

FILED
San Francisco County Superior Court

JUN 06 2018

CLERK OF THE COURT

BY: [Signature]
Deputy Clerk

1 Fredric Evenson (State Bar No. 198059)
2 ECOLOGY LAW CENTER
3 P.O. Box 1000
4 Santa Cruz, California 95061
5 Telephone: (831) 454-8216
6 Email: evenson@ecologylaw.com

7 Christopher Sproul (Bar No. 126398)
8 ENVIRONMENTAL ADVOCATES
9 5135 Anza Street
10 San Francisco, California 94121
11 Telephone: (415) 533-3376, (510) 847-3467
12 Facsimile: (415) 358-5695
13 Email: csproul@enviroadvocates.com

14 Counsel for Plaintiff,
15 ECOLOGICAL RIGHTS FOUNDATION

16 SUPERIOR COURT OF THE STATE OF CALIFORNIA
17 COUNTY OF SAN FRANCISCO

18 ECOLOGICAL RIGHTS FOUNDATION,

19 Plaintiff,

20 v.

21 SEARS, ROEBUCK AND CO., KMART
22 CORPORATION,

23 Defendants.

Case No. CGC-16-555370

MR
~~PROPOSED~~ CONSENT JUDGMENT

24 **1. INTRODUCTION**

25 1.1 On November 15, 2016, the Ecological Rights Foundation (“ERF”) acting on
26 behalf of itself and the general public, filed a Complaint for civil penalties and injunctive relief
27 (“Complaint”) in San Francisco Superior Court, Case No. CGC-16-555370, against defendant
28 Kmart Corporation (“Defendant” or “Kmart”). The Complaint alleges, among other things, that
Defendant violated provisions of the Safe Drinking Water and Toxic Enforcement Act of 1986,
Health and Safety Code Sections 25249.5, *et seq.* (Proposition 65) by failing to give clear and
reasonable warnings to those residents of California who use wood-burning outdoor heating
products, such as wood-burning fire pits, fire rings, fire tables, and chimeneas that are marketed
and/or distributed under a trademark owned by Kmart (“Covered Products”), that use of those

1 products causes exposures to carbon monoxide. Carbon monoxide is a chemical known to the
2 State of California to cause reproductive toxicity. The Complaint was based upon a 60-Day
3 Notice letter, sent by ERF on June 9, 2016 to Defendant, the California Attorney General, all
4 District Attorneys, and all City Attorneys with populations exceeding 750,000.

5 1.2 Defendant is a business that employs more than ten persons, and that markets
6 and/or sells Covered Products in California. The combustion of wood creates significant amounts
7 of carbon monoxide to be released into the air, causing inhalation exposures to those using or
8 standing near the Covered Products when they are in use. Pursuant to Health and Safety Code
9 Section 25249.8, carbon monoxide is a chemical known to the State of California to cause
10 reproductive toxicity. ERF alleges that Covered Products that are marketed and/or sold by
11 Defendant for use in California require a warning under Proposition 65, pursuant to Health and
12 Safety Code Section 25249.6. For purposes of this Consent Judgment, Kmart and ERF
13 (collectively "Parties") stipulate that this Court has jurisdiction over the allegations of violations
14 contained in the Complaint and personal jurisdiction over Defendant, that venue is proper in the
15 County of San Francisco, and that this Court has jurisdiction to enter this Consent Judgment as a
16 full settlement and resolution of the allegations contained in the Complaint.

17 1.3 This Consent Judgment resolves claims that are denied and disputed. The Parties
18 enter into this Consent Judgment pursuant to a full and final settlement of any and all claims
19 between the Parties for the purpose of avoiding prolonged litigation. Nothing in this Consent
20 Judgment shall be construed as an admission by Kmart of any fact, finding, conclusion of law,
21 issue of law, or violation of law, nor shall compliance with this Consent Judgment constitute or
22 be construed as an admission by Kmart of any fact, finding, conclusion of law, issue of law, or
23 violation of law. This Section shall not, however, diminish or otherwise affect Kmart's
24 obligations, responsibilities, or duties under this Consent Judgment.

25 1.4 The term "Effective Date" means the date this Consent Judgment is entered by the
26 Court. The term "Compliance Deadline" means the date sixty (60) days after the Effective Date.
27
28

1 **2. INJUNCTIVE RELIEF**

2 **2.1 Warnings**

3 A Covered Product that is (1) manufactured on or after the Compliance Deadline on
4 behalf of Kmart under a trademark owned by Kmart, and (2) offered for sale in California by
5 Kmart shall include one of the following warning statements:

6 **WARNING:** Combustion byproducts produced when using this product include carbon
7 monoxide, a chemical known to the State of California to cause birth defects or other
8 reproductive harm.

