

**FILED**  
UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF ILLINOIS

JUN 18 2009

KENNETH S. GARNER, CLERK  
PO BOX 1000  
GDS

U.S. Bankruptcy Court  
Northern District of Illinois  
Eastern Division

Case Number: 02-02474

Case Name: Kmart

In re: Settlement Agreement/applying such further Order  
Retention of Jurisdiction

34. Except as provided in 7 and 8 regarding proceedings in other administrative or judicial tribunals, the Court (or upon withdrawal of the Court's reference, the U.S District Court of the District of the Northern District of Illinois, Eastern Division) shall retain jurisdiction over the subject matter of this Settlement Agreement and the Parties hereto for the duration of the performance of the terms and provisions of this Settlement Agreement for the purpose of enabling any of the parties to apply to the court at any time for such further order, direction and relief as may be necessary or appropriate for the construction or interpretation of this Settlement Agreement or to effectuate or enforce compliance with its terms.

Respectfully Submitted

Hease Bartlett

June 16, 2009

ATTACHMENT A

Debtors

The list identifies each Debtor by its case number in these Chapter 11 Cases. The jurisdiction of incorporation or formation of each Debtor is also designated.

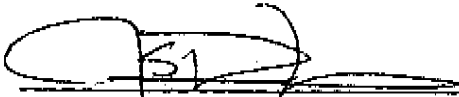
- Kmart Corporation (Michigan), 02-02474 ("Kmart")
- Kmart Corporation of Illinois, Inc. (Illinois), 02-02462 ("KM-IL")
- Kmart of Indiana (Indiana), 02-02463 ("KM-IN")
- Kmart of Pennsylvania LP (Pennsylvania), 02-02464 ("KM-PA")
- Kmart of North Carolina LLC (North Carolina), 02-02465 ("KM-NC")
- Kmart of Texas LP (Texas), 02-02466 ("KM-TX")
- Bluelight.com LLC (Delaware), 02-02467 ("Bluelight")
- Big Beaver of Florida Development, LLC (Florida), 02-02468 ("Big Beaver Florida")
- The Coolidge Group, n/k/a, TC Group I LLC (Michigan), 02-02469 ("Coolidge")
- Kmart Michigan Property Services, L.L.C. (Michigan), 02-02470 ("KM-MPS")
- Kmart Financing I (Delaware), 02-02471 ("Kmart Financing")
- Troy CMBS property, L.L.C. (Delaware), 02-02472 ("Troy CMBS")
- Big Beaver Development Corporation (Michigan), 02-02473 ("Big Beaver Development")
- Big Beaver of Guaynabo Development Corporation (Michigan), 02-02475 ("Big Beaver Guaynabo")
- Big Beaver of Caguas Development Corporation (Michigan), 02-02476 ("Big Beaver Caguas")
- Bluelight.com, Inc. (Delaware), 02-02477 ("Bluelight, Inc.")
- Kmart Holdings, Inc. (Delaware), 02-02478 ("Kmart Holdings")
- Kmart of Amsterdam, NY Distribution Center, Inc. (Michigan), 02-02479 ("Kmart Amsterdam")
- Kmart Stores of Indiana, Inc., f/k/a Kmart Logistics Services, Inc. (Michigan), 02-02480 ("Kmart Stores")
- Kmart of Michigan, Inc. (Michigan), 02-02481 ("KM-MI")
- Kmart Stores of TCNP, Inc., f/k/a Kmart Trading Services, Inc. (Michigan), 02-02482 ("TNCP")
- Kmart Overseas Corporation (Nevada), 02-02483 ("Overseas")
- JAF, Inc. (Delaware), 02-02484 ("JAF")
- VTA, Inc. (Delaware), 02-02485 ("VTA")
- Big Beaver of Caguas Development Corporation II (Michigan), 02-02486 ("Big Beaver Caguas.II")
- Big Beaver of Carolina Development Corporation (Michigan), 02-02487 ("Big Beaver Carolina")
- Kmart Pharmacies, Inc. (Michigan), 02-02488 ("Michigan Pharmacies")
- Builders Square, Inc. (Delaware), 02-02489 ("Builders Square")
- Kmart International Services, Inc. (Delaware), 02-02490 ("KM International")
- Sourcing & Technical Services Inc. (Florida), 02-02491 ("Sourcing & Technical")
- Kmart Pharmacies of Minnesota, Inc. (Minnesota), 02-02492 ("Minnesota Pharmacies")
- STI Merchandising, Inc. (Michigan), 02-02493 ("STI")
- Kmart CMBS Financing, Inc. (Delaware), 02-02494 ("Kmart CMBS")
- S.F.P.R., Inc. (Puerto Rico), 02-02499 ("SFPR")
- PMB, Inc. (Texas), 02-02496 ("PMB")
- ILJ, Inc. (Arkansas), 02-02497 ("IL")
- KBL Holding Inc. (Delaware), 02-02498 ("KBL")
- KLC, Inc. (Texas), 02-02495 ("KLC")

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FOR THE DEBTORS:

KMART CORPORATION


Date: 4/8/03

By:   
James E. Defebaugh

Its: SVP, Chief Compliance Officer & Secretary

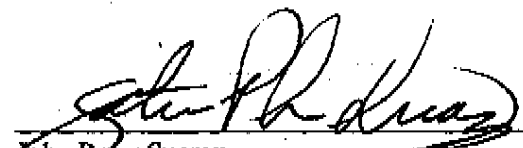
AS TO ALL OTHER DEBTORS

Date: 4/2/03

By:   
James E. Defebaugh

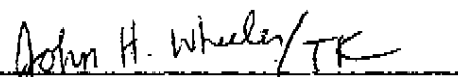
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Date: 4/8/03

