

SETTLEMENT AGREEMENT

1. INTRODUCTION

1.1 Anthony Ferreiro & Kmart Corporation

This Settlement Agreement ("Settlement Agreement") is entered into by and between Anthony Ferreiro ("Ferreiro"), and Kmart Corporation ("Kmart"). Together, Ferreiro and Kmart are collectively referred to as the "Parties." Ferreiro is an individual that resides in the State of California, and seeks to promote awareness of exposures to toxic chemicals and to improve human health by reducing or eliminating hazardous substances contained in consumer products.

Plaintiff contends that Kmart is a person in the course of doing business for purposes of the Safe Drinking Water and Toxic Enforcement Act of 1986, Health & Safety Code section 25249.6, et seq. ("Proposition 65").

1.2 General Allegations

Ferreiro alleges that Kmart has imported, distributed and/or sold in the State of California certain therapeutic shoe inserts containing Diisononyl phthalate (DINP) without the requisite Proposition 65 warning. On December 20, 2013, the State of California listed DINP as a chemical known to cause cancer.

1.3 Product Description

The products covered by this Settlement Agreement are *Remedy Therapeutic PVC Brass Health Shoe Insoles*, UPC No. 8 86511 09409 3 (the "Product" or "Products" containing DINP).

1.4 Notice of Violation

On May 28, 2015, Ferreiro served Kmart, Sears Holding Corporation ("Sears"), and various public enforcement agencies with a document entitled "Notice of Violation of California Health & Safety Code § 25249.5, et seq." (the "Notice"). The Notice provided Kmart and such others, including public enforcers, with notice that alleged that Kmart was in violation of California Health & Safety Code § 25249.6, for failing to warn

California customers that the Product exposed users in California to DINP. To the best of the Parties' knowledge, no public enforcer is diligently prosecuting the allegations set forth in the Notice.

1.5 No Admission

Kmart denies the material factual and legal allegations contained in the Notice and maintains that all products it has sold and/or distributed in California, including the Products, have been and are in compliance with all laws, and are completely safe for their intended use. Nothing in this Settlement Agreement shall be construed as an admission by Kmart of any fact, finding, issue of law, or violation of law; nor shall compliance with this Settlement Agreement constitute or be construed as an admission by Kmart of any fact, finding, conclusion, issue of law or violation of law, such being specifically denied by Kmart. However, this section shall not diminish or otherwise affect Kmart's obligations, responsibilities and duties under this Settlement Agreement. Notwithstanding the allegations in the Notice, Kmart maintains that it has not knowingly or intentionally manufactured, or caused to be manufactured, Products for sale in California in violation of Proposition 65.

1.6 Effective Date

For purposes of this Settlement Agreement, the term "Effective Date" shall mean July 29, 2016.

2. INJUNCTIVE RELIEF

2.1 Cease Sale of the Products in California

Commencing on the Effective Date, and continuing thereafter, Kmart shall not ship, sell, or offer for sale in California the Product.

3. PENALTIES PURSUANT TO HEALTH & SAFETY CODE § 25249.7(b)

In settlement of all claims referred to in the Notice and this Settlement Agreement, Kmart shall pay a total of \$500 in civil penalties in accordance with this Section. After a thorough investigation, Ferreiro agrees that this civil penalty payment

satisfies the statutory criteria under Proposition 65. Each penalty payment will be allocated in accordance with California Health & Safety Code § 25249.12(c)(1) and (d), with 75% of the funds remitted to the California Office of Environmental Health Hazard Assessment ("OEHHA") and the remaining 25% of the penalty remitted to Ferreiro. Each penalty payment shall be delivered to the addresses listed in Section 3.2 below. .

3.1 Civil Penalty

Within ten (10) days of the Effective Date, Kmart or its counsel shall issue two separate checks for the initial civil penalty payment to: (a) "OEHHA" in the amount of \$375.00; and (b) "Brodsky & Smith, LLC in Trust for Ferreiro" in the amount of \$125.00. All penalty payments shall be delivered to the addresses listed in Section 3.2 below.

