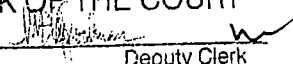


Brian Gaffney (State Bar No. 168778)
LAW OFFICES OF BRIAN GAFFNEY APC
2370 Market Street, Suite 103-318
San Francisco, CA 94114
Telephone: (650) 219 3187
Email: brian@gaffneylegal.com

FILED
San Francisco County Superior Court

JUL 10 2023

CLERK OF THE COURT

BY:  Deputy Clerk

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

Counsel for Plaintiff
ECOLOGICAL RIGHTS FOUNDATION

**SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SAN FRANCISCO**

ECOLOGICAL RIGHTS FOUNDATION,

Plaintiff,

v.

WALMART INC., *et al.*,

Defendants.

Case No. CGC-21-596389

[PROPOSED] CONSENT JUDGMENT

1. INTRODUCTION

1.1 On November 5, 2021, the Ecological Rights Foundation (“ERF”) acting on behalf of itself and the general public, filed a Complaint for civil penalties and injunctive relief (“Complaint”) in San Francisco Superior Court, Case No. CGC-21-596389 against defendant Walmart Inc. (also referred to herein as “Walmart” or “Defendant”). 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, in the operation of 3D pens using styrene monomer filaments—including acrylonitrile-butadiene-styrene (ABS) filaments, polycarbonate ABS (PC-ABS) filaments and high impact polystyrene

1 (HIPS) filaments—are exposed to Styrene, a chemical known to the State of California to cause cancer.
2 The Complaint was based upon a 60-Day Notice letter, sent by ERF on August 30, 2021 to Walmart, the
3 California Attorney General, all District Attorneys, and all City Attorneys with populations exceeding
4 750,000 (hereinafter, “the 60-Day Notice”).

5 1.2 For purposes of this Consent Judgment, “Covered Products” (or singularly, “Covered
6 Product”) are defined as follows:

- 7 ▪ ANSELF 3D Pen: “3D Printing Pen Adjustable Speed & Temperature LED Display ABS
8 Pen Holder with 1 Roll 10m PLA Filament for Drawing Painting Art Craft Making 3D
9 Modeling Children Education Birthday Christmas Gift Toy” (UPC 0079132791009,
10 Walmart Catalog Item 545429436) sold by Jingdong E-Commerce (Trade) Hong Kong
11 Corporation;
- 12 ▪ Basstop 3D Pen: “Basstop 3D Pen DIY 3D Printer Pen Drawing Pens 3D Printing Best
13 Gifts for Kids with ABS Filament—Blue” (UPC 0078068249965, Walmart Catalog Item
14 976007691) sold by Kas Motion Inc.;
- 15 ▪ Myriann 3D Pen: “3D Printing Pen Crafting Doodle Drawing Arts Printer Modeling ABS
16 Filaments DIY” (UPC 0076240932419, Walmart Catalog Item 678275522) sold by Kas
17 Motion Inc.;
- 18 ▪ VicTsing 3D Pen: “3D LED Printing Pen PLA/ABS Filaments Crafting Doodle Drawing
19 Arts Printer 3d Printing Pen Starter Kit for Kids & Adults Blue” (UPC 0079682660971,
20 Walmart Catalog Item 343056754) sold by Coutlet LLC;
- 21 ▪ HC-TOP 3D Pen: “Retired Items” (UPC 0094021435435, Walmart Catalog Item
22 676445602) sold by Horizon String, Inc.;
- 23 ▪ Allcaca 3D Pen: “3D Printing Pen with LCD Screen, Printer Pen for 3D Printing, Drawing,
24 Doodle Model Making and 3D Modeling, with Free Filament Refills, Adjustable Printing
25 Speed, Suitable for Kids and Adults” (UPC 0019155733760; Walmart Catalog Item
26 103064185) sold by Brands Classics LLC, Rosewill, Inc., and Appliance Parts Company /