By: 

John Peter Suarez  
Assistant Administrator for  
Enforcement and Compliance Assurance  
U.S. Environmental Protection Agency  
1200 Pennsylvania Ave., N.W.  
Washington, D.C. 20460

Date: April 7, 2003

By: 

John H. Wheeler  
Senior Attorney  
Office of Enforcement and Compliance Assurance  
U.S. Environmental Protection Agency  
1200 Pennsylvania Ave., N.W.  
Washington, D.C. 20460

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THE UNDERSIGNED PARTIES ENTER INTO THIS SETTLEMENT AGREEMENT

FOR THE UNITED STATES OF AMERICA:

Date: 4.10-03

By: Tom Sansonetti

Thomas L. Sansonetti  
Assistant Attorney General  
Environment and Natural Resources Division  
U.S. Department of Justice  
Washington, D.C. 20530

Date: 4/10/03

By: Kevin Lyskowski

Kevin Lyskowski  
Trial Attorney  
Environmental Enforcement Section  
Environment and Natural Resources Division  
U.S. Department of Justice  
Washington, D.C. 20044

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reserve all other rights and defenses they may have with respect to any Plan of Reorganization filed by the Debtors.

#### **AMENDMENTS/INTEGRATION AND COUNTERPARTS**

32. This Settlement Agreement and any other documents to be executed in connection herewith shall constitute the sole and complete agreement of the parties hereto with respect to the matters addressed herein. This Settlement Agreement may not be amended except by a writing signed by all parties to this Settlement Agreement.

33. This Settlement Agreement may be executed in counterparts each of which shall constitute an original and all of which shall constitute one and the same agreement.

#### **RETENTION OF JURISDICTION**

34. Except as provided in Paragraphs 7 and 8 regarding proceedings in other administrative or judicial tribunals, the Court (or, upon withdrawal of the Court's reference, the U.S. District Court of the District for the Northern District of Illinois, Eastern Division ) shall retain jurisdiction over the subject matter of this Settlement Agreement and the parties hereto for the duration of the performance of the terms and provisions of this Settlement Agreement for the purpose of enabling any of the parties to apply to the Court at any time for such further order, direction and relief as may be necessary or appropriate for the construction or interpretation of this Settlement Agreement or to effectuate or enforce compliance with its terms.

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indicate that the Settlement Agreement is not in the public interest.

29. This Settlement Agreement shall further be subject to approval of the Court under Bankruptcy Rule 9019. The Debtors shall promptly seek approval of this Settlement Agreement under Bankruptcy Rule 9019 and may file a request for such approval prior to the expiration of the thirty day notice and comment period referred to in the preceding paragraph, provided that a hearing on such request will not be held prior to the expiration of such period.

30. If for any reason (i) the Settlement Agreement is withdrawn by the United States as provided in Paragraph 28, or (ii) the Settlement Agreement is not approved, or (iii) the Chapter 11 Cases are dismissed or converted to cases under Chapter 7 of the Bankruptcy Code before the effective date of a Plan of Reorganization: (a) this Settlement Agreement shall be null and void and the parties shall not be bound hereunder or under any documents executed in connection herewith; (b) the parties shall have no liability to one another arising out of or in connection with this Settlement Agreement or under any documents executed in connection herewith; (c) this Settlement Agreement and any documents prepared in connection herewith shall have no residual or probative effect or value and it shall be as if they had never been executed; and (d) this Settlement Agreement, any statements made in connection with settlement discussions, and any documents prepared in connection herewith may not be used as evidence in any litigation between the parties.

31. The Debtors shall not propose any Plan of Reorganization or take any other action in the Chapter 11 Cases that is inconsistent with the terms and provisions of this Settlement Agreement. The United States, on behalf of EPA, DOI, and NOAA, will not oppose any term or provision of a Plan of Reorganization filed by the Debtors that is addressed by this Settlement Agreement. The parties

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As to the United States:

Environmental Enforcement Section  
Environment & Natural Resources Division  
U.S. Department of Justice  
P.O. Box 7611  
Ben Franklin Station  
Washington, D.C. 20044  
Ref. DOJ File No. 90-11-2-07845

John H. Wheeler  
Office of Enforcement and Compliance Assurance  
U.S. Environmental Protection Agency  
1200 Pennsylvania Ave., N.W. - Mail Code 2272A  
Washington, D.C. 20460

As to the Debtors:

General Counsel  
Kmart Corporation  
3100 West Big Beaver Road  
Troy, Michigan 48084-3163

Kenneth Berlin  
Skadden, Arps, Slate, Meagher & Flom  
1440 New York Avenue, N.W.  
Washington, D.C. 20005

**LODGING AND OPPORTUNITY FOR PUBLIC COMMENT**

28. This Settlement Agreement shall be lodged with the Court for a period not less than thirty days for public notice and comment. After the conclusion of the public comment period, the United States will file with the Court any comments received, as well as the United States' responses to the comments, and at that time, if appropriate, the Court will be requested by motion of the United States to approve the Settlement Agreement. The United States reserves the right to withdraw or withhold its consent if the comments regarding the Settlement Agreement disclose facts or considerations which



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26. The Debtors each agree that with respect to any suit for contribution brought against any of them after the Effective Date for matters related to this Settlement Agreement, they will notify the United States within fifteen business days of service of the complaint upon it. In addition, in connection with such suit, the Debtors shall notify the United States within fifteen business days of service or receipt of any Motion for Summary Judgment and within fifteen business days of receipt of any order from a court setting a case for trial (provided, however, that the failure to notify the United States pursuant to this Paragraph shall not in any way affect the protections afforded under Paragraphs 18 through 25).