3.2 Payment Procedures

(a) **Issuance of Payments.** Payments shall be delivered as follows:

(i) All payments owed to Ferreiro, pursuant to Section 3.1 shall be delivered to the following payment address:

Evan J. Smith, Esquire
Brodsky & Smith, LLC
Two Bala Plaza, Suite 510
Bala Cynwyd, PA 19004

(ii) All payments owed to OEHHA (EIN: 68-0284486), pursuant to Section 3.1 shall be delivered directly to OEHHA (Memo Line "Prop 65 Penalties") at the following addresses:

For United States Postal Service Delivery:

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

For Non-United States Postal Service Delivery:

Mike Gyurics
Fiscal Operations Branch Chief
Office of Environmental Health Hazard Assessment
1001 I Street
Sacramento, CA 95814

(b) **Copy of Payments to OEHHA.** Kmart agrees to provide Ferreiro's counsel with a copy of the check payable to OEHHA, simultaneous with its penalty payments to Ferreiro, to be delivered to the address provided in Section 3.2(a)(i), as proof of payment to OEHHA.

(c) **Tax Documentation.** Rogers Joseph O'Donnell is holding the settlement payments required under this Settlement Agreement and agrees to provide a completed IRS 1099 for its payments to each of the following payees under this Settlement Agreement:

(i) "Anthony Ferreiro," whose address and tax identification number shall be provided after this Settlement Agreement is fully executed by the Parties;

(ii) "Brodsky & Smith, LLC" (EIN: 23-2971061) at the address provided in Section 3.2(a)(i); and

(iii) "Office of Environmental Health Hazard Assessment" 1001 I Street, Sacramento, CA 95814.

4. **REIMBURSEMENT OF FEES AND COSTS**

The Parties acknowledge that Ferreiro and his counsel offered to resolve this dispute without reaching terms on the amount of fees and costs to be reimbursed to them, thereby leaving this fee issue to be resolved after the material terms of the agreement had been settled. Ferreiro then expressed a desire to resolve the fee and cost issue shortly after the other settlement terms had been finalized. The Parties reached an accord on the compensation to be paid to Ferreiro and his counsel under general contract principles and the private attorney general doctrine codified at California Code of Civil Procedure §

1021.5, for all work performed in connection with the claims alleged in the Notice through the mutual execution of this agreement, including but not limited to any and all investigative, expert and legal fees and expenses incurred by Ferreiro and his counsel as a result of investigating and bringing this matter to Kmart's attention, and negotiating this settlement in the public interest. Accordingly, within ten (10) days of the Effective Date, Kmart or its counsel shall issue a check payable to "Brodsky & Smith, LLC" in the amount of \$4,500 for all of the work and attorney's fees described above for delivery to the following address:

Evan Smith, Esquire
Brodsky & Smith, LLC
Two Bala Plaza, Ste. 510
Bala Cynwyd, PA 19004

5. RELEASE OF ALL CLAIMS

5.1 Release of Kmart, Sears and Downstream Customers and Entities

Ferreiro, acting on his own behalf, releases Kmart, Sears and their respective parents, subsidiaries, affiliated entities, directors, officers, agents, employees, licensors, licensees, attorneys and each entity to whom Kmart directly or indirectly distributes or sells the Products, including but not limited to, downstream distributors, wholesalers, customers, retailers, franchisees, cooperative members and licensees (collectively, the "Releasees"), from all claims for alleged or actual violations of Proposition 65 for their alleged failure to warn about alleged exposures to DINP contained in the Products that were manufactured, distributed, sold and/or offered for sale by Kmart through the Effective Date. This settlement is a full, final and binding resolution of all claims that were or could have been asserted against Kmart, Sears, and/or the Releasees in the Notice. Ferreiro agrees that compliance with the terms of this Settlement Agreement constitutes compliance with Proposition 65 with respect to DINP in the Products.

In further consideration of the promises and agreements herein contained, Ferreiro on his own behalf and on behalf of his past and current agents, representatives, attorneys, successors and/or assignees, hereby waives any right to institute or participate in, directly or indirectly, any form of legal action and releases all claims that he may have, including without limitation, all actions and causes of action in law and in equity, all suits, liabilities, demands, obligations, damages, costs, fines, penalties, losses, or expenses including, but not limited to, investigation fees, expert fees, and attorneys' fees, arising from Products manufactured, sold and/or distributed for sale prior to the Effective Date.

Ferreiro, on behalf of himself, his past and current agents, representatives, attorneys, successors, and/or assignees, further provides a general release herein which shall be effective as a full and final accord and satisfaction as a bar to any and all claims, liabilities, and demands of any nature, character or kind, known or unknown, suspected or unsuspected, as such claims relate to the Products manufactured, distributed and/or sold prior to the Effective Date.

