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ECOLOGICAL RIGHTS FOUNDATION

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Attorney for Defendants

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN FRANCISCO  
(Unlimited Jurisdiction)

ECOLOGICAL RIGHTS FOUNDATION,

CASE NO. CGC-06-449758

Plaintiff,

**[PROPOSED] CONSENT JUDGMENT**

v.

MARTHA STEWART LIVING OMNIMEDIA,  
INC.; MARTHA STEWART LIVING  
OMNIMEDIA, LLC; KMART  
CORPORATION; KMART HOLDINGS, INC.;  
and DOES 1 through 100 INCLUSIVE,

Defendants.

**1. INTRODUCTION**

1.1 Plaintiff: Plaintiff Ecological Rights Foundation (“ERF” or “Plaintiff”), is a nonprofit foundation dedicated to, among other causes, the protection of the environment, promotion of human health, environmental education, and consumer rights.

1.2 The Action: On February 23, 2006, Plaintiff filed a complaint in the Superior Court for the City and County of San Francisco (hereafter referred to as the “Action”) charging

1 Martha Stewart Living Omnimedia, Inc.; Martha Stewart Living Omnimedia, LLC; Kmart  
2 Corporation and Kmart Holdings, Inc. (hereinafter “Defendants”) with having violated The Safe  
3 Drinking Water and Toxic Enforcement Act of 1986 (“Proposition 65”), Health and Safety Code  
4 Section 25249.5 *et. seq.*, by exposing individuals to lead, a chemical known to the State of  
5 California to cause cancer and birth defects and other reproductive harm, without providing clear  
6 and reasonable warnings to such individuals. The alleged violations addressed in the Action were  
7 described in Plaintiff’s Notice of Intent to Sue dated December 14, 2005 (“Plaintiff’s Notice”),  
8 which Plaintiff had sent to the Defendants and to public enforcers as required by Health & Safety  
9 Code Section 25249.7. Defendants filed answers in the Action on April 26, 2006 denying all  
10 material allegations and asserting numerous affirmative defenses. The alleged violations at issue  
11 in the Action relate to exposure to lead from stained glass lamps (which contain leaded glass,  
12 leaded glass inserts, leaded mullions, lead coming and/or lead solder) manufactured, imported,  
13 marketed, distributed, and/or sold by Defendants.

14 1.3 Jurisdiction: For purposes of this Consent Judgment, the Parties stipulate that the  
15 San Francisco Superior Court has jurisdiction over the allegations in the Action and personal  
16 jurisdiction over Defendants as to the acts alleged in the Action, that venue is proper in the City  
17 and County of San Francisco, that this Court has jurisdiction to enter this Consent Judgment as a  
18 resolution of all claims which were alleged in the Action, and that the Court shall retain  
19 jurisdiction to implement the Consent Judgment.

20 1.4 No Admissions: For the purpose of avoiding prolonged litigation, the Parties enter  
21 into this Consent Judgment as a compromise of disputed claims and none of its provisions shall  
22 be construed as an admission by any Party of any fact, finding, issue of law, or violation of law,  
23 including Proposition 65, or any other statute, regulation, or common law requirement related to  
24 exposure to lead or other chemicals listed under Proposition 65 from the Covered Products. By  
25 executing this Consent Judgment and agreeing to provide the relief and remedies specified  
26 herein, Defendants do not admit any violations of Proposition 65, or any other law or legal duty  
27 and specifically deny that they have committed any such violations. This Consent Judgment shall  
28 not be construed as an admission that any reformulation and/or warnings regarding exposure to

1 lead are required under Proposition 65 for the Covered Products. Defendants maintain that all  
2 Covered Products manufactured, imported, distributed, and sold by them in California have at all  
3 times been in compliance with all applicable laws. Nothing in this Consent Judgment shall  
4 prejudice, waive, or impair any right, remedy, or defense that Plaintiff and Defendants may have  
5 in any other or in future legal proceedings unrelated to these proceedings. Defendants reserve all  
6 of their rights and defenses with regard to any claim by any person under Proposition 65 or  
7 otherwise. However, this paragraph shall not diminish or otherwise affect the obligations,  
8 responsibilities, waivers, releases, and/or duties provided for under this Consent Judgment.

