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

12 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**

13 **COUNTY OF ALAMEDA**

14 **CONSUMER ADVOCACY GROUP, INC.,**
15 **in the interest of the Public,**

16 **Plaintiff,**

17 **v.**

18 **SEARS HOLDING CORPORATION, a**
19 **Delaware Corporation; KMART**
20 **CORPORATION, a Michigan Corporation;**
21 **KMART CORPORATION OF ILLINOIS,**
22 **INC., an Illinois Corporation; and DOES 1-**
23 **20;**

24 **Defendants.**

CASE NO. RG14740440

CONSENT JUDGMENT [PROPOSED]

Complaint filed: September 12, 2014
Trial Date: None

25 **1. INTRODUCTION**

26 **1.1** This Consent Judgment is entered into by and between plaintiff Consumer
27 Advocacy Group, Inc. ("CAG") acting on behalf of itself and in the interest of the public, and
28 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,

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

9 **1.3 Notice of Violation.**

10 1.3.1 On or about March 25, 2013, CAG served Defendant and various public
11 enforcement agencies with documents entitled “60-Day Notice of Violation” (the “Notices”) that
12 provided the recipients with notice of alleged violations of Health & Safety Code § 25249.6 for
13 failing to warn individuals in California of exposures to DBP contained in the Covered Products.

14 1.3.2 No public enforcer has commenced or diligently prosecuted the allegations
15 set forth in the Notices.

16 **1.4 Complaint.**

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

21 **1.5 Consent to Jurisdiction**

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

1 Complaint or arising therefrom or related to.

2 **1.6 No Admission**

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

10 **2. DEFINITIONS**

11 **2.1** “Covered Products” means all the footwear sold, distributed, processed,
12 packaged, produced, manufactured, and/or handled by Defendant within North America.

13 **2.2** “Effective Date” means the date that this Consent Judgment is approved by the
14 Court.

15 **2.3** “DBP” means Di-*n*-butyl Phthalate, also known as Dibutyl Phthalate.

16 **3. INJUNCTIVE RELIEF/REFORMULATION**

17 **3.1** After the Effective Date, Defendant shall not sell, offer for sale in North America,
18 or ship Covered Products for sale in North America unless Defendant has reformulated the
19 Covered Products to the point where the level of DBP does not exceed more than 0.1 % by
20 weight or 1,000 ppm (parts per million).

21 **3.2** Defendant agrees, promises, and represents that, as of the Effective Date, to the
22 extent it ships or sells any Covered Products for sale to California customers from its existing
23 inventory that do not comply with Section 3.1, it will provide warnings on such Covered
24 Products that comply with Proposition 65. “Existing inventory” includes Covered Products
25 shipped, sold and/or otherwise distributed on or prior to the Effective Date, even if sold by
26 Defendant or Downstream Releasees after the Effective Date. The warnings shall be provided
27 in such a conspicuously and prominent manner that will assure the message is made available
28

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

3
4 **“WARNING: This product contains chemicals known to the State of
5 California to cause cancer, or birth defects, or other reproductive harm”**

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

9
10 **4. SETTLEMENT PAYMENT**

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

13 **4.1 Reimbursement of Attorneys’ Fees and Costs:** Defendant shall pay sixty
14 thousand dollars (\$60,000.00) to “Yeroushalmi & Associates” as reimbursement for the
15 investigation fees and costs, testing costs, expert fees, attorney fees, and other litigation costs and
16 expenses for all work performed through the approval of this Consent Judgment.

17 **4.2 Civil Penalties.** Defendant shall issue two separate checks for a total amount of
18 two thousand dollars (\$2,000.00) as penalties pursuant to Health & Safety Code § 25249.12: (a)
19 one check made payable to the State of California’s Office of Environmental Health Hazard
20 Assessment (OEHHA) in the amount of one thousand five hundred dollars (\$1,500.00)
21 representing 75% of the total penalty; and (b) one check to Consumer Advocacy Group, Inc. in
22 the amount of five hundred dollars (\$500.00) representing 25% of the total penalty. Two
23 separate 1099s shall be issued for the above payments: The first 1099 shall be issued to OEHHA,
24 P.O. Box 4010, Sacramento, CA 95184 (EIN: 68-0284486) in the amount of \$1,500.00. The
25 second 1099 shall be issued in the amount of \$500.00 to CAG and delivered to: Yeroushalmi &
26 Associates, 9100 Wilshire Boulevard, Suite 240W, Beverly Hills, California 90212.