1 Fortune Profit Trading Ltd.;

- 2 ■ General 3D Pen: “3D Printing Pen, 3D Pen for Doodling, Art & Craft Making, 3D
3 Modeling and Education, Blue” (UPC 0019155733756; Walmart Catalog Item 576791739)
4 sold by Brands Classics LLC and Rosewill, Inc.;
- 5 ■ Ikeepi 3D Pen: “3D Printing Pen with LCD Screen, Printer Pen for 3D Printing, Drawing,
6 Doodle Model Making and 3D Modeling, with Free Filament Refills, Adjustable Printing
7 Speed, Suitable for Kids and Adults” (UPC 0694105846786; Walmart Catalog Item
8 773732813) sold by Brands Classics LLC, Rosewill, Inc., and Jaco LLC; and
- 9 ■ Mascarry 3D Pen: “3D Pen, 1.75mm ABS and PLA Compatible 3D Printing Pen” (UPC
10 0078068251372; Walmart Catalog Item 205512284) sold by Fun for All Ages LLC; and
- 11 ■ V.I.P. 3D Pen: “3D Pen 3D Drawing Printing Printer Pen with Free Filament Refills” (UPC
12 0019155764538; Walmart Catalog Item 392540539) sold by Chicago Consumables
13 Incorporated.

14 1.3 Defendant is a business that employs more than ten persons, and operates an online
15 marketplace on which Covered Products were sold.

16 1.4 Plaintiff alleges that: (a) the Covered Products heat the above-identified filaments and thus
17 release Styrene into the air; and (b) people using the 3D pens with filaments incorporating a Styrene
18 monomer, and others standing in the same room, inhale Styrene in the normal course of use. Pursuant to
19 Health and Safety Code section 25249.8, Styrene is a chemical known to the State of California to cause
20 cancer. ERF alleges that Covered Products sold by Defendant for use in California require a warning under
21 Proposition 65, pursuant to Health and Safety Code section 25249.6.

22 1.5 For purposes of this Consent Judgment, the parties stipulate that this Court has jurisdiction
23 over the allegations of violations contained in the Complaint and personal jurisdiction over Walmart, that
24 venue is proper in the County of San Francisco, and that this Court has jurisdiction to enter this Consent
25 Judgment as a full settlement and resolution of the allegations contained in the Complaint.

1 1.6 This Consent Judgment resolves claims that are denied and disputed. The parties enter into
2 this Consent Judgment pursuant to a full and final settlement of any and all claims between the parties for
3 the purpose of avoiding prolonged litigation. This Consent Judgment shall not constitute an admission
4 with respect to any allegation of the Complaint, each and every allegation of which Walmart denies, nor
5 may this Consent Judgment, or compliance with it, be used as evidence of any alleged wrongdoing,
6 misconduct, culpability or liability on the part of Walmart.

7 1.7 The term “Effective Date” means the date that this Consent Judgment is entered by the
8 Court.

9 **2. INJUNCTIVE RELIEF**

10 2.1 As of the Effective Date, Walmart agrees¹ as follows:

11 A) It will not permit Coutlet LLC to sell the “VicTsing 3D LED Printing Pen PLA/ABS
12 Filaments Crafting Doodle Drawing Arts Printer 3d Printing Pen Starter Kit for Kids & Adults
13 Blue” (UPC 0079682660971; Walmart Catalog Item 343056754) on Walmart.com to California
14 consumers with shipping addresses in California or to supply such item to be sold in Walmart retail
15 stores in California.

16 B) It will not permit Kas Motion Inc. to sell either the “Basstop 3D Pen DIY 3D Printer Pen
17 Drawing Pens 3D Printing Best Gifts for Kids with ABS Filament—Blue” (UPC 0078068249965;
18 Walmart Catalog Item 976007691) or the “Myriann 3D Printing Pen Crafting Doodle Drawing
19 Arts Printer Modeling ABS Filaments DIY” (UPC 0076240932419; Walmart Catalog Item
20 678275522) on Walmart.com to California consumers with shipping addresses in California or to
21 supply such item to be sold in Walmart retail stores in California.

22 C) It will not permit Horizon String, Inc. to sell the “HC-TOP Retired Items” (UPC
23 0094021435435; Walmart Catalog Item 676445602) on Walmart.com to California consumers
24 with shipping addresses in California or to supply such item to be sold in Walmart retail stores in
25 California.