9 1.5 Dismissal of Martha Stewart Living Omnimedia. Notwithstanding any other  
10 provision of this Consent Judgment, neither Martha Stewart Living Omnimedia, Inc. nor Martha  
11 Stewart Living Omnimedia, LLC is a party to, or is bound by, this Consent Judgment. Within 5  
12 days following entry of this Consent Judgment by the Court, Plaintiff shall enter a dismissal of  
13 this action with respect to Martha Stewart Living Omnimedia, Inc. and Martha Stewart Living  
14 Omnimedia, LLC.

## 15 **2. INJUNCTIVE RELIEF**

16 2.1 Definition Of “Covered Products”: For purposes of this Consent Judgment, the  
17 term “Covered Products” means all stained glass lamps which contain leaded glass inserts,  
18 leaded mullions, leaded coming and/or lead solder which are manufactured, imported, marketed,  
19 sold, and/or distributed by Defendants (regardless of product nomenclature, model design,  
20 model designation or brand name - *i.e.*, both those employed directly by Defendants as well as  
21 privately labeled products supplied to others by Defendants).

22 2.2 Reformulation of Covered Products: After November 1, 2006, Defendant Kmart  
23 Corporation (hereinafter “Kmart”) shall not, by themselves or through others, manufacture,  
24 distribute, import, market, ship for sale and/or sell in the State of California any Covered  
25 Products manufactured (a) with solder that is specified to have a lead content exceeding 0.05  
26 percent (0.05%) lead by weight, and/or (b) with mullions or coming material that is specified to  
27 have a lead content exceeding 0.01 percent (0.01%) lead by weight.

28 2.3 Reliance On Specifications: Kmart may comply with the requirement in

Paragraph 2.2 by relying on the specifications provided by the supplier(s) of solder, mullions, or coming material, provided such reliance is in good faith.

2.4 Removal from Display by Dealers, Retailers and Distributors

As of November 1, 2006, Kmart will remove from their stores and warehouses in California all Covered Products which are not reformulated as defined in Paragraph 2.2 above.

**3. WAIVER AND RELEASE OF ALL CLAIMS**

3.1 Waiver And Release of Claims Against Defendants: Plaintiff on its own behalf and on behalf of its members, subsidiaries, successors, and assigns and its directors, officers, agents, attorneys, representatives, and employees, and as to those matters raised in Plaintiff's Notice on behalf of the general public, hereby releases Defendants and their directors, officers, agents, attorneys, representatives, employees, licensors, heirs, subsidiaries, affiliates, suppliers, authorized dealers, customers, predecessors, successors, and assigns, and waives all claims for injunctive relief or damages, penalties, fines, sanctions, mitigation, fees (including fees of attorneys, experts, and others), costs, expenses or any other sum incurred or claimed, for the alleged failure of Defendants or their subsidiaries, affiliates, suppliers, authorized dealers, customers, predecessors, successors, and assigns to provide clear and reasonable warning about exposure to lead from the sale or use of any Covered Products manufactured, distributed, and/or sold by Defendants in accordance with and including, but not limited to, Proposition 65.

3.2 Defendants' Waiver And Release Of Plaintiff: Defendants on their own behalf and on behalf of their subsidiaries, affiliates, authorized dealers, successors, and assigns and their directors, officers, agents, attorneys, representatives, and employees release Plaintiff and its members, directors, officers, agents, attorneys, representatives, employees, heirs, successors, and assigns from, and waives all claims for injunctive relief or damages, penalties, fines, sanctions, mitigation, fees (including fees of attorneys, experts, and others), costs, expenses, or any other sum incurred or claimed or which could have been claimed for matters related to the Action.

