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13 SUPERIOR COURT OF THE STATE OF CALIFORNIA

14 COUNTY OF ALAMEDA

15 UNLIMITED CIVIL JURISDICTION

16 LAURENCE VINOUCUR

17 Plaintiff,

18 v.

19 WESTFIELD OUTDOOR, INC., *et al.*,

20 Defendants.

Case No. RG15754189

**[PROPOSED] CONSENT JUDGMENT AS
TO DEFENDANT KMART
CORPORATION**

(Health & Safety Code § 25249.6 *et seq.* and
Code of Civil Procedure § 664.6)

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CONSENT JUDGMENT AS TO DEFENDANT KMART CORPORATION

1 **1. INTRODUCTION**

2 **1.1 Parties**

3 This Consent Judgment is entered into by and between plaintiff Laurence Vinocur
4 (“Vinocur”) and defendant Kmart Corporation (“Kmart”), with Vinocur and Kmart each referred to
5 individually as a “Party” and collectively as the “Parties.”

6 **1.2 Plaintiff**

7 Vinocur is a resident of the State of California who seeks to promote awareness of
8 exposures to toxic chemicals, and to improve human health by reducing or eliminating harmful
9 substances contained in consumer and commercial products.

10 **1.3 Defendant**

11 Kmart employs ten or more individuals and is a person in the course of doing business for
12 purposes of the Safe Drinking Water and Toxic Enforcement Act of 1986, California Health and
13 Safety Code section 25249.5 *et seq.* (“Proposition 65”).

14 **1.4 General Allegations**

15 Vinocur alleges that Kmart sells and/or distributes for sale in California, tents and shelters
16 that contain tris(1,3-dichloro-2-propyl) phosphate (“TDCPP”) and that Kmart does so without
17 providing the health hazard warning required by Proposition 65.

18 **1.5 Product Description**

19 For purposes of this Consent Judgment, “Tent” means a temporary, structured, and portable
20 enclosure intended for sleeping outdoors, made of fabric stretched over, and supported by, one or
21 more poles or frame, attached to pegs driven into the ground. “Private Label” means a product
22 manufactured on behalf of Kmart or distributed under the Kmart name, and packaged for sale under
23 a trademark owned by Kmart. The products covered by this Consent Judgment are Private Label
24 Tents containing TDCPP that are sold or distributed for sale in California by Kmart including, but
25 not limited to, the *Northwest Territory Sierra Dome Tent, Style #KMT120907-3, KSN#0-05734934-*
26 *2/180057349342, UPC # 8 18655 00644 1.* All such Private Label Tent products containing
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1 TDCPP that are sold in California by Kmart are referred to collectively hereinafter as the
2 “Products.”

3 **1.6 Notice of Violation**

4 On October 24, 2014, Vinocur served Kmart and the requisite public enforcement agencies
5 with a 60-Day Notice of Violation (“Notice”), alleging that Kmart violated Proposition 65 when it
6 failed to warn its customers and consumers in California that the Products expose users to TDCPP.
7 To the best of the Parties’ knowledge, no public enforcer has commenced and is diligently
8 prosecuting an action to enforce the allegations set forth in the Notice.

9 **1.7 Complaint**

10 On January 8, 2015 Vinocur commenced the instant action, naming Kmart as a defendant
11 for the alleged violations of Proposition 65 that are the subject of the Notice. Thereafter on
12 February 3, 2015, Vinocur filed a First Amended Complaint, the operative pleading in this action
13 (“Complaint”).

14 **1.8 No Admission**

15 Kmart denies the material, factual, and legal allegations contained in the Notice and
16 Complaint, and maintains that all of the products it has sold or distributed for sale in California,
17 including the Products, have been, and are, in compliance with all laws. Nothing in this Consent
18 Judgment shall be construed as an admission by Kmart of any fact, finding, conclusion of law, issue
19 of law, or violation of law, nor shall compliance with this Consent Judgment constitute or be
20 construed as an admission by Kmart of any fact, finding, conclusion of law, issue of law, or
21 violation of law. This Section shall not, however, diminish or otherwise affect Kmart’s obligations,
22 responsibilities, or duties under this Consent Judgment.

23 **1.9 Jurisdiction**

24 For purposes of this Consent Judgment only, the Parties stipulate that this Court has
25 jurisdiction over Kmart as to the allegations in the Complaint, that venue is proper in Alameda
26 County, and that the Court has jurisdiction to enter and enforce the provisions of this Consent
27 Judgment pursuant to Proposition 65 and Code of Civil Procedure section 664.6.
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1 **1.10 Effective Date**

2 For purposes of this Consent Judgment, the term “Effective Date” shall mean the date that
3 the Court grants the motion for approval of this Consent Judgment contemplated by Section 5.