9 Or,

10 **WARNING:** Combustion byproducts produced when using this product include carbon
11 monoxide and other chemicals known to the State of California to cause cancer, birth
12 defects or other reproductive harm.

13 The warning statements shall be affixed to or printed on the Covered Product or its packaging
14 and in the Covered Product's instruction booklet. The warning shall be prominently affixed to or
15 printed on the Covered Product or its packaging, and in its instruction booklet, and displayed
16 with such conspicuousness, as compared with other words, statements, designs, or devices as to
17 render the warning likely to be read and understood by an ordinary individual under customary
18 conditions of purchase or use. The type size of the warning must be in a type size no smaller
19 than the largest type size used for other consumer information on the product. The word
20 **"WARNING:"** shall be in upper case letters and bold text.

21 **2.2 Reporting**

22 No later than 75 days after the Execution Date, Defendants shall provide a report to ERF
23 documenting compliance with paragraph 2.1. The report shall include photographs of the
24 warning posting and documentation that the warnings are being included with Covered Products
25 that are offered for sale in California.

26 The warning requirements set forth in this Section 2.1 are imposed pursuant to
27 the terms of this Consent Judgment. The Parties recognize that these are not the exclusive
28 methods of providing a warning under Proposition 65 and its implementing regulations and that

1 they may or may not be appropriate in other circumstances.

2 **3. SETTLEMENT PAYMENTS**

3 **3.1 Civil Penalties and Payments In Lieu of Penalties**

4 Pursuant to Health and Safety Code section 25249.7(b)(2), Defendant shall pay \$5,000 in
5 civil penalties. The penalty payment will be allocated in accordance with California Health and
6 Safety Code section 25249.12(c)(1) & (d), with 75% of the penalty amount remitted to the
7 California Office of Environmental Health Hazard Assessment ("OEHHA") and the remaining
8 25% of the penalty amount paid to Ecological Rights Foundation. Defendant will provide these
9 payments in two checks for the following amounts made payable to: 1) "OEHHA" in the amount
10 of \$3,750, and 2) "Ecological Rights Foundation" in the amount of \$1,250.

11 **3.2 Attorneys' Fees and Litigation Costs**

12 In settlement of all of the claims that are alleged, or could have been alleged, in the Complaint
13 concerning Covered Products, Defendant shall pay \$22,500 to the Ecology Law Center to cover
14 Plaintiff's attorneys' fees and costs.

15 **3.3 Payments**

16 All payments shall be sent no later than 10 days after the Effective Date via USPS
17 certified mail, return receipt requested, to the following addresses. All payments to Ecological
18 Rights Foundation and Ecology Law Center shall be delivered to:

19 Fredric Evenson
20 Ecology Law Center
21 P.O. Box 1000
22 Santa Cruz, CA 95061

23 The payment to OEHHA shall be delivered to:

24 Mike Gyurics
25 Fiscal Operations Branch Chief
26 Office of Environmental Health Hazard Assessment
27 P.O. Box 4010
28 Sacramento, CA 95812-4010

29 **4. MATTERS COVERED BY THIS CONSENT JUDGMENT**

30 This Consent Judgment is a final and binding resolution between ERF, acting on behalf
31 of itself and (as to those matters raised in the 60-Day Notice Letter) the general public, and

1 Defendant of: (i) any violation of Proposition 65 (including but not limited to the claims made in
2 the Complaint); and (ii) any other statutory or common law claim to the fullest extent that any of
3 the foregoing described in (i) or (ii) were or could have been asserted by any person or entity
4 against Defendants or their parents, subsidiaries or affiliates, including but not limited to Sears,
5 Roebuck and Co., and all of their suppliers, customers, distributors, wholesalers, retailers, or any
6 other person in the course of doing business, and the successors and assigns of any of them, who
7 may use, maintain, distribute or sell Covered Products ("Released Entities"), based on its or their
8 failure to provide clear and reasonable warnings of exposures to carbon monoxide from Covered
9 Products. As to alleged exposures to carbon monoxide from Covered Products, compliance with
10 the terms of this Consent Judgment resolves any issue, now and in the future, concerning
11 compliance by Defendant and the Released Entities, with the requirements of Proposition 65
12 with respect to Covered Products, and any alleged resulting exposure.