3.3 Matters Covered By This Consent Judgment/Release of Future Claims: As to Covered Products, this Consent Judgment is a full, final, and binding resolution between the Plaintiff, acting on behalf of itself and, as to those matters raised in Plaintiff's Notice in the

1 public interest pursuant to Health and Safety Code Section 25249.7(d) on the one hand, and  
2 Defendants on the other hand, for the alleged failure to provide clear, reasonable, and lawful  
3 warnings of exposure to lead used or contained in the Covered Products manufactured,  
4 distributed, and/or sold by Defendants. As to Covered Products, compliance with the terms of  
5 this Consent Judgment resolves any issue, now and in the future, concerning compliance by  
6 Defendants with existing requirements of Proposition 65 to provide clear and reasonable warning  
7 about exposure to lead in the Covered Products manufactured, distributed, and/or sold by  
8 Defendants.

9       3.4     Waiver Of Civil Code Section 1542: This Consent Judgment is intended as a full  
10 settlement and compromise of all claims arising out of or relating to Plaintiffs' Notice and/or the  
11 Action regarding Covered Products, except as set forth herein. No claim is reserved as between  
12 the Parties hereto, and each Party expressly waives any and all rights which it may have under  
13 the provisions of Section 1542 of the Civil Code of the State of California, which provides:

14             A general release does not extend to claims which the creditor does not know or suspect  
15             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.

16 **4.     MONETARY PAYMENTS**

17       4.1     Within fifteen (15) days following the parties' execution of this Consent  
18 Judgment, Kmart shall pay \$35,000, in the form of a check made payable to "Brian Gaffney,  
19 Attorney Client Trust Account" with half this amount to be used by Center for Environmental  
20 Health and half this amount to be used by Ecological Rights Foundation to reduce harm from  
21 toxic chemicals or other pollutants, or to increase consumer worker and community awareness of  
22 health hazards posed by toxic chemicals. The payment for use by Center for Environmental  
23 Health and Ecological Rights Foundation shall not be construed as a credit against the personal  
24 claims of absent third parties for restitution against Defendants. The check shall be delivered by  
25 overnight delivery to Brian Gaffney, LAW OFFICES OF BRIAN GAFFNEY, 605 Market St.,  
26 Suite 505, San Francisco, CA 94105. In the event this Consent Judgment becomes null and void  
27 under either Paragraphs 11 or 12 infra, Plaintiff shall, within fifteen days, return the payment  
28 made under this paragraph to Kmart.

1           4.2     Within fifteen (15) days following the parties' execution of this Consent  
2 Judgment, Kmart shall pay \$23,000, in the form of a check made payable to "Brian Gaffney,  
3 Attorney Client Trust Account" as reimbursement for the investigation fees and costs, testing  
4 costs, expert witness fees, attorneys fees, and other litigation costs and expenses. The check shall  
5 be delivered by overnight delivery to Brian Gaffney, LAW OFFICES OF BRIAN GAFFNEY,  
6 605 Market St., Suite 505, San Francisco, CA 94105. In the event this Consent Judgment  
7 becomes null and void under either Paragraphs 11 or 12 infra, Plaintiff shall, within fifteen days,  
8 return the payment made under this paragraph to Kmart.

9           4.3     Defendants understand that the sales data and declaration under penalty of perjury  
10 provided to Plaintiff by Defendants was a material factor upon which Plaintiff has relied to  
11 determine the amount of monetary payments made under paragraph 4.1 above. To the best of  
12 Defendants' knowledge, the sales data provided is true and accurate. Plaintiff understands that  
13 Defendants consider the sales data and declaration to be confidential information and shall return  
14 the sales data and declaration to Defendants within fifteen days of the execution of this  
15 Agreement. In the event that Plaintiff discovers facts that demonstrate to a reasonable degree of  
16 certainty that the sales data is materially inaccurate, the parties shall meet in a good faith attempt  
17 to resolve the matter within ten (10) days of Defendants' receipt of notice from Plaintiff of his  
18 intent to challenge the accuracy of the sales data. If this good faith attempt fails to resolve  
19 Plaintiff's concerns, Plaintiff shall have the right to re-institute an enforcement action against  
20 Defendants, for those additional Covered Products, based upon any existing 60-Day Notice of  
21 violation served on Defendants.