26 ¹ The parties recognize and acknowledge that cessation of sales is not the only method of complying with Proposition
27 65.
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1 D) It will not permit Jingdong E-Commerce (Trade) Hong Kong Corporation to sell the
2 “Anself 3D Printing Pen Adjustable Speed & Temperature LED Display ABS Pen Holder with 1
3 Roll 10m PLA Filament for Drawing Painting Art Craft Making 3D Modeling Children Education
4 Birthday Christmas Gift Toy” (UPC 0079132791009; Walmart Catalog Item 545429436) on
5 Walmart.com to California consumers with shipping addresses in California or to supply such item
6 to be sold in Walmart retail stores in California.

7 (E) It will not permit Brands Classics LLC, Rosewill, Inc., and Appliance Parts Company /
8 Fortune Profit Trading Ltd. to sell the “Allcaca 3D Printing Pen with LCD Screen, Printer Pen for
9 3D Printing, Drawing, Doodle Model Making and 3D Modeling, with Free Filament Refills,
10 Adjustable Printing Speed, Suitable for Kids and Adults” (UPC 0019155733760; Walmart Catalog
11 Item 103064185) on Walmart.com to California consumers with shipping addresses in California
12 or to supply such item to be sold in Walmart retail stores in California.

13 (F) It will not permit Brands Classics LLC and Rosewill, Inc. to sell the “General 3D Printing
14 Pen, 3D Pen for Doodling, Art & Craft Making, 3D Modeling and Education, Blue” (UPC
15 0019155733756; Walmart Catalog Item 576791739) on Walmart.com to California consumers
16 with shipping addresses in California or to supply such item to be sold in Walmart retail stores in
17 California.

18 (G) It will not permit Brands Classics LLC, Rosewill, Inc., and Jaco LLC to sell the “Ikeepi
19 3D Printing Pen with LCD Screen, Printer Pen for 3D Printing, Drawing, Doodle Model Making
20 and 3D Modeling, with Free Filament Refills, Adjustable Printing Speed, Suitable for Kids and
21 Adults” (UPC 0694105846786; Walmart Catalog Item 773732813) on Walmart.com to California
22 consumers with shipping addresses in California or to supply such item to be sold in Walmart retail
23 stores in California.

24 (H) It will not permit Fun for All Ages LLC to sell the “Mascarry 3D Pen, 1.75mm ABS and
25 PLA Compatible 3D Printing Pen” (UPC 0078068251372; Walmart Catalog Item 205512284) on
26 Walmart.com to California consumers with shipping addresses in California or to supply such item
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1 to be sold in Walmart retail stores in California.

2 (I) It will not permit Chicago Consumables Incorporated to sell the “V.I.P. 3D Pen 3D Pen 3D
3 Drawing Printing Printer Pen with Free Filament Refills” (UPC 0019155764538; Walmart Catalog
4 Item 392540539) on Walmart.com to California consumers with shipping addresses in California
5 or to supply such item to be sold in Walmart retail stores in California.

6 2.2 ERF shall have the exclusive right to enforce the provisions of this Consent Judgment. ERF
7 represents and warrants neither it nor its agents or attorneys have assigned or otherwise transferred, or
8 attempted to assign, or transfer, any claim or claims against Walmart. ERF further warrants that neither it
9 nor its agents or attorneys are aware of any other potential private enforcer or attorney who intends to bring
10 litigation based on the 60-Day Notice.

11 2.3 To the extent ERF identifies any Covered Product (or any other item referenced in the 60-
12 Day Notice for sale on Walmart.com or in a Walmart retail store located in California) in the future which
13 it believes is not in compliance with this Consent Judgment (or if ERF believes that Walmart is in violation
14 or noncompliance with this Consent Judgment in any respect), ERF agrees to advise Walmart of such
15 alleged breach in the manner set forth in Section 14, and provide Walmart with 20 business days (calculated
16 from the date notice is provided electronically) to cure any alleged violation of this Consent Judgment (the
17 “Notice to Cure”). Such Notice to Cure to Walmart shall contain, to the extent known by ERF, information
18 sufficient for Walmart to identify the Covered Product such as the Covered Product’s UPC (Universal
19 Product Code) Number, the date and location when/where the Covered Product was sold, the Walmart
20 Order Number, and for Covered Products sold on Walmart.com, a screenshot of the Covered Product’s
21 online listing (also known as the product display page), including the Covered Product’s URL (Uniform
22 Resource Locator).