#### NOTICES AND SUBMISSIONS

27. Whenever, under the terms of this Settlement Agreement, written notice is required to be given, or a report or other document is required to be sent by one party to another, it shall be directed to the individuals at the addresses specified below, unless those individuals or their successors give notice of a change of address to the other parties in writing. All notices and submissions shall be considered effective upon receipt, unless otherwise provided. Except as otherwise provided in this Settlement Agreement, written notice as specified herein shall constitute complete satisfaction of any written notice requirement in the Settlement Agreement with respect to the United States and the Debtors, respectively.

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employee, or trustee of any Debtor is based solely on its status as and in its capacity as a successor or assign, officer, director, employee, or trustee of any Debtor.

21. The covenants not to sue contained in Paragraphs 18 and 20 of this Settlement Agreement extend only to the Debtors and the persons described in Paragraphs 18 and 20 above and do not extend to any other person. Nothing in this Agreement is intended as a covenant not to sue or a release from liability for any person or entity other than the Debtors, the United States, and the persons described in Paragraph 20. The United States and the Debtors expressly reserve all claims, demands and causes of action either judicial or administrative, past, present or future, in law or equity, which the United States or the Debtors may have against all other persons, firms, corporations, entities, or predecessors of the Debtors for any matter arising at or relating in any manner to the sites or claims addressed herein.

22. Notwithstanding the foregoing, the covenants not to sue contained in this Settlement Agreement shall not apply to nor affect any action based on (i) a failure to meet a requirement of this Settlement Agreement; (ii) criminal liability; or (iii) matters reserved in Paragraph 7(A) through (D) above.

23. Nothing in this Settlement Agreement shall be deemed to limit the authority of the United States to take response action under Section 104 of CERCLA, 42 U.S.C. § 9604, or any other applicable law or regulation, or to alter the applicable legal principles governing judicial review of any action taken by the United States pursuant to that authority. Nothing in this Settlement Agreement shall be deemed to limit the information gathering authority of the United States under Sections 104 and 122 of CERCLA, 42 U.S.C. §§ 9604 and 9622, or any other applicable federal law or regulation, or to

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excuse the Debtors from any disclosure or notification requirements imposed by CERCLA, RCRA, or any other applicable federal or state law or regulation.

24. The Debtors hereby covenant not to sue and agree not to assert or pursue any claims or causes of action against the United States with respect to the Liquidated Sites including, but not limited to, any direct or indirect claim for reimbursement from the Hazardous Substances Superfund (established pursuant to the Internal Revenue Code, 26 U.S.C. § 9507) through Sections 106(b)(2), 111, 112, 113 of CERCLA, 42 U.S.C. §§ 9606(b)(2), 9611, 9612, 9613, or any other provision of law; any claim against the United States, including any department, agency or instrumentality of the United States, under Sections 107 or 113 of CERCLA, 42 U.S.C. §§ 9607 or 9613 related to the Liquidated Sites, or any claims arising out of response activities at the Liquidated Sites. The covenant not to sue set forth in this Paragraph shall not apply in the event that the United States brings a cause of action or issues an order pursuant to the reservations set forth in Paragraph 7(C), but only to the extent that the Debtors' claims arise from the same response action, response costs, or damages that the United States is seeking pursuant to Paragraph 7(C). Nothing in this Settlement Agreement shall be deemed to constitute preauthorization of a claim within the meaning of Section 111 of CERCLA, 42 U.S.C. § 9611, 40 C.F.R. § 300.700(d).

#### CONTRIBUTION PROTECTION

25. With regard to all existing or future third-party Claims against the Debtors with respect to the Liquidated Sites, including claims for contribution, the parties hereto agree that the Debtors, their successors and assigns are entitled to such protection from actions or Claims as is provided by Section 113(f)(2) of CERCLA, 42 U.S.C. § 9613(f)(2).

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or their predecessors, including without limitation the Prepetition generation, transportation, disposal or release of hazardous wastes or materials or the Prepetition ownership or operation of hazardous waste facilities, shall be discharged under Section 1141 of the Bankruptcy Code by the confirmation of a Plan of Reorganization, and the United States shall receive no distributions in the Chapter 11 Cases with respect to such liabilities and obligations.

#### **COVENANT NOT TO SUE AND RESERVATION OF RIGHTS**

18. In consideration of all of the foregoing, including, without limitation, the payments and/or distributions that will be made and the Claims allowed pursuant to the terms of this Settlement Agreement, and except as specifically provided in Paragraphs 21 through 23 (below), the United States covenants not to file a civil action or to take any administrative or other action against the Debtors pursuant to Sections 106 or 107 of CERCLA, 42 U.S.C. §§ 9606 or 9607 or Section 7003 of RCRA, 42 U.S.C. § 6973, with respect to each of the Liquidated Sites. These covenants not to sue shall take effect on the Effective Date.

