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ALAMEDA COUNTY
AUG 25 2015
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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF ALAMEDA

CONSUMER ADVOCACY GROUP, INC., in the interest of the Public,

Plaintiff,

v.

SEARS HOLDING CORPORATION, a Delaware Corporation; KMART CORPORATION, a Michigan Corporation; KMART CORPORATION OF ILLINOIS, INC., an Illinois Corporation; and DOES 1-20.

Defendants.

CASE NO. RG14740440

~~[PROPOSED]~~ ORDER GRANTING MOTION TO APPROVE AND ENTER CONSENT JUDGMENT BETWEEN CONSUMER ADVOCACY GROUP, INC, AND KMART CORPORATION

Resv. No.: **R-1633323**
Date: August 21, 2015
Time 1:30 pm
Dept 510

Complaint filed: September 12, 2014

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

On August 21, 2015 at 9:30 a.m., the Court heard the Motion to Approve and Enter Consent Judgment Between Consumer Advocacy Group, Inc. ("Plaintiff") and Defendant KMART CORPORATION ("Defendant"). The Court, having considered the documents filed in connection with this matter, and no opposition being filed, has arrived at the following conclusions and SO ORDERS:

BY FAX

1. The Court grants the Motion to Approve and Enter Consent Judgment Between Plaintiff and Defendant, in its entirety pursuant to California Health and Safety Code section 25249.7, subdivision (f)(4).

2. The Court approves the [Proposed] Consent Judgment, which Plaintiff and Defendant have submitted to this Court for approval pursuant to Proposition 65 (*Cal. Health & Safety Code §§25249.5, et seq.*) after making the following findings:

The Court finds that the [Proposed] Consent Judgment complies with the requirements of Health and Safety Code § 25249.7 et seq. Defendant has agreed that (i) Defendant shall not sell, offer for sale in North America, or ship Covered Products for sale in North America unless Defendant has reformulated the Covered Products to the point where the level of Di-*n*-butyl Phthalate ("DBP") does not exceed more than 0.1 % by weight or 1,000 ppm (parts per million); (ii) To the extent it ships or sells any Covered Products for sale to California customers from its existing inventory that do not comply with reformulation described above, Defendant will provide warnings on such Covered Products that comply with Proposition 65; (iii) Defendant shall pay a total of **$64,000** covering civil penalties, payments in lieu of civil penalties, attorneys' fees and costs. This payment is divided as follows:

(a) $2,000 for civil penalties, of which 75% ($1,500) is paid to State of California's Office of Environmental Health Hazard Assessment (OEHHA) and 25% ($500) is paid to CAG (See *HSC* § 25249.12);

(b) $2,000 to CAG, in lieu of a civil penalty which CAG will use to address the same public harm alleged in this action;

(c) $60,000 for CAG's attorneys' fees and costs which are reasonable when compared to the "lodestar" amount.

(d) Further, the proposed settlement terms are presumed to confer a public benefit. A public benefit is presumed, because the [Proposed] Consent Judgment requires Defendant to reformulate the Covered Products that contain DBP in concentrations of more than 1,000 ppm throughout all of North America.

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By Deputy

Reuben Yeroushalmi (SBN 193981)
Daniel D. Cho (SBN 105409)
Ben Yeroushalmi (SBN 232540)
YEROUSHALMI & YEROUSHALMI
An Association of Independent Law Corporations
9100 Wilshire Boulevard, Suite 240W
Beverly Hills, California 90212
Telephone: 310.623.1926
Facsimile: 310.623.1930

Attorneys for Plaintiffs,
Consumer Advocacy Group, Inc.

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF ALAMEDA

CONSUMER ADVOCACY GROUP, INC., in the interest of the Public, Plaintiff, v. SEARS HOLDING CORPORATION, a Delaware Corporation; KMART CORPORATION, a Michigan Corporation; KMART CORPORATION OF ILLINOIS, INC., an Illinois Corporation; and DOES 1-20; Defendants.	CASE NO. RG14740440 **CONSENT JUDGMENT [~~PROPOSED~~]** Complaint filed: September 12, 2014 Trial Date: None

1. INTRODUCTION

1.1 This Consent Judgment is entered into by and between plaintiff Consumer Advocacy Group, Inc. ("CAG") acting on behalf of itself and in the interest of the public, and defendant KMART CORPORATION, a Michigan Corporation ("KMART" or "Defendant") with each a "Party" and collectively referred to as "Parties."

