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8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 COUNTY OF ALAMEDA

10 HECTOR VELARDE,

11 Plaintiff,

12 vs.

13 LDR GLOBAL INDUSTRIES, LLC and
14 KMART CORPORATION,

15 Defendants.

Case No. RG16809037

[PROPOSED] CONSENT JUDGMENT

Judge: Delbert Gee

Dept.: 302

Hearing Date: September 27, 2016

Hearing Time: 2:30 PM

Reservation #: R-1763449

1 **1. Introduction**

2 1.1 On November 21, 2015, Hector Velarde (“Velarde”) served LDR Global
3 Industries, LLC (“LDR Global”), Kmart Corporation (“Kmart”) and various public enforcement
4 agencies with a document entitled “Notice of Violation of California Health & Safety Code §
5 25249.6, *et seq.*” (the “Notice”). The Notice provided LDR Global and such others, including
6 public enforcers, with notice that alleged that LDR Global was in violation of California Health &
7 Safety Code § 25249.6 (“Proposition 65”), for failing to warn consumers and customers that
8 water supply lines manufactured, sold or distributed by LDR Global or LDR Industries, Inc.,
9 including but not limited to UPC No. 0 19442 10581 5 (“Product” or “Products”) exposed users
10 in California to the chemical Di(2-ethylhexyl) phthalate (DEHP). No public enforcer has
11 diligently prosecuted the allegations set forth in the Notice.

12 1.2 On March 24, 2016, Velarde filed a Complaint for Civil Penalties and Injunctive
13 Relief (“Complaint”) in Alameda County Superior Court, Case No. RG16809037, against LDR
14 Global and Kmart alleging violations of Proposition 65.

15 1.3 LDR Global and Kmart are each a corporation that employs more than ten persons
16 under California Health and Safety Code §25249.6 and offered the Products for sale within the
17 State of California.

18 1.4 Velarde’s Complaint alleges, among other things, that LDR Global and Kmart sold
19 the Products in California and/or to California citizens, that the Products contains DEHP, and that
20 the resulting exposure violated provisions of Proposition 65, by knowingly and intentionally
21 exposing persons to a chemical known to the State of California to cause both cancer and
22 reproductive toxicity without first providing a clear and reasonable warning to such individuals.

23 1.5 For purposes of this Consent Judgment only, the parties stipulate that this Court
24 has jurisdiction over the allegations of violations contained in the Complaint and personal
25 jurisdiction over LDR Global and Kmart as to the acts alleged in the Complaint, that venue is
26 proper in the County of Alameda, and that this Court has jurisdiction to enter this Consent
27 Judgment as a resolution of the allegations contained in the Complaint.

28 1.6 The parties enter into this Consent Judgment pursuant to a full settlement of

1 disputed claims between the parties as alleged in the Complaint for the purpose of avoiding
2 prolonged litigation. By execution of this Consent Judgment, LDR Global and Kmart do not
3 admit any violation of Proposition 65 and specifically deny that they have committed any such
4 violation. Nothing in this Consent Judgment shall be construed as an admission by LDR Global
5 or Kmart of any fact, issue of law or violation of law, nor shall compliance with the Consent
6 Judgment constitute or be construed as an admission by LDR Global or Kmart of any fact, issue
7 of law, or violation of law. Nothing in this Consent Judgment shall prejudice, waive, or impair
8 any right, remedy or defense that LDR Global or Kmart may have in any other future legal
9 proceeding. However, this paragraph shall not diminish or otherwise affect the obligations,
10 responsibilities and duties of LDR Global and Kmart under this Consent Judgment.

11 1.7 For purposes of this Consent Judgment, the term "Effective Date" shall mean the
12 date that the Consent Judgment is entered by the Court.

13 **2. Injunctive Relief**

14 2.1 Commencing ninety (90) days after the Effective Date, and continuing thereafter,
15 LDR Global and Kmart shall only ship, sell, or offer for sale in California, Reformulated Product
16 pursuant to Section 2.2 or Product that is labeled with a clear and reasonable warning pursuant to
17 Section 2.3. LDR Global and its downstream retailers shall have no obligation to label Products
18 that entered the stream of commerce prior to the Effective Date or within ninety (90) days after
19 the Effective Date. For purposes of this Settlement Agreement, a "Reformulated Product" is
20 Product that is in compliance with the standard set forth below in section 2.2.