23 2.4 ERF shall not be entitled to seek or recover any civil penalties, and ERF and its counsel
24 shall not be entitled to recovery or reimbursement of attorney’s fees and/or costs, or any other available
25 remedies arising from or related to Notices to Cure, provided Walmart timely remedies the alleged non-
26 compliance within 20 business days of receiving the Notice to Cure by Walmart (1) delisting a Covered
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1 Product from Walmart.com, (2) prohibiting such Covered Product sold on Walmart.com from being
2 shipped to an address in California, or (3) prohibiting such Covered Product from being sold at Walmart
3 retail stores in California. If Walmart so remedies the alleged non-compliance within 20 business days of
4 receiving the Notice to Cure, Walmart shall not be deemed in breach or violation of this Consent Judgment
5 in any respect. In the absence of Walmart curing within 20 business days of receiving the Notice to Cure,
6 ERF may bring an action to enforce this Consent Judgment to seek additional civil penalties,
7 reimbursement of reasonable attorney's fees and costs, injunctive relief, and any other available remedies,
8 or bring a new Proposition 65 action.

9 2.5 The injunctive relief awarded herein applies only to (1) Covered Products sold on
10 walmart.com and shipped to California addresses and (2) Covered Products sold in Walmart retail stores
11 located in California.

12 **3. SETTLEMENT PAYMENTS**

13 **3.1 Civil Penalties and Payments In Lieu of Penalties**

14 Pursuant to Health and Safety Code section 25249.7(b)(2), Walmart shall pay \$1,000 in civil
15 penalties. The penalty payment will be allocated in accordance with California Health and Safety Code
16 section 25249.12(c)(1) & (d), with 75% of the penalty amount remitted to the California Office of
17 Environmental Health Hazard Assessment ("OEHHA") and the remaining 25% of the penalty amount paid
18 to Ecological Rights Foundation. Walmart will provide these payments in two checks for the following
19 amounts made payable to: (1) "OEHHA" in the amount of \$750; and (2) "Ecological Rights Foundation"
20 in the amount of \$250. ERF shall provide Walmart with a current W-9 from ERF and OEHHA within seven
21 (7) days of the execution of this Consent Judgment.

22 The payments to OEHHA and Ecological Rights Foundation shall be sent no later than thirty (30)
23 days after the Effective Date. All payments shall be sent via USPS certified mail, return receipt requested
24 (or via overnight carrier), to the following addresses:

25 All payments to Ecological Rights Foundation shall be delivered to:

26 LAW OFFICES OF BRIAN GAFFNEY, A Professional Corporation
27
28

2370 Market Street, Suite 103-318
San Francisco, CA 94114

The payment to OEHHA shall be delivered to:

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

3.2 Attorneys' Fees and Litigation Costs

Walmart² shall reimburse ERF a total of \$39,000 towards its fees and costs incurred as a result of investigating and bringing this matter to Walmart's attention, and negotiating a settlement in the public interest. ERF shall provide Walmart with a current W-9 from Law Offices of Brian Gaffney A Professional Corporation within seven (7) days of the execution of this Consent Judgment. The \$39,000 check shall be made payable to "Law Offices of Brian Gaffney A Professional Corporation" and sent no later than thirty (30) days after the Effective Date via USPS certified mail, return receipt requested (or via overnight carrier), to the following address:

LAW OFFICES OF BRIAN GAFFNEY, A Professional Corporation
2370 Market Street, Suite 103-318
San Francisco, CA 94114

4. RELEASE OF ALL CLAIMS

4.1 Release of Walmart

ERF, acting on its own behalf and on behalf of its past and current agents, representatives, attorneys, successors and/or assignees (all of whom, collectively, are defined as the "ERF Releasers") and in the public interest, releases Walmart and its parents, direct and indirect subsidiaries, affiliated entities, marketplaces, directors, officers, agents, employees, attorneys and each entity that sold or distributed, directly or indirectly, any Covered Products on Walmart.com or in Walmart stores including, but not limited to, downstream vendors, manufacturers, distributors, wholesalers, customers, retailers, franchisees, cooperative members and licensees and all other downstream entities in the distribution chain, and the predecessors, successors, and assigns of any of them (collectively, "Releasees"), from all claims, causes of

² Walmart shall be permitted to seek recoupment for such funds from the entities listed in Section 2.1.