19. This Settlement Agreement in no way impairs the scope and effect of the Debtors' discharge under Section 1141 of the Bankruptcy Code as to any third parties or as to any Claims that are not addressed by this Settlement Agreement.

20. Without in any way limiting the covenant not to sue (and the reservations thereto) set forth in Paragraph 18 and notwithstanding any other provision of this Settlement Agreement, such covenant not to sue shall also apply to the Debtors' successors and assigns, officers, directors, employees, and trustees, but only to the extent that the alleged liability of the successor or assign, officer, director,

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Environmental Enforcement Division  
Environment & Natural Resources Division  
U.S. Department of Justice  
P.O. Box 7611  
Washington, D.C. 20044  
Ref. DOJ File No. 90-11-2-07845

John H. Wheeler  
Office of Enforcement and Compliance Assurance  
U.S. Environmental Protection Agency  
1200 Pennsylvania Ave., N.W. - Mail Code 2272A  
Washington, D.C. 20460

The United States must notify the Debtors in writing of any modifications to the foregoing addresses.

In the event that the United States sells or transfers its Claims, distributions will be made to a transferee only at such time as the Debtors receive written instructions from the United States directing that payments be made to a transferee and instructions as to where such payments should be made, and, prior to the closing of the Chapter 11 Cases, after an evidence of claim transfer shall have been filed with the Court.

16. Except as provided in Paragraph 5(H), distributions received by EPA will either be deposited in site-specific special accounts within the EPA Hazardous Substance Superfund to be retained and used to conduct or finance response actions at or in connection with those sites, or be deposited into the EPA Hazardous Substance Superfund.

#### **TREATMENT OF DISCHARGED SITES**

17. With respect to all Discharged Sites, all liabilities and obligations of the Debtors to the United States under Sections 106 and 107 of CERCLA, 42 U.S.C. §§ 9606 and 9607 and Section 7003 of RCRA, 42 U.S.C. § 6973, arising from Prepetition acts, omissions or conduct of the Debtors

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this Settlement Agreement, which proof of claim shall be deemed satisfied in full in accordance with the terms of this Settlement Agreement.

#### DISTRIBUTION INSTRUCTIONS

15. (a) Cash distributions for the Liquidated Sites to the United States on behalf of EPA shall be made by FedWire Electronic Funds Transfer ("EFT" or wire transfer) to the U.S. Department of Justice account in accordance with current electronic funds transfer procedures. Payment shall be made in accordance with instructions provided to the Debtor by the Financial Litigation Unit of the United States Attorney's Office for the Northern District of Illinois, Eastern Division, and shall reference the Case Number 02-02474 and DOJ File Number 90-11-2-07845. The Debtors shall transmit written confirmation of such payments to the Department of Justice at the address specified in Paragraph 27. In the event that the United States sells or transfers its Claims, payment will be made to a transferee only at such time as the Debtors receive written instructions from the United States directing that payments be made to a transferee and instructions as to where such payments should be directed, and, prior to the closing of the Chapter 11 Cases, after an evidence of claim transfer shall have been filed with the Court.

(b) Other distributions with respect to the allowed Claims of the United States for the Liquidated Sites pursuant to this Settlement Agreement shall be made as follows. Non-cash Distributions to the United States on behalf of EPA shall be made to:

U.S. EPA - Superfund  
P.O. Box 371003M  
Pittsburgh, PA 15251

Copies of all distributions and related correspondence to the United States shall be sent to:

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discrimination, as other Allowed Other Unsecured Claims with all attendant rights provided by the Bankruptcy Code and other applicable law and (B) will not be entitled to any priority in distribution.

In no event shall the Other Unsecured Claims allowed or to be allowed pursuant to this Settlement Agreement be subordinated to any other Allowed Other Unsecured Claims pursuant to any provision of the Bankruptcy Code or other applicable law that authorizes or provides for subordination of allowed Claims, including without limitation Sections 105, 510 and 726(a)(4) of the Bankruptcy Code. Allowed Secured Claims under or pursuant to the terms of this Settlement Agreement shall be paid in full in accordance with Article 5.1 of the Plan of Reorganization.

12. The Claims allowed in this Settlement Agreement do not constitute, nor shall they be construed as, forfeitures, fines or penalties (or payments in lieu thereof), and nothing herein is intended, or shall be construed, as an admission by Debtors of any facts (other than the fact of payments made referred to in Paragraph 5) or any violation of law. Notwithstanding the foregoing, Debtors do agree to comply with all terms of this Settlement Agreement upon the Effective Date.

13. Notwithstanding any other provision of this Settlement Agreement, and except as provided under applicable law, there shall be no restrictions on the ability and right of the United States on behalf of EPA to transfer or sell all or a portion of any securities distributed to them pursuant to the Plan of Reorganization; to sell their right to all or a portion of any distributions under the Plan to one or more third parties; or to transfer or sell to one or more third parties all or a portion of any Allowed Secured Claim or Allowed Other Unsecured Claim pursuant to this Settlement Agreement.