1.2 It is alleged that Defendant employs ten or more persons, is a person in the course of doing business for purposes of the Safe Drinking Water and Toxic Enforcement Act of 1986,

BY FAX

California Health & Safety Code §§ 25249.6 et seq. ("Proposition 65"), and manufactured, distributed, and/or sold Flip Flop Sandals, including, but not limited to, "Island Club Brand Flip Flop Sandals, "021929FEB11", Girls, Pink, "10491", "Rhinestone 2", DEPT 35, CAT: 08, SUBCAT: 02, SEAS: 3011, KSN: 0-029504449-5, UPC 6 939894 091075" and Children's Sandals , including, but not limited to, "Kmart, Island Club, Boys, Navy, 10492, RILEY 2, 7/8, EV/5281, Dept: 35, Cat: 08, Subcat: 01, Seas: 3011, KSN: 0-02960127-5, UPC # 6 939894 055251, 021929NOV10, MADE IN CHINA" before the Effective Date of this Consent Judgment.

1.3 Notice of Violation.

1.3.1 On or about March 25, 2013, CAG served Defendant and various public enforcement agencies with documents entitled "60-Day Notice of Violation" (the "Notices") that provided the recipients with notice of alleged violations of Health & Safety Code § 25249.6 for failing to warn individuals in California of exposures to DBP contained in the Covered Products.

1.3.2 No public enforcer has commenced or diligently prosecuted the allegations set forth in the Notices.

1.4 Complaint.

On September 12, 2014, CAG filed a Complaint for civil penalties and injunctive relief ("Complaint") in Alameda Superior Court, Case No. RG14740440. The Complaint alleges, among other things, that Defendant violated Proposition 65 by failing to give clear and reasonable warnings of exposure to DBP from Covered Products.

1.5 Consent to Jurisdiction

While otherwise disputed, for purposes of this Consent Judgment, the parties consent that this Court has jurisdiction over the allegations of violations contained in the Complaint and personal jurisdiction over Defendant as to the acts alleged in the Complaint, that venue is proper in the City and County of Alameda and that this Court has jurisdiction to enter this Consent Judgment as a full settlement and resolution of the allegations contained in the Complaint and of all claims which were or could have been raised by any person or entity based in whole or in part, directly or indirectly, on the prior conduct of the parties or on the facts alleged in the

Complaint or arising therefrom or related to.

1.6 No Admission

This Consent Judgment resolves claims that are denied and disputed. The parties enter into this Consent Judgment pursuant to a full and final settlement of any and all claims between the parties for the purpose of avoiding prolonged litigation. This Consent Judgment shall not constitute an admission with respect to any material allegation of the Complaint, each and every allegation of which Defendant denies including jurisdiction, nor may this Consent Judgment or compliance with it be used as evidence of any wrongdoing, misconduct, culpability or liability on the part of Defendant.

2. DEFINITIONS

2.1 "Covered Products" means all the footwear sold, distributed, processed, packaged, produced, manufactured, and/or handled by Defendant within North America.

2.2 "Effective Date" means the date that this Consent Judgment is approved by the Court.

2.3 "DBP" means Di-*n*-butyl Phthalate, also known as Dibutyl Phthalate.

3. INJUNCTIVE RELIEF/REFORMULATION

3.1 After the Effective Date, Defendant shall not sell, offer for sale in North America, or ship Covered Products for sale in North America unless Defendant has reformulated the Covered Products to the point where the level of DBP does not exceed more than 0.1 % by weight or 1,000 ppm (parts per million).

3.2 Defendant agrees, promises, and represents that, as of the Effective Date, to the extent it ships or sells any Covered Products for sale to California customers from its existing inventory that do not comply with Section 3.1, it will provide warnings on such Covered Products that comply with Proposition 65. "Existing inventory" includes Covered Products shipped, sold and/or otherwise distributed on or prior to the Effective Date, even if sold by Defendant or Downstream Releasees after the Effective Date. The warnings shall be provided in such a conspicuously and prominent manner that will assure the message is made available

and likely to be read, seen, or heard by the consumer prior to or at the time of the sale or purchase. The Parties agree that product labeling stating that:

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

shall constitute compliance with Proposition 65 with respect to DBP in the Covered Products for any Covered Products in existing inventory that do not comply with Section 3.1 and were distributed and/or sold by Releasees or Downstream Releasees after the Effective Date.

4. SETTLEMENT PAYMENT

Total Payment: Within 10 days after the Effective Date, Defendant shall mail via certified mail, payments totaling sixty-four thousand dollars ($64,000.00) as follows:

4.1 Reimbursement of Attorneys' Fees and Costs: Defendant shall pay sixty thousand dollars ($60,000.00) to "Yeroushalmi & Associates" as reimbursement for the investigation fees and costs, testing costs, expert fees, attorney fees, and other litigation costs and expenses for all work performed through the approval of this Consent Judgment.