21 2.2 "Reformulated Product" shall mean Product that contains less than or equal to
22 1,000 parts per million ("ppm") of DEHP when analyzed pursuant to CPSC-CH-C1001-09.3
23 Standard Operating Procedure for Determination of Phthalates method.

24 2.3 Commencing on the Effective Date, LDR Global and Kmart shall, for all Products
25 they sell or distribute and that are intended for sale in California and that is not a Reformulated
26 Product, provide clear and reasonable warnings as set forth in subsections 2.3(a) and (b) below.
27 The warning shall be prominently placed with such conspicuousness as compared with other
28 words, statements, designs, or devices as to render it likely to be read and understood by an

1 ordinary individual under customary conditions before purchase or use. Each warning shall be
2 provided in a manner such that the consumer or user understands to which specific Product the
3 warning applies, so as to minimize the risk of consumer confusion.

4 **(a) Retail Store Sales**

5 **(i) Product Labeling.** LDR Global shall affix a warning to the
6 packaging, labeling or directly on each Product they sell or distribute and that are
7 intended for sale in California and that is not a Reformulated Product that states:

8 **[PROPOSITION 65] WARNING:**

9 This product contains (one or more) chemicals known to the State of California to
10 cause cancer and other birth defects or other reproductive harm. Wash hands after
11 handling. (California law requires this warning to be given to customers in the
12 State of California.)

The bracketed text may, but is not required to, be used.

13 **(ii) Point of Sale Warnings.** Alternatively to the Product

14 Labeling set forth in Section 2.3(a)(i) above, LDR Global may provide
15 warning signs in the form below to its customers in California with
16 instructions to post the warning signs in close proximity to the point of
17 display of the Product. Such instruction sent to LDR Global customers
18 shall be sent by certified mail, return receipt requested.

19 **[PROPOSITION 65] WARNING:**

20 This product contains (one or more) chemicals known to the State of California to
21 cause cancer and other birth defects or other reproductive harm. Wash hands after
22 handling. (California law requires this warning to be given to customers in the
23 State of California.)

The bracketed text may, but is not required to, be used.

24 **(b) Mail Order Catalog Warning.**

25 In the event that LDR Global or
26 Kmart directly sells Product via a printed mail order catalog directly to consumers located in
27 California after the Effective Date that is not a Reformulated Product, LDR Global and Kmart
28 shall provide a warning for such Product sold via printed mail order catalog to such California
residents. A warning that is given in a printed mail order catalog shall be in the same type size or
larger than the Product description text within the catalog. The following warning shall be

1 provided on the same page and in the same location as the display and/or description of the
2 Product:

3 **[PROPOSITION 65] WARNING:**

4 This product contains (one or more) chemicals known to the State of California to
5 cause cancer and other birth defects or other reproductive harm. Wash hands after
6 handling. (California law requires this warning to be given to customers in the
7 State of California.)

8 The bracketed text may, but is not required to, be used. Where it is impracticable to provide the
9 warning on the same page and in the same location as the display and/or description of the
10 Product, LDR Global and Kmart may utilize a designated symbol to cross reference the
11 applicable warning and shall define the term "designated symbol" with the following language on
12 the inside of the front cover of the printed catalog or on the same page as any order form for the
13 Product:

14 **[PROPOSITION 65] WARNING:** Certain products identified with this symbol
15 ▼ and offered for sale in this catalog contain a chemical known to the State of
16 California to cause cancer, birth defects or other reproductive harm.

17 The bracketed text may, but is not required to, be used. The designated symbol must appear on
18 the same page and in close proximity to the display and/or description of the Product. On each
19 page where the designated symbol appears, LDR Global and Kmart must provide a header or
20 footer directing the consumer to the warning language and definition of the designated symbol.