27 **4.3 Payments in Lieu of Civil Penalties**

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

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

14 **4.4** Payments pursuant to 4.1, 4.2 and 4.3 shall be delivered to: Reuben Yeroushalmi,
15 Yeroushalmi & Yeroushalmi, 9100 Wilshire Blvd., Suite 240W, Beverly Hills, CA 90212 within
16 the time agreed upon by the Parties.

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

18 **5.1** This Consent Judgment is a full, final, and binding resolution between CAG on
19 behalf of itself and in the public interest and Defendant and its officers, directors, insurers,
20 employees, parents, shareholders, divisions, subdivisions, subsidiaries, partners, affiliates, sister
21 companies, agents, contractors, vendors, and their successors and assigns ("Defendant
22 Releasees"), including but not limited to each of their suppliers, customers, distributors,
23 wholesalers, retailers, or any other person in the course of doing business, and the successors and
24 assigns of any of them who may use, maintain, distribute or sell Covered Products
25 ("Downstream Defendant Releasees"), for all conduct of Defendant prior to the Effective Date
26 based on alleged exposure to DBP from Covered Products as set forth in the Notice.
27 Defendant's compliance with this Consent Judgment shall constitute compliance with
28 Proposition 65 with respect to DBP from Covered Products.

1 **5.2** CAG on behalf of itself, its past and current agents, representatives, attorneys,
2 successors, and/or assignees, hereby waives all rights to institute or participate in, directly or
3 indirectly, any form of legal action and releases all claims, including, without limitation, all
4 actions, and causes of action, in law or in equity, suits, liabilities, demands, obligations,
5 damages, costs, fines, penalties, losses, or expenses (including, but not limited to, investigation
6 fees, expert fees, and attorneys' fees) of any nature whatsoever, whether known or unknown,
7 fixed or contingent (collectively "Claims"), against Defendant, Defendant Releasees, and
8 Downstream Defendant Releasees arising from any allegations of violation of Proposition 65 or
9 any other statutory or common law regarding the failure to warn about exposure to DBP from
10 Covered Products manufactured, distributed, or sold by Defendant, Defendant Releasees, and
11 Downstream Defendant Releasees. In furtherance of the foregoing, as to alleged exposures to
12 DBP from Covered Products, CAG hereby waives any and all rights and benefits which it now
13 has, or in the future may have, conferred upon it with respect to the Claims arising from any
14 violation of Proposition 65 or any other statutory or common law regarding the failure to warn
15 about exposure to DBP from Covered Products by virtue of the provisions of section 1542 of the
16 California Civil Code, which provides as follows:

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

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

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

6 **6. ENFORCEMENT OF JUDGMENT**

7 **6.1** The terms of this Consent Judgment shall be enforced exclusively by the Parties
8 hereto. Except as otherwise agreed by the Parties, the Parties may, by noticed motion or order to
9 show cause before the Superior Court of California, City and County of Alameda, giving the
10 notice required by law, enforce the terms and conditions contained herein. A Party may enforce
11 any of the terms and conditions of this Consent Judgment only after that Party first provides
12 notice to the Party allegedly failing to comply with the terms and conditions of this Consent
13 Judgment and provide 60 days in which the Parties shall attempt to resolve such Party's failure to
14 comply in an open and good faith manner.

15 **6.2 Notice of Violation.** Prior to bringing any motion, order to show cause, or other
16 proceeding to enforce any alleged violation of Section 3.1 of this Consent Judgment, CAG shall
17 provide a Notice of Violation ("NOV") to Defendant. The NOV shall include for each of the
18 Newly Alleged Products: the date(s) the alleged violation(s) was observed and the location at
19 which the Newly Alleged Products were offered for sale, and shall be accompanied by all test
20 data obtained by CAG regarding the Newly Alleged Products, including an identification of the
21 component(s) of the Newly Alleged Products that were tested. Before any destructive testing of
22 any Newly Alleged Products is conducted by or on behalf of CAG, CAG shall give Defendant(s)
23 an opportunity to inspect and verify at reasonable times and places the authenticity of any Newly
24 Alleged Product in violation of this Consent Judgment.