4.2 Civil Penalties. Defendant shall issue two separate checks for a total amount of two thousand dollars ($2,000.00) as penalties pursuant to Health & Safety Code § 25249.12: (a) one check made payable to the State of California's Office of Environmental Health Hazard Assessment (OEHHA) in the amount of one thousand five hundred dollars ($1,500.00) representing 75% of the total penalty; and (b) one check to Consumer Advocacy Group, Inc. in the amount of five hundred dollars ($500.00) representing 25% of the total penalty. Two separate 1099s shall be issued for the above payments: The first 1099 shall be issued to OEHHA, P.O. Box 4010, Sacramento, CA 95184 (EIN: 68-0284486) in the amount of $1,500.00. The second 1099 shall be issued in the amount of $500.00 to CAG and delivered to: Yeroushalmi & Associates, 9100 Wilshire Boulevard, Suite 240W, Beverly Hills, California 90212.

4.3 Payments in Lieu of Civil Penalties

Defendant also shall separately pay two thousand dollars ($2,000.00) to CAG as a

payment in lieu of civil penalty pursuant to Health & Safety Code §25249.7(b) and California Code of Regulations, Title 11 § 3203(b). CAG will use this payment for investigation of the public's exposure to Proposition 65 listed chemicals through various means, laboratory fees for testing for Proposition 65 listed chemicals, expert fees for evaluating exposures through various mediums, including but not limited to consumer product, occupational, and environmental exposures to Proposition 65 listed chemicals, and the cost of hiring consulting and retained experts who assist with the extensive scientific analysis necessary for those files in litigation, as well as administrative costs incurred during the litigation, in order to reduce the public's exposure to Proposition 65 listed chemicals by notifying those persons and/or entities believed to be responsible for such exposures and attempting to persuade those persons and/or entities to reformulate their products or the source of exposure to completely eliminate or lower the level of Proposition 65 listed chemicals, thereby addressing the same public harm as allegedly in the instant Action.

4.4 Payments pursuant to 4.1, 4.2 and 4.3 shall be delivered to: Reuben Yeroushalmi, Yeroushalmi & Yeroushalmi, 9100 Wilshire Blvd., Suite 240W, Beverly Hills, CA 90212 within the time agreed upon by the Parties.

5. MATTERS COVERED BY THIS CONSENT JUDGMENT

5.1 This Consent Judgment is a full, final, and binding resolution between CAG on behalf of itself and in the public interest and Defendant and its officers, directors, insurers, employees, parents, shareholders, divisions, subdivisions, subsidiaries, partners, affiliates, sister companies, agents, contractors, vendors, and their successors and assigns ("Defendant Releasees"), including but not limited to each of their suppliers, customers, distributors, wholesalers, retailers, or any other person in the course of doing business, and the successors and assigns of any of them who may use, maintain, distribute or sell Covered Products ("Downstream Defendant Releasees"), for all conduct of Defendant prior to the Effective Date based on alleged exposure to DBP from Covered Products as set forth in the Notice. Defendant's compliance with this Consent Judgment shall constitute compliance with Proposition 65 with respect to DBP from Covered Products.

5.2 CAG on behalf of itself, its past and current agents, representatives, attorneys, successors, and/or assignees, hereby waives all rights to institute or participate in, directly or indirectly, any form of legal action and releases all claims, including, without limitation, all actions, and causes of action, in law or in equity, suits, liabilities, demands, obligations, damages, costs, fines, penalties, losses, or expenses (including, but not limited to, investigation fees, expert fees, and attorneys' fees) of any nature whatsoever, whether known or unknown, fixed or contingent (collectively "Claims"), against Defendant, Defendant Releasees, and Downstream Defendant Releasees arising from any allegations of violation of Proposition 65 or any other statutory or common law regarding the failure to warn about exposure to DBP from Covered Products manufactured, distributed, or sold by Defendant,Defendant Releasees, and Downstream Defendant Releases. In furtherance of the foregoing, as to alleged exposures to DBP from Covered Products, CAG hereby waives any and all rights and benefits which it now has, or in the future may have, conferred upon it with respect to the Claims arising from any violation of Proposition 65 or any other statutory or common law regarding the failure to warn about exposure to DBP from Covered Products by virtue of the provisions of section 1542 of the California Civil Code, which provides as follows:

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

CAG understands and acknowledges that the significance and consequence of this waiver of California Civil Code section 1542 is that even if CAG suffers future damages arising out of or resulting from, or related directly or indirectly to, in whole or in part, the Claims arising from any alleged violation of Proposition 65 or any other statutory or common law regarding the failure to warn about exposure to DBP from Covered Products, including but not limited to any exposure to, or failure to warn with respect to exposure to DBP from the Covered Products, CAG will not be able to make any claim for those damages against Defendant or the Defendant Releasees or Downstream Defendant Releasees. Furthermore, CAG acknowledges that it intends these consequences for any such Claims arising from any alleged violation of Proposition 65 or

any other statutory or common law regarding the failure to warn about exposure to DBP from Covered Products as may exist as of the date of this release but which CAG does not know exist, and which, if known, would materially affect their decision to enter into this Consent Judgment, regardless of whether their lack of knowledge is the result of ignorance, oversight, error, negligence, or any other cause.

6. ENFORCEMENT OF JUDGMENT

6.1 The terms of this Consent Judgment shall be enforced exclusively by the Parties hereto. Except as otherwise agreed by the Parties, the Parties may, by noticed motion or order to show cause before the Superior Court of California, City and County of Alameda, giving the notice required by law, enforce the terms and conditions contained herein. A Party may enforce any of the terms and conditions of this Consent Judgment only after that Party first provides notice to the Party allegedly failing to comply with the terms and conditions of this Consent Judgment and provide 60 days in which the Parties shall attempt to resolve such Party's failure to comply in an open and good faith manner.

6.2 Notice of Violation. Prior to bringing any motion, order to show cause, or other proceeding to enforce any alleged violation of Section 3.1 of this Consent Judgment, CAG shall provide a Notice of Violation ("NOV") to Defendant. The NOV shall include for each of the Newly Alleged Products: the date(s) the alleged violation(s) was observed and the location at which the Newly Alleged Products were offered for sale, and shall be accompanied by all test data obtained by CAG regarding the Newly Alleged Products, including an identification of the component(s) of the Newly Alleged Products that were tested. Before any destructive testing of any Newly Alleged Products is conducted by or on behalf of CAG, CAG shall give Defendant(s) an opportunity to inspect and verify at reasonable times and places the authenticity of any Newly Alleged Product in violation of this Consent Judgment.

6.2.1 **Non-Contested NOV.** CAG shall take no further action regarding the alleged violation if, within 60 days of receiving such NOV, Defendant serves a Notice of Election ("NOE") that meets one of the following conditions:

(a) The Newly Alleged Products were shipped and/or distributed by Defendant for sale in California before the Effective Date, or

(b) Since receiving the NOV Defendant has taken corrective action by either (i) removing the Newly Alleged Products identified in the NOV from sale in California, or (ii) providing a clear and reasonable warning for the Newly Alleged Products identified in the NOV pursuant to 27 Cal. Code Regs. § 25603.

6.2.2 **Contested NOV.** Defendant may serve an NOE informing CAG of its election to contest the NOV within 60 days of receiving the NOV.

(a) In its election, Defendant may request that the sample(s) Covered Products tested by CAG be subject to additional confirmatory testing at an EPA-accredited laboratory.

(b) If the confirmatory testing establishes that the Newly Alleged Products do not contain DBP in excess of the level allowed in Section 3.1, CAG shall take no further action regarding the alleged violation. If the testing does not establish compliance with Section 3.1, Defendant may withdraw its NOE to contest the violation and may serve a new NOE pursuant to Section 6.2.1.

(c) If Defendant does not withdraw an NOE to contest the NOV, the Parties shall meet and confer for a period of no less than 30 days before CAG may seek an order enforcing the terms of this Consent Judgment.

6.3 In any proceeding brought by either Party to enforce this Consent Judgment, such party may seek whatever fines, costs, penalties or remedies as may be provided by law for any violation of Proposition 65 or this Consent Judgment.

7. ENTRY OF CONSENT JUDGMENT

7.1 CAG shall file a motion seeking approval of this Consent Judgment pursuant to California Health & Safety Code § 25249.7(f). Upon entry of the Consent Judgment, CAG and Defendant waive their respective rights to a hearing or trial on the allegations of the Complaint.

7.2 If this Consent Judgment is not approved by the Court, (a) this Consent Judgment and any and all prior agreements between the parties merged herein shall terminate and become

null and void, and the actions shall revert to the status that existed prior to the execution date of this Consent Judgment; (b) no term of this Consent Judgment or any draft thereof, or of the negotiation, documentation, or other part or aspect of the Parties' settlement discussions, shall have any effect, nor shall any such matter be admissible in evidence for any purpose in this Action, or in any other proceeding; and (c) the Parties agree to meet and confer to determine whether to modify the terms of the Consent Judgment and to resubmit it for approval.