4 **2. INJUNCTIVE SETTLEMENT TERMS**

5 Kmart shall not sell in California any Products manufactured after September 1, 2015,
6 except Reformulated Products.

7 For purposes of this Consent Judgment, “Reformulated Products” are defined as Products with a
8 maximum concentration of no more than 25 parts per million each of TDCPP or tris(2-
9 chloroethyl)phosphate (“TCEP”), when analyzed pursuant to U.S. Environmental Protection
10 Agency testing methodologies 8141, 3545 and/or 8270C, or other methodologies utilized by state or
11 federal agencies for the purpose of determining TDCPP content in a solid substance. Kmart is not a
12 seller of, and shall not be responsible for, products offered by third parties on websites hosted by
13 Kmart or its affiliates.

14 **3. MONETARY SETTLEMENT TERMS**

15 **3.1 Payments Pursuant to Health and Safety Code § 25249.7(b)(2)**

16 Pursuant to Health and Safety Code section 25249.7(b)(2), and in settlement of all the
17 claims referred to in this Consent Judgment, Kmart shall pay \$40,000 in civil penalties in
18 accordance with this Section. Each penalty payment will be allocated in accordance with California
19 Health & Safety Code § 25249.12(c)(1) & (d), with 75% of the funds remitted to the California
20 Office of Environmental Health Hazard Assessment (“OEHHA”) and the remaining 25% of the
21 penalty payment remitted to Vinocur. Vinocur’s counsel shall be responsible for remitting Kmart’s
22 penalty payment(s) under this Consent Judgment to OEHHA.

23 **3.1.1 Initial Civil Penalty.** Kmart shall make an initial civil penalty payment of
24 \$12,000. Kmart shall provide its payment in a single check made payable to “Laurence Vinocur,
25 Client Trust Account” to be delivered to the address provided in Section 3.4, below.

26 **3.1.2 Final Civil Penalty.** On October 30, 2015, Kmart shall make a final civil
27 penalty payment of \$28,000. Pursuant to title 11 California Code of Regulations section 3203(c),
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1 Vinocur agrees that the final civil penalty payment shall be waived in its entirety if, no later than
2 October 20, 2015, an officer of Kmart provides Vinocur with a signed declaration certifying that all
3 of the Products manufactured for sale in California on or after September 1, 2015, are Reformulated
4 Products, and that Kmart will continue to have manufactured for sale in California only
5 Reformulated Products in the future. The option to provide a declaration certifying early
6 reformulation in lieu of making the final civil penalty payment otherwise required by this Section is
7 a material term, and time is of the essence.

8 **3.2 Reimbursement of Attorneys' Fees and Costs**

9 The Parties acknowledge that Vinocur and his counsel offered to resolve this dispute
10 without reaching terms on the amount of fees and costs to be reimbursed to them, thereby leaving
11 the issue to be resolved after the material terms of the agreement had been settled. After the other
12 settlement terms had been finalized, the Parties negotiated a resolution of the compensation due to
13 Vinocur and his counsel under general contract principles and the private attorney general doctrine
14 codified at California Code of Civil Procedure § 1021.5. For all work performed through the
15 mutual execution of this agreement and the Court's approval of the same, but exclusive of fees and
16 costs on appeal, if any, Kmart shall reimburse Vinocur and his counsel \$41,000. Kmart's
17 payment is to be delivered within ten days of the Effective date in the form of a check payable to
18 "The Chanler Group." The reimbursement shall cover all fees and costs incurred by Vinocur,
19 including but not limited to the costs of investigating, bringing this matter to Kmart's attention,
20 litigating, negotiating a settlement in the public interest, and obtaining the Court's approval of the
21 same.

22 **3.3 Payment Address**

23 All payments required by this Consent Judgment shall be delivered to the following
24 address:

25 The Chanler Group
26 Attn: Proposition 65 Controller
27 2560 Ninth Street
28 Parker Plaza, Suite 214
Berkeley, CA 94710

1 **3.4 Payment Timing / Enforcement of Payment Terms**

2 With the exception of the final civil penalty payment required by Section 3.1.2, Kmart shall
3 deliver all payments required by this Consent Judgment to Vinocur’s counsel within five days of
4 the Effective Date. In the event that any payment required by this Consent Judgment, including
5 the Section 3.1.2 final civil penalty, is untimely, the Parties agree and acknowledge that (a) Kmart
6 shall be liable to Vinocur for 10% simple interest on any unpaid amount(s); (b) Vinocur may seek
7 to enforce Kmart’s payment obligations under general contract principles and Code of Civil
8 Procedure sections 664.6; and (c) Vinocur shall be entitled to any fees incurred recovering such
9 settlement payments pursuant to general contract principles and Code of Civil Procedure section
10 1021.5.

11 **4. CLAIMS COVERED AND RELEASED**

12 **4.1 Vinocur’s Release of Proposition 65 Claims**

13 Vinocur, acting on his own behalf and in the public interest, releases Kmart and its parents,
14 subsidiaries, affiliated entities under common ownership, directors, officers, employees, and
15 attorneys (“Releasees”) for any violations arising under Proposition 65 for unwarned exposures to
16 TDCPP from Products distributed or sold by Kmart prior to the Effective Date, as set forth in the
17 Notice. Compliance with the terms of this Consent Judgment constitutes compliance with
18 Proposition 65 by Kmart with respect to exposures to TDCPP from Products manufactured, sold or
19 distributed for sale by Kmart after the Effective Date.