25 **6.2.1 Non-Contested NOV.** CAG shall take no further action regarding the
26 alleged violation if, within 60 days of receiving such NOV, Defendant serves a Notice of
27 Election ("NOE") that meets one of the following conditions:
28

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

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

7 6.2.2 **Contested NOV.** Defendant may serve an NOE informing CAG of its
8 election to contest the NOV within 60 days of receiving the NOV.

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

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

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

20 6.3 In any proceeding brought by either Party to enforce this Consent Judgment, such
21 party may seek whatever fines, costs, penalties or remedies as may be provided by law for any
22 violation of Proposition 65 or this Consent Judgment.

23 7. ENTRY OF CONSENT JUDGMENT

24 7.1 CAG shall file a motion seeking approval of this Consent Judgment pursuant to
25 California Health & Safety Code § 25249.7(f). Upon entry of the Consent Judgment, CAG and
26 Defendant waive their respective rights to a hearing or trial on the allegations of the Complaint.

27 7.2 If this Consent Judgment is not approved by the Court, (a) this Consent Judgment
28 and any and all prior agreements between the parties merged herein shall terminate and become

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

7 **8. MODIFICATION OF JUDGMENT AND RIGHTS THEREUNDER**

8 **8.1** This Consent Judgment may be modified only upon written agreement of the
9 Parties and upon entry of a modified Consent Judgment by the Court thereon, or upon motion of
10 any Party as provided by law and upon entry of a modified Consent Judgment by the Court. Any
11 Party may waive in writing any right it may have under this Consent Judgment.

12 **8.2** Any Party seeking to modify this Consent Judgment shall attempt in good faith to
13 meet and confer with the other Party prior to filing a motion to modify the Consent Judgment.

14 **9. RETENTION OF JURISDICTION**

15 **9.1** This Court shall retain jurisdiction of this matter to implement and enforce the
16 terms of this Consent Judgment.

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

18 **10.1** CAG shall serve a copy of this Consent Judgment, signed by both parties, on the
19 California Attorney General so that the Attorney General may review this Consent Judgment
20 prior to its submittal to the Court for approval. No sooner than forty five (45) days after the
21 Attorney General has received the aforementioned copy of this Consent Judgment, and in the
22 absence of any written objection by the Attorney General to the terms of this Consent Judgment,
23 the Parties may then submit it to the Court for approval.

24 **11. ATTORNEY FEES**

25 **11.1** Except as specifically provided in Section 4.1 and 6.3, each Party shall bear its
26 own costs and attorney fees in connection with this action.

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

14 **13. EXECUTION AND COUNTERPARTS**

15 **13.1** This Consent Judgment may be executed in counterparts and by means of
16 facsimile or portable document format (PDF), which taken together shall be deemed to constitute
17 one document.

18 **14. NOTICES**

19 **14.1** Any notices under this Consent Judgment shall be by personal delivery or First
20 Class Mail.

21 If to CAG:

22
23 Reuben Yeroushalmi
24 9100 Wilshire Boulevard, Suite 240W
25 Beverly Hills, CA 90212
(310) 623-1926

26 If to Kmart Corporation

27 Lori K. Miller
28 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.

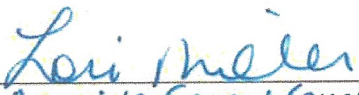
AGREED TO:

Date: July 14, 2015

By: 
Plaintiff, CONSUMER ADVOCACY
GROUP, INC.

AGREED TO:

Date: July 7, 2015

By: 
Associate General Counsel
Defendant, KMART CORPORATION, a
Michigan Corporation

IT IS SO ORDERED.

Date: _____

JUDGE OF THE SUPERIOR COURT