8. MODIFICATION OF JUDGMENT AND RIGHTS THEREUNDER

8.1 This Consent Judgment may be modified only upon written agreement of the Parties and upon entry of a modified Consent Judgment by the Court thereon, or upon motion of any Party as provided by law and upon entry of a modified Consent Judgment by the Court. Any Party may waive in writing any right it may have under this Consent Judgment.

8.2 Any Party seeking to modify this Consent Judgment shall attempt in good faith to meet and confer with the other Party prior to filing a motion to modify the Consent Judgment.

9. RETENTION OF JURISDICTION

9.1 This Court shall retain jurisdiction of this matter to implement and enforce the terms of this Consent Judgment.

10. SERVICE ON THE ATTORNEY GENERAL

10.1 CAG shall serve a copy of this Consent Judgment, signed by both parties, on the California Attorney General so that the Attorney General may review this Consent Judgment prior to its submittal to the Court for approval. No sooner than forty five (45) days after the Attorney General has received the aforementioned copy of this Consent Judgment, and in the absence of any written objection by the Attorney General to the terms of this Consent Judgment, the Parties may then submit it to the Court for approval.

11. ATTORNEY FEES

11.1 Except as specifically provided in Section 4.1 and 6.3, each Party shall bear its own costs and attorney fees in connection with this action.

12. GOVERNING LAW

12.1 The validity, construction and performance of this Consent Judgment shall be governed by the laws of the State of California, without reference to any conflicts of law provisions of California law.

12.2 The Parties, including their counsel, have participated in the preparation of this Consent Judgment and this Consent Judgment is the result of the joint efforts of the Parties. This Consent Judgment was subject to revision and modification by the Parties and has been accepted and approved as to its final form by all Parties and their counsel. Accordingly, any uncertainty or ambiguity existing in this Consent Judgment shall not be interpreted against any Party as a result of the manner of the preparation of this Consent Judgment. Each Party to this Consent Judgment agrees that any statute or rule of construction providing that ambiguities are to be resolved against the drafting Party should not be employed in the interpretation of this Consent Judgment and, in this regard, the Parties hereby waive California Civil Code § 1654.

13. EXECUTION AND COUNTERPARTS

13.1 This Consent Judgment may be executed in counterparts and by means of facsimile or portable document format (PDF), which taken together shall be deemed to constitute one document.

14. NOTICES

14.1 Any notices under this Consent Judgment shall be by personal delivery or First Class Mail.

If to CAG:

Reuben Yeroushalmi
9100 Wilshire Boulevard, Suite 240W
Beverly Hills, CA 90212
(310) 623-1926

If to Kmart Corporation

Lori K. Miller
Associate General Counsel, Law Department
3333 Beverly Road

Hoffman Estates, IL 60179

With a copy to:

Michael Steel, Esq.
Alejandro Luis Bras, Esq.
Morrison & Foerster LLP
425 Market Street
San Francisco, CA 94105

15. AUTHORITY TO STIPULATE

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

AGREED TO:

Date: July 14, 2015

By: _____

Plaintiff, CONSUMER ADVOCACY GROUP, INC.

AGREED TO:

Date: July 7, 2015

By: Lori Meiler
Associate General Counsel

Defendant, KMART CORPORATION, a Michigan Corporation

IT IS SO ORDERED.

Date: 8/25/15

_____
Delbert C. Gee
JUDGE OF THE SUPERIOR COURT

CLERK'S CERTIFICATE OF MAILING (CCP 1013a)

I certify that the following is true and correct:

I am a Deputy Clerk employed by the Alameda County Superior Court. I am over the age of 18 years. My business address is ***24405 Amador Street, Hayward***, California. I served this Consent Judgment by placing copies in envelope(s) addressed as shown below and then by sealing and placing those for collection, stamping or metering with prepaid postage, and mailing on the date stated below, in the United States mail at ***Hayward***, California, following standard court practices.

Yeroushalmi, Ben
Yeroushalmi & Yeroushalmi
9100 Wilshire Blvd. Ste. 240W
Beverly Hills, CA 90212

Steel, Michael J.
Morrison & Foerster
425 Market St. Ste. 3300
San Francisco, CA 94105

Date 8/26/2015

Executive Officer/Clerk of the Superior Court

By _____
Danielle Labrecque, Courtroom Clerk for the
Honorable Delbert Gee
Department 510