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9 Attorneys for Plaintiffs,
10 Consumer Advocacy Group, Inc.

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SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF LOS ANGELES

CONSUMER ADVOCACY GROUP, INC.,
in the public interest,

Plaintiff,

v.

SEARS HOLDINGS CORPORATION, a
Delaware Corporation, KMART
CORPORATION, a Michigan Corporation,
AMWAY CORP., a Virginia Corporation,
ALTICOR, INC., a Michigan Corporation,
and DOES 1-20,

Defendants.

CASE NO. BC493596

CONSENT JUDGMENT [PROPOSED]

Dept: 14

Judge: Terry A. Green

Complaint filed: October 10, 2012

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 ("KMART"), with each a Party and collectively referred to as "Parties."

1 1.2 Kmart employs ten or more persons, is a person in the course of doing business for
2 purposes of the Safe Drinking Water and Toxic Enforcement Act of 1986, California Health &
3 Safety Code §§ 25249.6 et seq. (“Proposition 65”), and manufactures, distributes, and sells
4 Concourse™ Tote Bag, Dept. 80, Cat: 72, KSN: 0-84972411-7, Code 720849724-117, RN#
5 42000 (“Covered Products”).

6 **1.3 Notice of Violation.**

7 1.3.1 On or about March 9, 2012, CAG served Kmart and various public
8 enforcement agencies with a document entitled “60-Day Notice of Violation” (the “March
9 9, 2012 Notice”) that provided the recipients with notice of alleged violations of Health &
10 Safety Code § 25249.6 for failing to warn individuals in California of exposures to
11 di(2-ethylhexyl)phthalate (DEHP) contained in Covered Products.

12 1.3.2 No public enforcer has commenced or diligently prosecuted the allegations
13 set forth in the March 9, 2012 Notice.

14 **1.4 Complaint.**

15 On November 8, 2012, CAG filed a First Amended Complaint for civil penalties and
16 injunctive relief (“Complaint”) in Los Angeles Superior Court, Case No. BC493596. The
17 Complaint alleges, among other things, that Kmart violated Proposition 65 by failing to give clear
18 and reasonable warnings of exposure to DEHP from Covered Products.

19 **1.5 Consent to Jurisdiction**

20 For purposes of this Consent Judgment, the parties stipulate that this Court has jurisdiction
21 over the allegations of violations contained in the Complaint and personal jurisdiction over Kmart
22 as to the acts alleged in the Complaint, that venue is proper in the City and County of Los Angeles
23 and that this Court has jurisdiction to enter this Consent Judgment as a full settlement and
24 resolution of the allegations contained in the Complaint and of all claims which were or could have
25 been raised by any person or entity based in whole or in part, directly or indirectly, on the facts
26 alleged therein or arising therefrom or related to.
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1 **1.6 No Admission**

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

8 **2. DEFINITIONS**

9 2.1 “Covered Products” means Concourse TM Tote Bag, Dept. 80, Cat: 72, KSN:
10 0-84972411-7, Code 720849724-117, RN# 42000 sold by Kmart.

11 2.2 “Effective Date” means the date that this Consent Judgment is approved by the
12 Court.

13 **3. INJUNCTIVE RELIEF/REFORMULATION**

14 3.1 Within 30 days of the Effective Date Kmart shall not sell or offer for sale in
15 California Covered Products that contain DEHP with more than 0.1% DEHP by weight.

16 **4. SETTLEMENT PAYMENT**

17 **Total Payment:** Within ten (10) business days of the Effective Date, Kmart shall mail by
18 certified mail, payments totaling fifty thousand dollars (\$50,000.00) as follows:

19 4.1 **Reimbursement of Attorneys’ Fees and Costs:** Kmart shall pay \$45,000 to
20 “Yeroushalmi & Associates” as reimbursement for the investigation fees and costs, testing costs,
21 expert fees, attorney fees, and other litigation costs and expenses for all work performed through
22 the approval of this Consent Judgment.

23 4.2 **Civil Penalties.** Kmart shall issue two separate checks for a total amount of \$4,000
24 as penalties pursuant to Health & Safety Code § 25249.12: (a) one check made payable to the State
25 of California’s Office of Environmental Health Hazard Assessment (OEHHA) in the amount of
26 \$3,000 representing 75% of the total penalty; and (b) one check to Consumer Advocacy Group,
27 Inc. in the amount of \$1,000, representing 25% of the total penalty. Two separate 1099s shall be
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1 issued for the above payments: The first 1099 shall be issued to OEHHA, P.O. Box 4010,
2 Sacramento, CA 95184 (EIN: 68-0284486) in the amount of \$3,000. The second 1099 shall be
3 issued in the amount of \$1,000 to CAG and delivered to: Yeroushalmi & Associates, 9100
4 Wilshire Boulevard, Suite 610E, Beverly Hills, California 90212.