13 **5. ENTRY OF CONSENT JUDGMENT**

14 5.1 The Parties hereby request that the Court promptly enter this Consent Judgment.
15 Upon entry of the Consent Judgment, Defendant and ERF waive their respective rights to a
16 hearing or trial on the allegations of the Complaint.

17 Within 15 days of ERF's receipt of Kmart's payment of the civil penalty and attorneys'
18 fee reimbursement required by Sections 3.1 and 3.2, ERF agrees to file a request for a dismissal
19 with prejudice as to defendant Sears Roebuck and Co.

20 **6. ENFORCEMENT OF JUDGMENT**

21 6.1 The terms of this Consent Judgment shall be enforced exclusively by the Parties
22 hereto. The Parties may, by noticed motion or order to show cause before the Superior Court of
23 San Francisco County, giving the notice required by law, enforce the terms and conditions
24 contained herein.

25 6.2 In any proceeding brought by either party to enforce this Consent Judgment, such
26 party may seek whatever fines, costs, penalties or remedies as may be provided by law for any
27 violation of Proposition 65 or this Consent Judgment.

1 **7. MODIFICATION OF JUDGMENT**

2 7.1 This Consent Judgment may be modified only upon written agreement of the
3 Parties and upon entry of a modified Consent Judgment by the Court thereon, or upon motion of
4 any party as provided by law and upon entry of a modified Consent Judgment by the Court.

5 **8. TERMINATION AND RETENTION OF JURISDICTION**

6 8.1 This Court shall retain jurisdiction of this matter to implement and enforce the
7 terms this Consent Judgment.

8 **9. AUTHORITY TO STIPULATE**

9 9.1 Each signatory to this Consent Judgment certifies that he or she is fully authorized
10 by the party he or she represents to enter into this Consent Judgment and to execute it on behalf
11 of the party represented and legally to bind that party.

12 **10. SERVICE ON THE ATTORNEY GENERAL**

13 10.1 ERF shall serve a copy of this Consent Judgment, signed by the Parties, on the
14 California Attorney General on behalf of the Parties so that the Attorney General may review
15 this Consent Judgment prior to its submittal to the Court for approval. No sooner than forty five
16 (45) days after the Attorney General has received the aforementioned copy of this Consent
17 Judgment, and in the absence of any written objection by the Attorney General to the terms of
18 this Consent Judgment, the Parties may then submit it to the Court for approval.

19 **11. ENTIRE AGREEMENT**

20 11.1 This Consent Judgment contains the sole and entire agreement and understanding
21 of the Parties with respect to the entire subject matter hereof and any and all prior discussions,
22 negotiations, commitments and understandings related hereto. No representations, oral or
23 otherwise, express or implied, other than those contained herein have been made by any party
24 hereto. No other agreements not specifically referred to herein, oral or otherwise, shall be
25 deemed to exist or to bind the Parties.

1 **12. GOVERNING LAW**

2 12.1 The validity, construction and performance of this Consent Judgment shall be
3 governed by the laws of the State of California, without reference to any conflicts of law
4 provisions of California law.

5 **13. EXECUTION AND COUNTERPARTS**

6 13.1 This Consent Judgment may be executed in counterparts which taken together
7 shall be deemed to constitute one document.

8 **14. COURT APPROVAL**

9 14.1 If this Consent Judgment is not approved by the Court, it shall be of no force or
10 effect, and cannot be used in any proceeding for any purpose.

11 **15. NOTICES**

12 15.1 Any notices or payments due under this Consent Judgment shall be sent by
13 personal delivery or Certified Mail.

14
15 If to Ecological Rights Foundation: Fredric Evenson
16 Ecology Law Center
17 P.O. Box 1000
Santa Cruz, CA 95061

18 If to Kmart Corporation Attn: Legal Department
19 Kmart Corporation
20 3333 Beverly Road
Hoffman Estates, IL 60179

21 With a copy to:

22 Michael Steel
23 Morrison & Foerster LLP
24 425 Market Street
25 32nd Floor
26 San Francisco, CA 94105
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IT IS SO STIPULATED:

DATED: APRIL 25, 2018

ECOLOGICAL RIGHTS FOUNDATION
Ecological Rights Foundation

BY: *James Lampert* EXEC. DIR.
JAMES LAMPART, EXECUTIVE DIRECTOR

DATED: 4/2/18

KMART CORPORATION

BY: *[Signature]*
ITS: D.C.C. & ASST-SEC'y

IT IS SO ORDERED, ADJUDGED AND DECREED:

DATED: 6/6/18

[Signature]
JUDGE OF THE SUPERIOR COURT

HAROLD KAHN