14. The United States shall be deemed to have a filed a proof of claim for matters addressed in

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thereafter on which the security trades), or if the security is not listed or admitted to trade on such exchange, on the principal national securities exchange on which the security is listed or admitted to trading or, if not listed or admitted to trading on any national securities exchange, the weighted average of the reported bid prices for the security on all transactions on the National Association of Securities Dealers Automated Quotations National Market System or, if the security is not listed or admitted to trading on any national securities exchange or quoted on such National Market System, the weighted average of the reported sales prices for such security on all transactions in the over-the-counter market in the United States as furnished by any New York Stock Exchange member firm selected by the Debtors and the United States for that purpose. For purposes of determining the number of shares of securities that have the value of the Distribution Amount on the Settlement/Judgment Date, the fair market value per share of securities on the Settlement/Judgment Date shall be determined as set forth in the immediately preceding sentence. The terms of Paragraphs 8 and 9 and this Paragraph 10 of this Settlement Agreement shall apply to, be binding on, and inure to the benefit of any successor or assign of the Debtors to the extent that and only to the extent that the alleged liability of the successor or assign for an Additional Site is based solely on its status as and in its capacity of a successor or assign of the Debtors.

#### **TREATMENT OF ALLOWED CLAIMS**

11. All Allowed Other Unsecured Claims under or pursuant to the terms of this Settlement Agreement, including without limitation any Claims as may eventually be allowed and paid as Allowed Other Unsecured Claims pursuant to Paragraphs 8-10 for Additional Sites, regardless of the holder of such Claims (A) will receive the same treatment under the Plan of Reorganization, without



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9. In the event any Claim is liquidated pursuant to Paragraph 8 by settlement or judgment to a determined amount (the "Determined Amount"), the applicable Debtor(s) with which such settlement is made or against which such judgment is entered will satisfy such Claim within 30 days after the date on which the settlement or judgment is final and effective (the "Settlement/ Judgment Date") by providing the holder of the Claim the "Distribution Amount." The Distribution Amount shall be the value of the consideration which would have been distributed under the Plan of Reorganization to the holder of such Claim if the Determined Amount had been an Allowed Other Unsecured Claim in such amount under the Plan of Reorganization. Except as provided in Paragraph 10, the Distribution Amount shall be paid in the same form (e.g., cash, notes, etc.) as was distributed under the Plan of Reorganization.

Notwithstanding the foregoing, with respect to Operable Unit 2 of the Peterson Puritan site (a/k/a J.M. Mills Landfill), the reorganized Debtor shall pay (1) up to \$506,500 of the Determined Amount as an Allowed Secured Claim, and (2) the Distribution Amount with respect to the amount, if any, by which the Determined Amount exceeds \$506,500.

10. In the event that the Plan of Reorganization provides that Allowed Other Unsecured Claims will receive consideration other than cash, Debtors may, in their sole discretion, provide the non-cash portion of the Distribution Amount to the United States in cash that has an aggregate value as of the Settlement/Judgment Date that is equivalent to the Distribution Amount. For purposes of determining the value of the consideration paid to the holders of Allowed Other Unsecured Claims at the time of distribution(s), notes shall have a value equal to their face value and equity securities shall have a value equal to the weighted average of the reported regular way sales prices of all transactions for the security on the New York Stock Exchange on the date(s) of distribution (or the first date

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liability of the Debtors or enter into a settlement with the Debtors with regard to any of the Additional Sites in the manner and before the administrative or judicial tribunal in which the United States' claims would have been resolved or adjudicated if the Chapter 11 Cases had never been commenced.

However, the United States shall not issue or cause to be issued any unilateral order or seek any injunction against the Debtors under Section 106 of CERCLA, 42 U.S.C. § 9606, or Section 7003 of RCRA, 42 U.S.C. § 6973, arising from the Prepetition acts, omissions or conduct of the Debtors or their predecessors with respect to any Additional Sites. The United States and the Debtors will attempt to settle each liability or obligation asserted by the United States against the Debtors relating to an Additional Site on a basis that is fair and equitable under the circumstances, including consideration of (i) settlement proposals made to other PRPs who are similar to the Debtors in the nature of their involvement with the site, (ii) the fact of the Debtors' bankruptcy, and (iii) the circumstances of this Agreement; but nothing in this sentence shall create an obligation of the United States that is subject to judicial review. The aforesaid liquidation of liability may occur notwithstanding the terms of the Plan of Reorganization, the order confirming the Plan of Reorganization, or the terms of any order entered to effectuate the discharge received by the Debtors. In any action or proceeding with respect to an Additional Site, the Debtors and the United States reserve any and all rights, claims, and defenses they would have been entitled to assert had the claim been liquidated in the ordinary course or during the course of the Chapter 11 Cases, including, without limitation, any argument that joint and several liability should or should not be imposed upon the Debtors. Nothing herein shall be construed to limit the Parties' rights to assert any and all rights, claims and defenses they may have in actions or proceedings involving other parties with respect to Additional Sites.

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United States could have pursued enforcement actions or proceedings if the Chapter 11 Cases had never been commenced. The Debtors reserve the right to assert any and all defenses and counterclaims available to them under applicable law with respect to any Claims and obligations of the Debtors to the United States under subparagraphs A through C that are asserted by the United States except for any alleged defense of discharge of liabilities provided under the Bankruptcy Code, any plan of reorganization or order of confirmation. The United States reserves all of its rights with respect to any defenses or counterclaims asserted by the Debtors under this subparagraph D.