## 22     **5.     SEVERABILITY**

23           In the event that any of the provisions of this Consent Judgment are held by a court to be  
24 unenforceable, the validity of the enforceable provisions remaining shall not be adversely  
25 affected thereby.

## 26     **6.     MODIFICATION OF CONSENT JUDGMENT**

27           This Consent Judgment may be modified only upon the written agreement of the Parties, or  
28 pursuant to court order issued upon motion of a Party, and upon entry of a modified Consent

Judgment by this Court.

## **7. ENFORCEMENT OF CONSENT JUDGMENT**

7.1 The Parties may, by motion or order to show cause before this Court, and upon notice having been given to all Parties in accordance with Paragraph 10 below, unless waived, enforce the terms and conditions of this Consent Judgment and seek whatever fines, costs, penalties, or remedies (including reasonable attorneys' fees and costs) are provided by law.

7.2 The Parties may enforce the terms and conditions of this Consent Judgment pursuant to paragraph 7.1 only after the complaining party has first given thirty (30) days notice to the Party allegedly failing to comply with the terms and conditions of the Consent Judgment and has attempted, in an open and good faith manner, to resolve such Party's alleged failure to comply.

## **8. GOVERNING LAW**

8.1 The terms of this Consent Judgment shall be governed by, and construed in accordance with, the laws of the State of California.

8.2 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 Section 1654.

## **9. ENTIRE AGREEMENT**

This Consent Judgment constitutes the sole and entire agreement and understanding between the Parties with respect to the subject matter hereof, and any prior discussions, negotiations, commitments, or understandings related thereto, if any, are hereby merged herein and therein. There are no warranties, representations, or other agreements between the Parties, except as expressly set forth herein. No representations, oral or otherwise, express or implied, other than those specifically

referred to herein, shall be deemed to exist or bind any of the Parties hereto. No supplementation, modification, waiver, or termination of this Consent Judgment shall be binding unless executed in writing by the Party to be bound thereby. No waiver of any of the provisions of this Consent Judgment shall be deemed or shall constitute a waiver of any of the other provisions hereof, whether or not similar, nor shall such waiver constitute a continuing waiver.

## **10. NOTICES**

All notices or correspondence to be given pursuant to this Consent Judgment shall be in writing and shall be personally delivered or sent by first-class, registered, certified mail, overnight courier, and/or via facsimile transmission (with presentation of facsimile transmission confirmation) addressed to the Parties as follows:

For Plaintiffs: Ecological Rights Foundation  
867 B Redwood Drive  
Garberville, CA 95542

With a copy to: Brian Gaffney  
LAW OFFICES OF BRIAN GAFFNEY  
605 Market Street, Suite 505  
San Francisco, CA 94105

For Defendant Kmart: Cary W. Mergele, Esq.  
Assistant General Counsel  
SEARS HOLDINGS MANAGEMENT CORPORATION  
3333 Beverly Road  
Hoffman Estates, IL 60192-3322  
[cmergele@kmart.com](mailto:cmergele@kmart.com)  
Business (847) 286-5639  
Fax (248) 458-1071

With a copy to: Michael Steel  
PILLSBURY WINTHROP SHAW PITTMAN LLP  
50 Fremont St.  
San Francisco, CA 94105  
[Michael.steel@pillsburylaw.com](mailto:Michael.steel@pillsburylaw.com)  
Business: 415-983-1000  
Fax: 415-983-1200

The contacts and/or addresses stated immediately above may be amended by giving notice to all Parties to this Consent Judgment.