5 **4.3 Payment In Lieu of Civil Penalties:** Kmart shall pay \$1,000 in lieu of civil
6 penalties to "Consumer Advocacy Group, Inc." CAG will use this payment for investigation of the
7 public's exposure to Proposition 65 listed chemicals through various means, laboratory fees for
8 testing for Proposition 65 listed chemicals, expert fees for evaluating exposures through various
9 mediums, including but not limited to consumer product, occupational, and environmental
10 exposures to Proposition 65 listed chemicals, and the cost of hiring consulting and retained
11 experts who assist with the extensive scientific analysis necessary for those files in litigation, as
12 well as administrative costs incurred during the litigation, in order to reduce the public's exposure
13 to Proposition 65 listed chemicals by notifying those persons and/or entities believed to be
14 responsible for such exposures and attempting to persuade those persons and/or entities to
15 reformulate their products or the source of exposure to completely eliminate or lower the level of
16 Proposition 65 listed chemicals, thereby addressing the same public harm as allegedly in the
17 instant Action. Further, should the court require it, CAG will submit under seal, an accounting of
18 these funds as described above as to how the funds were used. The check shall be made payable to
19 "Consumer Advocacy Group, Inc." and delivered to Reuben Yeroushalmi, Yeroushalmi &
20 Associates, 9100 Wilshire Boulevard, Suite 610E, Beverly Hills, California 90212.

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22 **4.4** Payments pursuant to 4.1, 4.2 and 4.3 shall be delivered to: Reuben Yeroushalmi,
23 Yeroushalmi & Associates, 9100 Wilshire Blvd., Suite 610E, Beverly Hills, CA 90212 within
24 fourteen (14) days of the Effective Date.

25 **5. MATTERS COVERED BY THIS CONSENT JUDGMENT**

26 **5.1** This Consent Judgment is a full, final, and binding resolution between CAG on
27 behalf of itself and in the public interest and Kmart and its officers, directors, insurers, employees,
28 parents, shareholders, divisions, subdivisions, subsidiaries, partners, affiliates, sister companies

1 and their successors and assigns (“Defendant Releasees”), including but not limited to each of its
2 suppliers, customers, distributors, wholesalers, retailers, or any other person in the course of doing
3 business, and the successors and assigns of any of them, who may use, maintain, distribute or sell
4 Covered Products (“Downstream Defendant Releasees”), for all claims for violations of
5 Proposition 65 up through the Effective Date based on exposure to DEHP from Covered Products
6 as set forth in the Notice. Kmart and Defendant Releasees’ compliance with this Consent
7 Judgment shall constitute compliance with Proposition 65 with respect to DEHP from Covered
8 Products as set forth in the Notice.

9 5.2 CAG on behalf of itself, its past and current agents, representatives, attorneys,
10 successors, and/or assignees, hereby waives all rights to institute or participate in, directly or
11 indirectly, any form of legal action and releases all claims, including, without limitation, all
12 actions, and causes of action, in law or in equity, suits, liabilities, demands, obligations, damages,
13 costs, fines, penalties, losses, or expenses (including, but not limited to, investigation fees, expert
14 fees, and attorneys’ fees) of any nature whatsoever, whether known or unknown, fixed or
15 contingent (collectively “Claims”), against Kmart, Defendant Releasees, and Downstream
16 Defendant Releasees arising from any violation of Proposition 65 or any other statutory or
17 common law regarding the failure to warn about exposure to DEHP from Covered Products
18 manufactured, distributed, or sold by Kmart and Defendant Releasees. In furtherance of the
19 foregoing, as to alleged exposures to DEHP from Covered Products, CAG hereby waives any and
20 all rights and benefits which it now has, or in the future may have, conferred upon it with respect to
21 the Claims arising from any violation of Proposition 65 or any other statutory or common law
22 regarding the failure to warn about exposure to DEHP from Covered Products by virtue of the
23 provisions of section 1542 of the California Civil Code, which provides as follows:

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

30 CAG understands and acknowledges that the significance and consequence of this waiver of

1 California Civil Code section 1542 is that even if CAG suffers future damages arising out of or
2 resulting from, or related directly or indirectly to, in whole or in part, the Claims arising from any
3 violation of Proposition 65 or any other statutory or common law regarding the failure to warn
4 about exposure to DEHP from Covered Products, including but not limited to any exposure to, or
5 failure to warn with respect to exposure to DEHP from the Covered Products, CAG will not be
6 able to make any claim for those damages against Kmart or the Defendant Releasees or
7 Downstream Defendant Releasees. Furthermore, CAG acknowledges that it intends these
8 consequences for any such Claims arising from any violation of Proposition 65 or any other
9 statutory or common law regarding the failure to warn about exposure to DEHP from Covered
10 Products as may exist as of the date of this release but which CAG does not know exist, and which,
11 if known, would materially affect their decision to enter into this Consent Judgment, regardless of
12 whether their lack of knowledge is the result of ignorance, oversight, error, negligence, or any
13 other cause.

14 **6. ENFORCEMENT OF JUDGMENT**

15 6.1 The terms of this Consent Judgment shall be enforced exclusively by the parties
16 hereto. The parties may, by noticed motion or order to show cause before the Superior Court of
17 California, City and County of Los Angeles, giving the notice required by law, enforce the terms
18 and conditions contained herein. A Party may enforce any of the terms and conditions of this
19 Consent Judgment only after that Party first provides 30 days' notice to the Party allegedly failing
20 to comply with the terms and conditions of this Consent Judgment and attempts to resolve such
21 Party's failure to comply in an open and good faith manner.

22 6.2 **Notice of Violation.** Prior to bringing any motion, order to show cause, or other
23 proceeding to enforce Section 0 of this Consent Judgment, CAG shall provide a Notice of
24 Violation ("NOV") to Kmart. The NOV shall include for each of the Covered Products: the
25 date(s) the alleged violation(s) was observed and the location at which the Covered Products were
26 offered for sale, and shall be accompanied by all test data obtained by CAG regarding the Covered
27 Products, including an identification of the component(s) of the Covered Products that were tested.
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1 6.2.1 **Non-Contested NOV.** CAG shall take no further action regarding the
2 alleged violation if, within 30 days of receiving such NOV, Kmart serves a Notice of
3 Election (“NOE”) that meets one of the following conditions:

4 (a) The Covered Products were shipped by Kmart for sale in California
5 before the Effective Date, or

6 (b) Since receiving the NOV Kmart has taken corrective action by
7 either (i) requesting that its customers in California remove the Covered Products
8 identified in the NOV from sale in California and destroy or return the Covered Products to
9 Kmart, or (ii) providing a clear and reasonable warning for the Covered Products identified
10 in the NOV pursuant to 27 Cal. Code Regs. § 25603.

11 6.2.2 **Contested NOV.** Kmart may serve an NOE informing CAG of its election
12 to contest the NOV within 30 days of receiving the NOV.

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

16 (b) If the confirmatory testing establishes that the Covered Products do
17 not contain DEHP in excess of the level allowed in Section 3.1 CAG shall take no further
18 action regarding the alleged violation. If the testing does not establish compliance with
19 Section 3.1, Kmart may withdraw its NOE to contest the violation and may serve a new
20 NOE pursuant to Section 6.2.1.

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

24 6.3 In any proceeding brought by either Party to enforce this Consent Judgment, such
25 party may seek whatever fines, costs, penalties or remedies as may be provided by law for any
26 violation of Proposition 65 or this Consent Judgment.
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1 **7. ENTRY OF CONSENT JUDGMENT**

2 7.1 CAG shall file a motion seeking approval of this Consent Judgment pursuant to
3 California Health & Safety Code § 25249.7(f). Upon entry of the Consent Judgment, CAG and
4 Kmart waive their respective rights to a hearing or trial on the allegations of the Complaint.

5 7.2 If this Consent Judgment is not approved by the Court, (a) this Consent Judgment
6 and any and all prior agreements between the parties merged herein shall terminate and become
7 null and void, and the actions shall revert to the status that existed prior to the execution date of this
8 Consent Judgment; (b) no term of this Consent Judgment or any draft thereof, or of the negotiation,
9 documentation, or other part or aspect of the Parties' settlement discussions, shall have any effect,
10 nor shall any such matter be admissible in evidence for any purpose in this Action, or in any other
11 proceeding; and (c) the Parties agree to meet and confer to determine whether to modify the terms
12 of the Consent Judgment and to resubmit it for approval.