#### **TREATMENT OF ADDITIONAL SITES**

8. With respect to all Additional Sites, all liabilities and obligations of the Debtors to the United States under Sections 106 and 107 of CERCLA, 42 U.S.C. §§ 9606 and 9607 and Section 7003 of RCRA, 42 U.S.C. § 6973, arising from Prepetition acts, omissions or conduct of the Debtors or their predecessors, including without limitation the Prepetition generation, transportation, disposal or release of hazardous wastes or materials or the Prepetition ownership or operation of hazardous waste facilities, shall be discharged under Section 1141 of the Bankruptcy Code by the confirmation of a Plan of Reorganization, and the United States shall receive no distributions in the Chapter 11 Cases with respect to such liabilities and obligations, but the applicable reorganized Debtors may be required to pay the United States or such other party as they may designate, such amounts as are provided for in this Paragraph and Paragraph 9. Such liabilities and obligations shall be treated and liquidated as other unsecured claims on the terms specified herein. If and when the United States undertakes enforcement activities in the ordinary course with respect to any Additional Site, the United States may seek a determination of the liability, if any, of the Debtors and may seek to obtain and liquidate a judgment of

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(iii) Claims against the Debtors by the United States under Section 107 of CERCLA, 42 U.S.C. § 9607, for recovery of natural resource damages arising as a result of Postpetition releases or ongoing releases of hazardous substances at or which migrate or leach from a Debtor-Owned Site; or

(iv) Claims against the Debtors by the United States for recovery of civil penalties for violations of law resulting from Postpetition conduct of the Debtors at Debtor-Owned Sites. As used in this Paragraph 7, "Postpetition conduct" shall not include a failure to satisfy or comply with any Prepetition liability or obligations, or to pay a claim (including, without limitation, a penalty claim) except as required by or resulting from the terms of the Plan of Reorganization, any provision of this Settlement Agreement, or a final order of the Court confirming a Plan of Reorganization.

B. With respect to any Additional Site or Discharged Site, Claims against the Debtors by the United States under Sections 106 and 107(a)(1)-(4) of CERCLA, 42 U.S.C. §§ 9606 and 9607(a)(1)-(4), arising as a result of the Debtors' Postpetition conduct which would give rise to liability under 42 U.S.C. §§ 9606 and 9607(a)(1)-(4).

C. With respect to any Liquidated Site, the parties reserve all rights and defenses they may have with respect to Postpetition conduct of the Debtors occurring after the date of lodging of this Settlement Agreement which would give rise to liability under 42 U.S.C. §§ 9606 and 9607(a)(1)-(4). Nothing in this Settlement Agreement shall affect or limit such rights and defenses.

D. The United States may pursue enforcement actions or proceedings under applicable law with respect to the Claims and obligations of the Debtors to the United States under the foregoing subparagraphs A through C in the manner, and by the administrative or judicial tribunals, in which the

B. The Claims and payments set forth in Paragraph 5 will be deemed allocated towards all past, present and future Claims with respect to response costs and natural resource damages for the Liquidated Sites, whether to address matters known or unknown, for which a Claim of any kind or nature has been or could be asserted against the Debtors pursuant to Sections 106 or 107 of CERCLA, 42 U.S.C. §§ 9606 or 9607, or Section 7003 of RCRA, 42 U.S.C. § 6973, by the United States or by the potentially responsible parties or potentially responsible party groups which have incurred or may incur such costs.

**NON-DISCHARGEABILITY/DEBTOR-OWNED SITES/RESERVATION OF RIGHTS**

7. The following claims of or obligations to the United States shall not be discharged under Section 1141 of the Bankruptcy Code by the confirmation of a Plan of Reorganization, nor shall such claims or obligations be impaired or affected in any way by the Chapter 11 Cases or confirmation of a Plan of Reorganization:

A. With respect to any Debtor-Owned Sites:

(i) Claims against the Debtors by the United States under Section 107 of CERCLA, 42 U.S.C. § 9607, for recovery of response costs incurred Postpetition with respect to response action taken at a Debtor-Owned Site, including such response action taken to address hazardous substances that have migrated from a Debtor-Owned Site to a proximate location;

(ii) Actions against the Debtors by the United States under CERCLA or RCRA seeking to compel the performance of a removal action, remedial action, corrective action, closure or any other cleanup action at a Debtor-Owned Site, including actions to address hazardous substances that have migrated to a proximate location from a Debtor-Owned Site;

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H. With respect to the Lenz Oil Services Site in DuPage County, Illinois: the United States on behalf of EPA shall have an Allowed Secured Claim of \$350,000. The amount received by EPA on account of its Allowed Secured Claim under this Paragraph shall be deposited into the Lenz Oil Site Reserve Special Account within the EPA Hazardous Substance Superfund, and shall be used to conduct or finance response actions at or in connection with the Lenz Oil Services site, or shall be transferred by EPA to the EPA Hazardous Substance Superfund.

I. With respect to the Operating Industries, Inc. Landfill in Los Angeles, California: the United States on behalf of EPA shall have an Allowed Other Unsecured Claim of \$11,868.

J. With respect to the Tulalip Landfill in Marysville, Washington: the United States on behalf of EPA shall have an Allowed Other Unsecured Claim of \$74,876.

Summary of Total Allowed Secured Claims and Allowed Other Unsecured Claims Under Paragraph 5: The United States on behalf of EPA shall have an Allowed Secured Claim of \$579,151 and an Allowed Other Unsecured Claim of \$171,744.

6. With respect to the Liquidated Sites:

A. With respect to the Allowed Other Unsecured Claims set forth in Paragraph 5 for EPA, only the amount of cash received by EPA (and net cash received by EPA on account of any non-cash distributions) from the Debtors under this Settlement Agreement for the Allowed Other Unsecured Claim for a particular site, and not the total amount of the allowed claim, shall be credited by EPA to its account for a particular site, which credit shall reduce the liability of non-settling potentially responsible parties for the particular site by the amount of the credit.