20 **4.2 Vinocur’s Individual Release of Claims**

21 Vinocur, in his individual capacity only and *not* in his representative capacity, also provides
22 a release to Kmart and Releasees, which shall be effective as a full and final accord and satisfaction,
23 as a bar to all actions, causes of action, obligations, costs, expenses, attorneys’ fees, damages,
24 losses, claims, liabilities and demands of Vinocur of any nature, character or kind, whether known
25 or unknown, suspected or unsuspected, arising out of alleged or actual exposures to TDCPP or
26 TCEP in Products manufactured, distributed or sold by Defendant before the Effective Date.

27 **4.3 Kmart’s Release of Vinocur**

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1 Kmart, on its own behalf and on behalf of its past and current agents, representatives,
2 attorneys, successors and assigns, hereby waives any and all claims against Vinocur and his
3 attorneys and other representatives, for any and all actions taken or statements made by Vinocur
4 and his attorneys and other representatives in the course of investigating claims, seeking to enforce
5 Proposition 65 against it in this matter, or with respect to the Products.

6 **5. COURT APPROVAL**

7 This Consent Judgment is not effective until it is approved and entered by the Court and
8 shall be null and void if, for any reason, it is not approved and entered by the Court within one year
9 after it has been fully executed by all Parties. The Parties agree to support the entry of this
10 agreement as a judgment, and to obtain the Court's approval of their settlement in a timely manner.
11 The Parties acknowledge that, pursuant to California Health and Safety Code section 25249.7(f), a
12 noticed motion is required for judicial approval of this Consent Judgment, which motion Vinocur
13 shall draft and file and Kmart shall support, appearing at the hearing if so requested. If any third-
14 party objection to the motion is filed, Vinocur and Kmart agree to work together to file a reply and
15 appear at any hearing. This provision is a material component of the Consent Judgment and shall
16 be treated as such in the event of a breach.

17 **6. SEVERABILITY**

18 If, subsequent to the Court's approval and entry of this Consent Judgment as a judgment,
19 any provision of this Consent Judgment is held by a court to be unenforceable, the validity of the
20 remaining provisions shall not be adversely affected.

21 **7. GOVERNING LAW**

22 The terms of this Consent Judgment shall be governed by the laws of the State of California
23 and apply within the State of California. In the event that Proposition 65 is repealed, preempted, or
24 is otherwise rendered inapplicable by reason of law generally, or as to the Products, then Kmart
25 may provide Vinocur with written notice of any asserted change in the law, and shall have no
26 further obligations pursuant to this Consent Judgment, with respect to, and to the extent that, the
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1 Products are so affected. Nothing in this Consent Judgment shall be interpreted to relieve Kmart
2 from its obligation to comply with any pertinent state or federal law or regulation.

3 **8. DISMISSAL OF SEARS HOLDING CORPORATION**

4 Within 15 days of Vinocur's receipt of Kmart's payment of the initial civil penalty and
5 attorneys' fee reimbursement required by Sections 3.1.1 and 3.2, Vinocur agrees to file a request for
6 a dismissal with prejudice as to defendant Sears Holding Corporation.

7 **9. NOTICE**

8 Unless specified herein, all correspondence and notice required by this Consent Judgment
9 shall be in writing and sent by: (i) personal delivery, (ii) first-class registered or certified mail,
10 return receipt requested; or (iii) a recognized overnight courier to any Party by the other at the
11 following addresses:

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13 To Kmart:

14 Attn: Legal Department
15 Kmart Corporation
16 3333 Beverly Road
17 Hoffman Estates, IL 60179

To Vinocur:

Attn: Proposition 65 Coordinator
The Chanler Group
2560 Ninth Street
Parker Plaza, Suite 214
Berkeley, CA 94710-2565

18 With a copy to:

19 Michael Steel
20 Morrison & Foerster LLP
21 425 Market Street
San Francisco, CA 94105

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

24 **10. COUNTERPARTS, FACSIMILE AND PDF SIGNATURES**

25 This Consent Judgment may be executed in counterparts and by facsimile or portable
26 document format (pdf) signature, each of which shall be deemed an original and, all of which, when
27 taken together, shall constitute one and the same document.

1 **11. COMPLIANCE WITH REPORTING REQUIREMENTS**

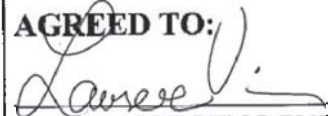
2 Vinocur and his counsel agree to comply with the reporting form requirements referenced in
3 California Health and Safety Code section 25249.7(f).

4 **12. MODIFICATION**

5 This Consent Judgment may be modified only by: (i) a written agreement of the Parties and
6 the entry of a modified Consent Judgment by the Court thereon; or (ii) upon a successful motion of
7 any party and the entry of a modified Consent Judgment by the Court thereon.

8 **13. AUTHORIZATION**

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

12 **AGREED TO:**
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14 LAURENCE VINO CUR

15 Dated: 11/13/2015

AGREED TO:

KMART CORPORATION

By: Stuart W. Gray
(Print Name)

Its: VP, Deputy General Counsel
(Title)

Dated: 11/13/15

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