13 **8. MODIFICATION OF JUDGMENT**

14 8.1 This Consent Judgment may be modified only upon written agreement of the
15 parties and upon entry of a modified Consent Judgment by the Court thereon, or upon motion of
16 any party as provided by law and upon entry of a modified Consent Judgment by the Court.

17 8.2 Any Party seeking to modify this Consent Judgment shall attempt in good faith to
18 meet and confer with the other Party prior to filing a motion to modify the Consent Judgment.

19 **9. RETENTION OF JURISDICTION**

20 9.1 This Court shall retain jurisdiction of this matter to implement and enforce the
21 terms of this Consent Judgment.

22 **10. DUTIES LIMITED TO CALIFORNIA**

23 This Consent Judgment shall have no effect on Covered Products sold outside the State of
24 California.

25 **11. SERVICE ON THE ATTORNEY GENERAL**

26 11.1 CAG shall serve a copy of this Consent Judgment, signed by both parties, on the
27 California Attorney General so that the Attorney General may review this Consent Judgment prior
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1 to its submittal to the Court for approval. No sooner than forty five (45) days after the Attorney
2 General has received the aforementioned copy of this Consent Judgment, and in the absence of any
3 written objection by the Attorney General to the terms of this Consent Judgment, the parties may
4 then submit it to the Court for approval.

5 **12. ATTORNEY FEES**

6 12.1 Except as specifically provided in Section 4.1 and 6.3, each Party shall bear its own
7 costs and attorney fees in connection with this action.

8 **13. ENTIRE AGREEMENT**

9 13.1 This Consent Judgment contains the sole and entire agreement and understanding
10 of the parties with respect to the entire subject matter hereof and any and all prior discussions,
11 negotiations, commitments and understandings related hereto. No representations, oral or
12 otherwise, express or implied, other than those contained herein have been made by any party
13 hereto. No other agreements not specifically referred to herein, oral or otherwise, shall be deemed
14 to exist or to bind any of the parties.

15 **14. GOVERNING LAW**

16 14.1 The validity, construction and performance of this Consent Judgment shall be
17 governed by the laws of the State of California, without reference to any conflicts of law
18 provisions of California law.

19 14.2 The Parties, including their counsel, have participated in the preparation of this
20 Consent Judgment and this Consent Judgment is the result of the joint efforts of the Parties. This
21 Consent Judgment was subject to revision and modification by the Parties and has been accepted
22 and approved as to its final form by all Parties and their counsel. Accordingly, any uncertainty or
23 ambiguity existing in this Consent Judgment shall not be interpreted against any Party as a result of
24 the manner of the preparation of this Consent Judgment. Each Party to this Consent Judgment
25 agrees that any statute or rule of construction providing that ambiguities are to be resolved against
26 the drafting Party should not be employed in the interpretation of this Consent Judgment and, in
27 this regard, the Parties hereby waive California Civil Code § 1654.
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1 **15. EXECUTION AND COUNTERPARTS**

2 15.1 This Consent Judgment may be executed in counterparts and by means of facsimile
3 or portable document format (pdf), which taken together shall be deemed to constitute one
4 document.

5 **16. NOTICES**

6 16.1 Any notices under this Consent Judgment shall be by personal delivery or First
7 Class Mail.

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9 If to CAG:

10 Reuben Yeroushalmi, Esq.
11 9100 Wilshire Boulevard, Suite 610E
12 Beverly Hills, CA 90212
13 (310) 623-1926

14 If to Kmart Corporation:

15 Kmart Corporation
16 3333 Beverly Road
17 Hoffman Estates, IL 60179

18 With a copy to:

19 Michael Steel
20 Alejandro Bras
21 Morrison Foerster
22 425 Market Street
23 San Francisco, CA 94105

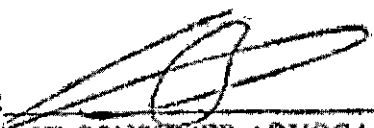
24 **17. AUTHORITY TO STIPULATE**

25 17.1 Each signatory to this Consent Judgment certifies that he or she is fully authorized
26 by the party he or she represents to enter into this Consent Judgment and to execute it on behalf of
27 the party represented and legally to bind that party.
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AGREED TO:

Date: 12-5-13, 2013

By: 

Plaintiff, CONSUMER ADVOCACY GROUP, INC.

AGREED TO:

Date: 12/5/13, 2013

By: 

Defendant, KMART CORPORATION

IT IS SO ORDERED.

Date: _____

JUDGE OF THE SUPERIOR COURT