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no distributions from the Debtors in the Chapter 11 Cases with respect to the Debtors' liabilities and obligations under CERCLA for the Liquidated Sites other than as set forth in this Settlement Agreement. If no amount of allowed claim is listed below for EPA, DOL, or NOAA for a particular Liquidated Site, then the amount of the allowed claim for such agency for the Liquidated Site is zero.

A. With respect to the Arkwright Dump site in Spartanburg, South Carolina: the United States on behalf of EPA shall have an Allowed Other Unsecured Claim of \$85,000.

B. With respect to the Bedde Waste Oil site in Plaistow, New Hampshire: the United States on behalf of EPA shall have an Allowed Secured Claim of \$11,934.

C. With respect to the Bill Johns Waste Oil site in Jacksonville, Florida: the United States on behalf of EPA shall have an Allowed Other Unsecured Claim of \$0 with respect to response costs incurred prior to November 21, 2001. On or about June 3, 2002, Kmart paid an amount for response costs incurred in connection with the Bill Johns Waste Oil site prior to November 21, 2001.

D. With respect to the Delatte Metals site in Ponchatoula, Louisiana: the United States on behalf of EPA shall have an Allowed Other Unsecured Claim of \$0.

E. With respect to the Florida Petroleum Reprocessors site in Davie, Florida: the United States on behalf of EPA shall have an Allowed Secured Claim of \$65,308.

F. With respect to the Hows Corner site in Plymouth, Maine: the United States on behalf of EPA shall have an Allowed Secured Claim of \$135,735.53.

G. With respect to the Jack Goins site in Cleveland, Tennessee: the United States on behalf of EPA shall have an Allowed Secured Claim of \$16,173.47.

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### **PARTIES BOUND; SUCCESSION AND ASSIGNMENT**

3. This Settlement Agreement applies to, is binding upon, and shall inure to the benefit of the United States, the Debtors, and the Debtors' legal successors and assigns, and any trustee, examiner or receiver appointed in the Bankruptcy Cases.

### **SETOFF OF CLAIMS**

4. On December 23, 2002, Debtor Kmart and the United States entered into a settlement agreement concerning a tax refund due to Kmart with respect to which the United States asserted a right of setoff pursuant to 11 U.S.C. § 553. Pursuant to that agreement, the United States issued the tax refund to Kmart and Kmart agreed that the United States would have an allowed secured claim against Kmart, treated under its chapter 11 plan in accordance with 11 U.S.C. § 1129(b)(2)(A), in an amount not to exceed \$1,085,651.00, provided that the Bankruptcy Court determined that the United States had a right to setoff and had an Allowed Claim. Kmart has determined not to oppose setoff of a portion of the EPA's claims against the tax refund Kmart has received and, as set forth in paragraph 5, has agreed to an Allowed Secured Claim in the amount of \$579,151 and has further agreed that the United States on behalf of EPA will have an Allowed Secured Claim up to \$506,500 against the reorganized Debtor with respect to response costs later determined to be attributable to Kmart with respect to a particular waste disposal site.

### **ALLOWANCE OF CLAIMS**

5. In settlement and satisfaction of the United States' CERCLA Claims with respect to the Liquidated Sites, the Debtors consent to Allowed Secured Claims or Allowed Other Unsecured Claims against Debtor Kmart Corporation in the amounts as set forth below. The United States shall receive



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including any later expansion of such site as may be determined by EPA, and any affected natural resources, or (ii) for those sites not included on the NPL, all areas affected or potentially affected by the release or threatened release of hazardous substances, and affected natural resources, as a direct or indirect result of the operations or activities occurring on or in the vicinity of that site which gave rise to the release or threatened release.

M. "NOAA" means the National Oceanic and Atmospheric Administration of the United States Department of Commerce of the United States of America or any legal successor thereto.

N. "NPL" means the National Priorities List, 40 C.F.R. Part 300.

O. "Plan of Reorganization" or "Plan" means any plan of reorganization that is confirmed and becomes effective in the Chapter 11 Cases.

P. "Prepetition" refers to the time period on or prior to January 22, 2002.

"Postpetition" refers to the time period from and after January 23, 2002 through the date of confirmation.

Q. "RCRA" refers to the Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901 et seq., as now in effect or hereafter amended.

R. "United States" means the United States of America, including EPA, DOI, NOAA, and all of the United States' agencies, departments and instrumentalities.

#### JURISDICTION

2. The Court has jurisdiction over the subject matter hereof pursuant to 28 U.S.C. §§ 157, 1331, and 1334, and 42 U.S.C. §§ 9607 and 9613(b).

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County, West Virginia; the Bufkin Store Lead Site in Tabor City, North Carolina; the Chadbourn Battery site in Chadbourn, North Carolina; the Guyton Battery site in Chadbourn, North Carolina; the Jimmy Green Metals site in Nashville, North Carolina; the Odum Bufkin Battery site in Green Sea, South Carolina; the Old Stake Road Lead site in Chadbourn North Carolina; the Petroleum Conservation (a/k/a U.S. Oil, Two Rivers) site in Two Rivers, Wisconsin; and the Vinegar Hill Battery (a/k/a Williams store) site in Tabor City, North Carolina.