1 actions, allegations, and demands raised in the 60-Day Notice and/or the Complaint for alleged violations
2 of Proposition 65 through the Effective Date based on failure to warn about alleged exposures to Styrene
3 from use of the Covered Products. This settlement is a full, final and binding resolution of all claims
4 asserted against Walmart and/or the Releasees based on the claims, causes of action, and demands set forth
5 in the 60-Day Notice or the Complaint alleging failure to provide warnings under Proposition 65 for alleged
6 exposures to Styrene from use of the Covered Products.

7 In further consideration of the promises and agreements herein contained, and for the payment to
8 be made pursuant to Section 3 above, the ERF Releasors provide a release herein which shall be effective
9 as a full and final accord and satisfaction, as a bar to all actions, causes of action, obligations, costs,
10 expenses, attorneys' fees, damages, losses, claims, liabilities and demands against Walmart and/or any of
11 the Releasees of any nature, character, or kind, arising out of the claims and allegations set forth in the 60-
12 Day Notice or the Complaint for the alleged failure to provide warnings for alleged exposure to Styrene
13 from use of the Covered Products.

14 **4.2 Walmart's Release of ERF**

15 Walmart hereby waives any and all claims against ERF and the ERF Releasors for any and all
16 actions taken or statements made (or those that could have been taken or made) by ERF and/or its attorneys
17 and other representatives related to this matter, whether in the course of investigating claims or otherwise
18 seeking to enforce Proposition 65 against it in this matter or with respect to the Covered Products.

19 **4.3 California Civil Code Section 1542**

20 It is possible that other claims not known to the parties arising out of the facts alleged in the Notice
21 and relating to the Covered Products will develop or be discovered. ERF on behalf of itself only, on one
22 hand, and Walmart, on the other hand, acknowledge that this agreement is expressly intended to cover and
23 include all such claims up through the Effective Date, including all rights of action therefor. The parties
24 acknowledge that the claims released in Sections 4.1 and 4.2 above may include unknown claims, and
25 nevertheless waive California Civil Code section 1542 as to any such unknown claims. California Civil
26 Code section 1542 reads as follows:

1 A general release does not extend to claims that the creditor or releasing party does not know or
2 suspect to exist in his or her favor at the time of executing the release and that, if known by him or
3 her, would have materially affected his or her settlement with the debtor or released party.

4 ERF and Walmart each acknowledge and understand the significance and consequences of this specific
5 waiver of California Civil Code section 1542.

6 **5. ENFORCEMENT OF JUDGMENT**

7 5.1 The terms of this Consent Judgment shall be enforced exclusively by the parties hereto.
8 Notwithstanding Section 4.1 *supra*, the parties may, by noticed motion before the Superior Court of San
9 Francisco County, giving the notice required by law, enforce the terms and conditions contained herein.
10 However, in the event that a dispute arises with respect to any of the provisions of this Consent Judgment,
11 the parties shall meet and confer within 10 days after either party receives written notice of an alleged
12 violation of this Agreement, and make a good faith attempt to resolve the dispute before a noticed motion
13 is filed. In any proceeding brought by either party to enforce this Consent Judgment, ERF may seek
14 whatever fines, costs, penalties or remedies as may be provided by law for any violation of this Consent
15 Judgment. This Section is subject to Walmart's right to timely cure as set forth in Sections 2.3 and 2.4,
16 *supra*.

17 **6. MODIFICATION OF JUDGMENT**

18 6.1 This Consent Judgment may be modified only upon written agreement of the parties and upon
19 entry of a modified Consent Judgment by the Court thereon, or upon motion of any party as provided by
20 law and upon entry of a modified Consent Judgment by the Court.

21 6.2 If, subsequent to the execution of this Consent Judgment, any of the provisions of
22 this Consent Judgment are deemed by a court to be unenforceable, the validity of the enforceable
23 provisions remaining shall not be adversely affected.