21 (c) **Internet Sales Warning.** In the event that LDR Global or Kmart sells
22 Product via the internet directly to consumers located in California after the Effective Date that is
23 not a Reformulated Product, LDR Global and Kmart shall provide a warning for such Product
24 sold via the internet to such California residents. A warning that is given on the internet shall be
25 in substantially the same type size as the Product description text and shall be given in
26 conjunction with the direct sale of the Product. The warning shall appear either: (a) on the same
27 web page on which the Product is displayed; (b) on the same web page as the order form for the
28 Product; (c) on the same page as the price for the Product; (d) on the same webpage where the
Product is displayed via web link or (e) on one or more web pages displayed to a purchaser

1 during the checkout process. However, it shall not be a violation of this provision of the Consent
2 Judgment if an internet retailer, such as Amazon.com, unilaterally modifies the Product display,
3 description, order form, or checkout process such that the warning provided by LDR Global
4 and/or Kmart no longer appears as required by this provision. The following warning shall be
5 provided:

6 **[PROPOSITION 65] WARNING:**

7 This product contains (one or more) chemicals known to the State of California to cause
8 cancer and other birth defects or other reproductive harm. Wash hands after handling.
(California law requires this warning to be given to customers in the State of California.)

9 The bracketed text may, but is not required to, be used.

10 **3. Entry of Consent Judgment**

11 3.1 The parties hereby request that the Court promptly enter this Consent Judgment.
12 Upon entry of this Consent Judgment, Velarde, LDR Global and Kmart waive their respective
13 rights to a hearing or trial on the allegations of the Complaint and 60-Day Notice.

14 3.2 In the event that the Attorney General objects or otherwise comments on one or
15 more provisions of this Consent Judgment, LDR Global and Kmart agree not to oppose, object to,
16 or otherwise impede any reasonable steps taken by Velarde to satisfy such concerns or objections.

17 **4. Matters Covered By This Consent Judgment**

18 4.1 **Plaintiff's Public Release of Proposition 65 Claims.** This Consent
19 Judgment is a final and binding resolution between Velarde, acting on his own behalf, and on
20 behalf of the public and in the public interest, and Defendants LDR Global and Kmart, and shall
21 have preclusive effect such that no other person or entity, whether purporting to act in his, her, or
22 its interests or the public interest shall be permitted to pursue and/or take any action with respect
23 to any violation of Proposition 65 that was alleged in the Complaint, or that could have been
24 brought pursuant to the Notice against LDR Global, Kmart or their downstream retailers of the
25 Product ("Proposition 65 Claims"). As to alleged exposures to DEHP in the Product, compliance
26 with the terms of this Consent Judgment by LDR Global and Kmart is deemed sufficient to
27 satisfy all obligations concerning compliance by LDR Global and Kmart, and each of their
28

1 downstream retailers, with the requirements of Proposition 65 with respect to the Products.

2 **4.2 Plaintiff's Release of Additional Claims.** As to Velarde for and in his
3 individual capacity only, this Consent Judgment shall have preclusive effect such that he shall not
4 be permitted to pursue and/or take any action with respect to any other statutory or common law
5 claim, to the fullest extent that any such claim was or could have been asserted by him against
6 LDR Global , Kmart or any and all downstream retailers of the Products based on their exposure
7 of Velarde to DEHP in the Products, or their failure to provide a clear and reasonable warning of
8 exposure to Velarde as well as any other claim based in whole or in part on the facts alleged in
9 the Complaint and the Notice, whether based on actions committed by LDR Global, Kmart, or
10 any of their downstream retailers of the Products ("DEHP Exposure Claims").

11 **4.3 Waiver of Rights Under Section 1542 of the California Civil Code.** As to
12 Velarde's public release of Proposition 65 Claims set forth in Section 4.1 ("Public Release") and
13 his individual release of DEHP Exposure Claims set forth in Section 4.2 ("Individual Release"),
14 Velarde, acting on his own behalf and on behalf of the public with respect to the Public Release
15 and acting in his individual capacity with respect to the Individual Release, waives all rights to
16 institute any form of legal action, and releases all claims against LDR Global, Kmart, and their
17 downstream retailers, including their parents, subsidiaries, affiliates, assigns, and acquiring
18 entities of any of them, who may use, maintain, distribute or sell the Products, for the Proposition
19 65 Claims and the DEHP Exposure Claims (referred to collectively in this Section as "Claims").
20 In furtherance of the foregoing, Velarde, acting on his own behalf and on behalf of the public
21 with respect to the Public Release and acting in his individual capacity with respect to the
22 Individual Release, waives any and all rights and benefits which he now has, or in the future may
23 have, conferred upon him with respect to the Claims by virtue of the provisions of § 1542 of the
24 California Civil Code, which provides as follows:

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

1 **HIS SETTLEMENT WITH THE DEBTOR.**

2 4.4 **LDR Global's and Kmart's Release of Plaintiff Velarde.** LDR Global and
3 Kmart, each on behalf of itself, its past and current agents, representatives, attorneys, successors
4 and/or assignees, hereby waives any and all claims against Velarde, his attorneys, and other
5 representatives for any and all actions taken or statements made (or those that could have been
6 taken or made) by Velarde and his attorneys and other representatives, whether in the course of
7 investigating claims or otherwise seeking enforcement of Proposition 65 against LDR Global or
8 Kmart in this matter.