I. "DOF" means the Department of the Interior of the United States of America or any legal successor thereto.

J. "EPA" means the United States Environmental Protection Agency or any legal successor thereto.

K. "Effective Date" means the date on which this Settlement Agreement is approved by the Bankruptcy Court.

L. "Liquidated Sites" means the following sites: the Arkwright Dump site in Spartanburg, South Carolina; the Beede Waste Oil site in Plaistow, New Hampshire; the Bill Johns Waste Oil site in Jacksonville, Florida (with respect to response costs incurred prior to November 21, 2001); the Delatte Metals site in Ponchatoula, Louisiana; the Florida Petroleum Reprocessors site in Davie, Florida; the Hows Corner site in Plymouth, Maine; the Jack Goins site in Cleveland, Tennessee; the Lenz Oil Services site in DuPage County, Illinois; the Operating Industries, Inc. Landfill site in Monterey Park, California; and the Tulalip Landfill in Marysville, Washington.

A "Liquidated Site" delineated above shall be construed to include (i) for those sites now or hereafter included on the NPL, all areas of a site as defined by EPA for purposes of the NPL,

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threatened release of hazardous substances, and affected natural resources, as a direct or indirect result of the operations or activities occurring on that site which gave rise to the release or threatened release. Additional Sites shall include, but not be limited to, Operable Unit 2 of the Peterson Puritan site (a/k/a J.M. Mills Landfill); the Bill Johns Waste Oil Site in Jacksonville, Florida (with respect to response costs incurred on or after November 21, 2001); the Green River Disposal site in Owensboro, Kentucky; the Milt Adams (a/k/a Approved Oil) site in Commerce City, Colorado; and the West Virginia Ordnance site in Point Pleasant, West Virginia.

B. "Allowed Other Unsecured Claim" shall have the meaning set forth in the Plan of Reorganization.

C. "Allowed Secured Claim" shall have the meaning set forth in the Plan of Reorganization.

D. "CERCLA" refers to the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. §§ 9601 et seq., as now in effect or hereafter amended.

E. "Claims" has the meaning provided in Section 101(5) of the Bankruptcy Code.

F. "Debtors" shall mean Kmart Corporation and certain of its affiliates listed on Attachment A hereto that filed voluntary petitions for relief on January 22, 2002, as debtors, debtors-in-possession or in a new or reorganized form as a result of the Chapter 11 Cases.

G. "Debtor-Owned Sites" means any properties or sites owned by any of the Debtors at or at any time after the confirmation of the Plan of Reorganization.

H. "Discharged Site" means the following sites with respect to which the United States asserts no Claims on behalf of EPA, DOI, or NOAA: the Adkins Branch Tire Dump in Putnam

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WHEREAS the United States seeks set-off of these Claims against a tax refund due Debtor Kmart;

WHEREAS the Debtors and the United States wish to resolve their differences with respect to the Liquidated Sites and deal with other issues relating to environmental matters as provided herein;

WHEREAS in consideration of, and in exchange for, the promises and covenants herein, including, without limitation, the covenants not to sue set forth in Paragraphs 18, 20, and 24 and, subject to the provisions of Paragraphs 28-30, intending to be legally bound hereby, the Debtors and the United States hereby agree to the terms and provisions of this Settlement Agreement;

WHEREAS settlement of the matters governed by this Settlement Agreement is in the public interest and an appropriate means of resolving these matters;

NOW, THEREFORE, without the admission of liability or any adjudication on any issue of fact or law, and upon the consent and agreement of the parties to this Settlement Agreement by their attorneys and authorized officials, it is hereby agreed as follows:

#### DEFINITIONS

In this Agreement, the following terms shall have the following meanings:

A. "Additional Sites" means all sites, including, without limitation, all facilities, as that term is defined in CERCLA, other than the Liquidated Sites, the Discharged Sites, and the Debtor-Owned Sites. An "Additional Site" shall be construed to include (i) for those sites now or hereafter included on the NPL, all areas of a site as defined by EPA for purposes of the NPL, including any later expansion of such site as may be determined by EPA, and any affected natural resources, and (ii) for those sites not included on the NPL, all areas affected or potentially affected by the release or

*Dease Barthke*

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION**

In re:	:	
KMART CORPORATION, <u>et al.</u> ,	:	Case No. 02-02474
	:	(Jointly Administered)
Debtors.	:	Chapter 11
	:	Judge Susan Pierson Sonderby

**SETTLEMENT AGREEMENT**

WHEREAS Kmart Corporation and certain of its affiliates (collectively the "Debtors") filed with the United States Bankruptcy Court for the Northern District of Illinois, Eastern Division (the "Court" or "Bankruptcy Court") voluntary petitions for relief under title 11 of the United States Code (the "Bankruptcy Code") on January 22, 2002 (the "Petition Date") (the "Chapter 11 Cases") which are jointly administered as Case No. 02-02474;

WHEREAS the United States contends that the Debtors are liable for response costs incurred and to be incurred by the United States in the course of responding to releases and threats of releases of hazardous substances into the environment for the Liquidated Sites as set forth herein and natural resource damages relating to such sites;

WHEREAS the Debtors would dispute the United States' contentions;

WHEREAS the Debtors seek, to the maximum extent permitted by law, to obtain protection, through the resolution of environmental liabilities for the Liquidated Sites as set forth herein, from and against all Claims that have been or may in the future be asserted for response costs or natural resource damages;