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

Ferreiro, on behalf of himself, his past and current agents, representatives, attorneys, successors, and/or assignees, expressly waives and relinquishes any and all rights and benefits that he may have under, or which may be conferred on him by the provisions of Civil Code section 1542 as well as under any other state or federal statute or common law principle of similar effect, to the fullest extent that he may lawfully waive such rights or benefits pertaining to the released matters herein.

5.2 Kmart and Sears' Release of Ferreiro

Kmart and Sears, each on behalf of themselves, their past and current agents, representatives, attorneys, successors and/or assignees, hereby waives any and all claims

against Ferreiro, his attorneys and other representatives, for any and all actions taken or statements made (or those that could have been taken or made) by Ferreiro and/or his attorneys and other representatives, whether in the course of investigating claims or otherwise seeking to enforce Proposition 65 against it in this matter or with respect to the Products.

Kmart and Sears further acknowledge that they are familiar with Civil Code section 1542, which provides as follows:

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

Kmart and Sears, on behalf of themselves, their past and current agents, representatives, attorneys, successors, and/or assignees, expressly waive and relinquish any and all rights and benefits that they may have under, or which may be conferred on them by the provisions of Civil Code section 1542 as well as under any other state or federal statute or common law principle of similar effect, to the fullest extent that they may lawfully waive such rights or benefits pertaining to the released matters herein.

6. **SEVERABILITY**

If, subsequent to the execution of this Settlement Agreement, any of the provisions of this Settlement Agreement are deemed by a court to be unenforceable, the validity of the enforceable provisions remaining shall not be adversely affected.

7. **ENTIRE AGREEMENT**

This Settlement Agreement contains the sole and entire agreement and understanding of the Parties with respect to the entire subject matter hereof, and any and all prior discussions, negotiations, commitments and understandings related hereto. No representations, oral or otherwise, express or implied, other than those contained herein

have been made by any party hereto. No other agreements not specifically referred to herein, oral or otherwise, shall be deemed to exist or to bind any of the Parties.

8. GOVERNING LAW

The terms of this Settlement Agreement shall be governed by the laws of the State of California and apply within the State of California. In the event that Proposition 65 is repealed or is otherwise rendered inapplicable by reason of law generally, or as to the Products, then Kmart shall have no further obligations pursuant to this Settlement Agreement with respect to, and to the extent that, the Products are so affected.

9. NOTICES

Unless specified herein, all correspondence and notices required to be provided pursuant to this Settlement Agreement shall be in writing and personally delivered or sent by: (i) first-class (registered or certified mail) return receipt requested; or (ii) overnight or two-day courier on any party by the other party to the following addresses:

For Kmart:

J. Robert Maxwell
ROGERS JOSEPH O'DONNELL
311 California Street, 10th FL
San Francisco, CA 94104

For Ferreiro:

Evan J. Smith
Brodsky & Smith, LLC
Two Bala Plaza, Suite 510
Bala Cynwyd, PA 19004
877-534-2590

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

10. COUNTERPARTS: SIGNATURES

This Settlement Agreement may be executed in counterparts and by facsimile or .pdf signature, each of which shall be deemed an original, and all of which, when taken together, shall constitute one and the same document.

11. COMPLIANCE WITH HEALTH & SAFETY CODE § 25249.7(f)

Ferreiro agrees to comply with the reporting requirements referenced in Health & Safety Code section 25249.7(f).

12. MODIFICATION

This Settlement Agreement may be modified only by a written agreement of the Parties.

13. AUTHORIZATION

The undersigned are authorized to execute this Settlement Agreement and have read, understood and agree to all of the terms and conditions contained of this Settlement Agreement.

AGREED TO:

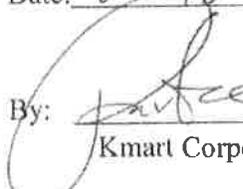
AGREED TO:

Date: _____

Date: 8-2-16 _____

By: _____

Anthony Ferreiro

By:  _____

Kmart Corporation

11. COMPLIANCE WITH HEALTH & SAFETY CODE § 25249.7(f)

Ferreiro agrees to comply with the reporting requirements referenced in Health & Safety Code section 25249.7(f).

12. MODIFICATION

This Settlement Agreement may be modified only by a written agreement of the Parties.

13. AUTHORIZATION

The undersigned are authorized to execute this Settlement Agreement and have read, understood and agree to all of the terms and conditions contained of this Settlement Agreement.

AGREED TO:

AGREED TO:

Date: July 18, 2016

Date: _____

By: Anthony Ferreiro
Anthony Ferreiro

By: _____

Kmart Corporation