9 5. **Enforcement of Judgment**

10 5.1 The terms of this Consent Judgment shall be enforced exclusively by the parties
11 hereto. The parties may, by noticed motion or order to show cause before the Superior Court of
12 Alameda County, giving the notice required by law, enforce the terms and conditions contained
13 herein. In any proceeding brought by either party to enforce this Consent Judgment, such party
14 may seek whatever fines, costs, penalties or remedies as may be provided by law for any violation
15 of Proposition 65 or this Consent Judgment.

16 6. **Modification of Judgment**

17 6.1 This Consent Judgment may be modified only by written agreement of the parties
18 upon entry of a modified Consent Judgment by the Court thereon, or upon motion of any party as
19 provided by law and upon an entry of a modified Consent Judgment by the Court.

20 6.2 Should any court enter final judgment in a case brought by Velarde or the People
21 involving the Products that sets forth standards defining when Proposition 65 warnings will or
22 will not be required ("Alternative Standards"), or if the California Attorney General's office
23 otherwise provides written endorsement (i.e., a writing that is circulated by the Attorney General
24 that is not intended for the purpose of soliciting further input or comments) of Alternative
25 Standards applicable to products that are of the same general type and function as the Products
26 and constructed from the same materials, LDR Global and/or Kmart shall be entitled to seek a
27 modification of this Consent Judgment on sixty (60) days' notice to Velarde so as to be able to
28 utilize and rely on such Alternative Standards in lieu of those set forth in Section 2 of this

1 Consent Judgment. Velarde shall not unreasonably contest any proposed application to effectuate
2 such a modification provided that the Products for which such a modification is sought are of the
3 same general type and function as those to which the Alternative Standards apply.

4 **7. Settlement Payment**

5 7.1 In settlement of all the claims referred to in this Consent Judgment, and without
6 any admission of liability therefore, LDR Global shall make the following monetary payments:

7 7.1.1 **Civil Penalty.** Within ten (10) business days of the entry of this Consent
8 Judgment by the Court, LDR Global shall pay a total of \$1,000.00 in civil penalties in accordance
9 with this Section. The Initial Civil Penalty payment will be allocated in accordance with
10 California Health & Safety Code §§ 25249.12(c)(1) and (d), with 75% of the funds remitted to the
11 California Office of Environmental Health Hazard Assessment ("OEHHA") and the remaining
12 25% of the civil penalty remitted to Velarde. Within ten (10) business days of the entry of this
13 Consent Judgment by the Court, LDR Global shall issue two separate checks for the civil penalty
14 payment to (a) "OEHHA" in the amount of 750.00; and (b) "Brodsky & Smith, LLC in Trust for
15 Velarde" in the amount of 250.00. Payment owed to Velarde pursuant to this Section shall be
16 delivered to the following payment address:

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

21 Payment owed to OEHHA (EIN: 68-0284486) pursuant to this Section shall be delivered directly
22 to OEHHA (Memo Line "Prop 65 Penalties") at one of the following address(es):

23 For United States Postal Service Delivery:

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

For Non-United States Postal Service Delivery:

Mike Gyurics
Fiscal Operations Branch Chief
Office of Environmental Health Hazard Assessment

1 1001 I Street
2 Sacramento, CA 95814

3 A copy of the check payable to OEHHA shall be mailed to Brodsky & Smith, LLC at the
4 address set forth above as proof of payment to OEHHA.