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1 **11. COMPLIANCE WITH REPORTING REQUIREMENTS/ATTORNEY GENERAL**  
2 **OFFICE REVIEW AND COMMENT**

3 The parties agree to comply with the reporting form requirements referenced in Health &  
4 Safety Code § 25249.7(f). Within a reasonable time of receiving all necessary signatures to this  
5 Consent Judgment, and consistent with Health & Safety Code §25249.7(f), Plaintiff shall notice a  
6 Motion to Approve Settlement and for Entry of Consent Judgment (“Motion”) in the San Francisco  
7 Superior Court for a hearing scheduled not earlier than forty-five (45) days later. Plaintiff shall  
8 serve this Consent Judgment and the noticed Motion to the California Attorney General’s office  
9 within a reasonable time of receiving all necessary signatures.

10 It is expressly understood and agreed by the Parties hereto that the rights and obligations  
11 contained in this Consent Judgment are expressly conditioned on the non-opposition by the  
12 California Attorney General’s Office to this Consent Judgment. Should the Attorney General object  
13 to the Consent Judgment, the Parties shall negotiate in good faith to modify the Consent Judgment  
14 in a manner that resolves the objection of the Attorney General.

15 If the Parties cannot agree on appropriate modifications within thirty (30) days of receiving  
16 the Attorney General’s objections, this Consent Judgment shall, at any Party’s option, be deemed  
17 null and void as to that Party, shall not bind that Party, and shall not be construed as an admission  
18 or waiver of any claim or defense and cannot be used for any purpose. In the event any Party elects  
19 to treat this consent judgment as being null and void as provided for in this paragraph, such Party  
20 shall provide written notice to all of the Parties to the Action pursuant to the notice provisions  
21 hereof.

22 **12. COURT APPROVAL/EFFECTIVE DATE**

23 The Court shall either approve or disapprove of this Consent Judgment in its entirety, without  
24 alteration, deletion or amendment, unless otherwise so stipulated by the Parties and their counsel.  
25 Defendants agree to support the motion to approve this Consent Judgment in full, and shall take all  
26 reasonable measures to ensure that it is entered without delay. In the event that the Court fails to  
27 approve and order entry of the Consent Judgment without any change whatsoever (unless otherwise  
28 so stipulated by the Parties), this Consent Judgment shall become null and void upon the election

of either Party and upon written notice to all of the Parties to the Action pursuant to the notice provisions herein.

If the Court enters this Consent Judgment, Plaintiff shall, within ten (10) working days after the Effective Date, electronically provide or otherwise serve a copy of it and the report required pursuant to 11 Cal. Code Regs. § 3004 to/on the California Attorney General's Office.

The Effective Date of this Consent Judgment shall be the date it is entered by the Court.

### **13. AUTHORIZATION**

The undersigned are authorized to execute this Consent Judgment on behalf of their respective Parties and have read, understood, and agree to all of the terms and conditions of this Consent Judgment.

### **14. COUNTERPARTS/FACSIMILE SIGNING**

This Consent Judgment may be executed in one or more counterparts, each of which shall be deemed an original, and all of which, when taken together, shall constitute one and the same document. All signatures need not appear on the same page of the document and signatures of the Parties transmitted by facsimile shall be deemed binding.

### **APPROVED AS TO FORM:**

Dated: \_\_\_\_\_, 2006

LAW OFFICES OF BRIAN GAFFNEY

By: \_\_\_\_\_  
Brian Gaffney  
Attorney for Plaintiff

Dated: \_\_\_\_\_, 2006

PILLSBURY WINTHROP SHAW PITTMAN, LLP

By: \_\_\_\_\_  
Michael Steel  
Attorney for Defendants

### **IT IS SO STIPULATED:**

ECOLOGICAL RIGHTS FOUNDATION

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

By: \_\_\_\_\_  
James Lamport  
Executive Director

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

KMART CORPORATION

2 By: \_\_\_\_\_

3 Title: \_\_\_\_\_

4  
5 In accordance with the stipulation of Plaintiff and Defendants,

6 **IT IS SO ORDERED, ADJUDGED, AND DECREED:**

7  
8 Dated: \_\_\_\_\_

9 \_\_\_\_\_  
10 JUDGE OF THE SUPERIOR COURT