24 **7. TERMINATION AND RETENTION OF JURISDICTION**

25 7.1 This Court shall retain jurisdiction of this matter to implement and enforce the terms this
26 Consent Judgment. In the event that Proposition 65 is repealed, preempted, or is otherwise rendered
27 inapplicable by reason of law generally, or as to the Covered Products, then Walmart may provide ERF
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1 with written notice of any asserted change in the law, and shall have no further injunctive obligations
2 pursuant to this Consent Judgment, with respect to, and to the extent that, the Covered Products are affected
3 by such a change in the law.

4 **8. AUTHORITY TO EXECUTE CONSENT JUDGMENT**

5 8.1 Each signatory to this Consent Judgment certifies that he or she is fully authorized by the
6 party he or she represents to enter into this Consent Judgment and to execute it on behalf of the party
7 represented and legally bind that party.

8 **9. SERVICE ON THE ATTORNEY GENERAL**

9 9.1 ERF shall serve a copy of this Consent Judgment, signed by both parties, on the California
10 Attorney General concurrently with filing and serving the motion for approval in court. Service on the
11 Attorney General shall occur no later than forty five (45) days prior to the date the motion for approval will
12 be heard in court.

13 **10. ENTIRE AGREEMENT**

14 10.1 This Consent Judgment contains the sole and entire agreement and understanding of the
15 parties with respect to the entire subject matter hereof and any and all prior discussions, negotiations,
16 commitments and understandings related hereto. No representations, oral or otherwise, express or implied,
17 other than those contained herein have been made by any party hereto. No other agreements not specifically
18 referred to herein, oral or otherwise, shall be deemed to exist or to bind any of the parties.

19 **11. GOVERNING LAW**

20 11.1 The validity, construction and performance of this Consent Judgment shall be governed by
21 the laws of the State of California, without reference to any conflicts of law provisions of California law.

22 **12. EXECUTION AND COUNTERPARTS**

23 12.1 This Consent Judgment may be executed in counterparts which taken together shall be
24 deemed to constitute one document.

1 **13. COURT APPROVAL**

2 13.1 If this Consent Judgment is not approved by the Court, it shall be of no force or effect, and
3 cannot be used in any proceeding for any purpose.

4 **14. NOTICES**

5 Any notices due under this Consent Judgment shall be sent by USPS certified mail, return receipt
6 requested and email.

7 If to Ecological Rights Foundation: Fredric Evenson
8 Ecology Law Center
9 P.O. Box 1000
Santa Cruz, CA 95061

10 With a copy to:
11 LAW OFFICES OF BRIAN GAFFNEY, A Professional Corporation
12 2370 Market Street, Suite 103-318
San Francisco, CA 94114
brian@gaffneylegal.com

13 If to WALMART INC.:
14 Walmart Inc. c/o
15 C T Corporation System
330 North Brand Boulevard, Suite 700
16 Glendale, CA 91203

17 and

18 Thomas L. Van Wyngarden
19 Pillsbury Winthrop Shaw Pittman LLP
725 South Figueroa Street, 36th Floor
20 Los Angeles, CA 90017-5524
tom.vanwyngarden@pillsburylaw.com

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

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ECOLOGICAL RIGHTS FOUNDATION

DATED:

By: _____

Its: _____

DATED: MAY 25, 2023

~~WALMART INC.~~

By: 
THOMAS L. VANWYNGAARDEN
ITS: AUTHORIZED SIGNATORY

IT IS SO ORDERED, ADJUDGED AND DECREED:

DATED: 7/10/23

rlr

JUDGE OF THE SUPERIOR COURT

RICHARD ULMER

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DATED: 5/25/2023

ECOLOGICAL RIGHTS FOUNDATION

BY: *Linda S. Sherby*
Linda S. Sherby
ITS: EXECUTIVE DIRECTOR

DATED: _____

WALMART INC.

BY: _____

ITS: _____

IT IS SO ORDERED, ADJUDGED AND DECREED:

DATED: 8/7/19/23

leg
JUDGE OF THE SUPERIOR COURT

RICHARD B. ULMER