5 7.1.2 **Attorney Fees and Costs.** In addition to the payment above,
6 LDR Global shall pay \$14,000.00 to Brodsky & Smith, LLC ("Brodsky & Smith") as complete
7 reimbursement for Velarde's attorneys' fees and costs, including any investigation and laboratory
8 costs or expert fees, incurred in the course of bringing the Complaint and in enforcing Proposition
9 65, including without limitation, preparation of the 60-Day Notice letter and discussions with the
10 office of the Attorney General. Payment shall be made within ten (10) business days of the entry
11 of this Consent Judgment by the Court and sent to the address for Brodsky & Smith set forth in
12 Section 7.1.1, above.

13 **8. Notices**

14 8.1 Any and all notices between the parties provided for or permitted under this
15 Agreement, or by law, shall be in writing and personally delivered or sent by: (i) first-class
16 (registered or certified mail) return receipt requested; or (ii) overnight or two-day courier on any
17 party by the other party to the following addresses:

18 For LDR Global and Kmart:

19 Samir J. Abdelnour, Esq.
20 Hanson Bridgett LLP
425 Market Street, 26th Floor
San Francisco, CA 94105

21 For Velarde:

22 Evan J. Smith
23 BRODSKY & SMITH, LLC
9595 Wilshire Blvd., Suite 900
24 Beverly Hills, CA 90212
T: 877.354.2590

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

27 **9. Authority to Stipulate**

28

1 9.1 Each signatory to this Consent Judgment certifies that he or she is fully authorized
2 by the party he or she represents to enter into this Consent Judgment and to execute it on behalf of
3 the party represented and legally to bind that party.

4
5 **10. Counterparts**

6 10.1 This Stipulation may be signed in counterparts and shall be binding upon the
7 parties hereto as if all said parties executed the original hereof.

8 **11. Retention of Jurisdiction**

9 11.1 This Court shall retain jurisdiction of this matter to implement the Consent
10 Judgment.

11 **12. Service on the Attorney General**

12 12.1 Velarde shall serve a copy of this Consent Judgment, signed by all parties, on the
13 California Attorney General on behalf of the parties so that the Attorney general may review this
14 Consent Judgment prior to its submittal to the Court for Approval. No sooner than forty-five (45)
15 days after the Attorney General has received the aforementioned copy of this Consent Judgment,
16 and in the absence of any written objection by the Attorney General to the terms of this Consent
17 Judgment, the parties may then submit it to the Court for Approval.

18 **13. Entire Agreement**

19 13.1 This Consent Judgment contains the sole and entire agreement and understanding
20 of the parties with respect to the entire subject matter hereof, and any and all discussions,
21 negotiations, commitment and understandings related thereto. No representations, oral or
22 otherwise, express or implied, other than those contained herein have been made by any party
23 hereto. No other agreements not specifically referred to herein, oral or otherwise, shall be deemed
24 to exist or to bind any of the parties.

25 **14. Governing Law and Construction**

26 14.1 The validity, construction and performance of this Consent Judgment shall be
27 governed by the laws of the State of California, without reference to any conflicts of law
28 provisions of California law.

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15. Court Approval

15.1 If this Consent Judgment is not approved by the Court, it shall be of no force or effect, and cannot be used in any proceeding for any purpose.

IT IS SO STIPULATED:

Dated: 7/27/16

Dated: _____

By: 
Hector Velarde

By: _____
LDR Global Industries, LLC

Dated: _____

By: _____
Kmart Corp.

IT IS SO ORDERED, ADJUDGED AND DECREED:

Dated: _____

Judge of Superior Court

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15. Court Approval

15.1 If this Consent Judgment is not approved by the Court, it shall be of no force or effect, and cannot be used in any proceeding for any purpose.

IT IS SO STIPULATED:

Dated: _____

Dated: 7/27/16

By: _____
Hector Velarde

By: [Signature] VP Finance
LDR Global Industries, LLC

Dated: _____

By: _____
Kmart Corp.

IT IS SO ORDERED, ADJUDGED AND DECREED:

Dated: _____

Judge of Superior Court

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15. Court Approval

15.1 If this Consent Judgment is not approved by the Court, it shall be of no force or effect, and cannot be used in any proceeding for any purpose.

IT IS SO STIPULATED:

Dated: _____

Dated: _____

By: _____
Hector Velarde

By: _____
LDR Global Industries, LLC

Dated: 8-5-16

By: 
Kmart Corporation

IT IS SO ORDERED, ADJUDGED AND DECREED:

Dated: _____

Judge of Superior Court