart.com](http://marthastewart.com)®.

[shop.kmart.com](http://shop.kmart.com)

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prime PVC, rubber, nylon, brass

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# FELICITY

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**Gilmour**  
GARDENING INNOVATION



**Full Lifetime Replacement Policy** If this Flexogen® hose does not give the user complete satisfaction, the manufacturer will replace the hose free of charge. (Industrial and Commercial uses are excluded.) For free replacement, cut off both coupling ends and send them, postage prepaid, to:

Gilmour Group  
Excelsior Springs Division  
140 Corum Road  
Excelsior Springs, MO 64024

Should you have any questions, contact Customer Service at:  
1-800-458-0107 (PA Residents 1-814-443-4802).



Not For Use With Hot Water

**WARNING**

This product contains one or more chemicals known to the State of California to cause cancer and birth defects or other reproductive harm. *Wash hands after handling.*



Gilmour Manufacturing Company  
Customer Service Department  
P.O. Box 838  
Somerset, PA 15501 USA  
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