

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


In re: Case No. 02-B-02474  
(Jointly Administered)  
KMART CORPORATION, et al., Chapter 11  
Hon. Susan P. Sonderby  
Debtors.

NOTICE OF FILING

TO: See attached Service List.

PLEASE TAKE NOTICE that there was filed UNDER SEAL on the 26<sup>th</sup> day of August, 2003, with the Clerk of the United States Bankruptcy Court for the Northern District of Illinois, 219 S. Dearborn St., 6<sup>th</sup> Fl., Chicago, IL 60604, ***The Hartz Mountain Corporation's Reply to Omnibus Objection to Other Executory Contract or Unexpired Lease (Non-Real Estate) Cure Claims***, a copy of which was served upon Counsel for Debtor.

THE HARTZ MOUNTAIN CORPORATION

By:   
Sara E. Cook

VERIFICATION BY CERTIFICATION

The undersigned states that he/she served the foregoing Notice of Filing and the above-listed document(s) referred to therein by mailing a copy to the above-named attorney at the address indicated via hand delivery and depositing same in the U.S. Mail at 33 North LaSalle St., Chicago, IL 60602, on August 26, 2003 with proper postage prepaid.

[X] Under penalties as provided by  
law pursuant to 735 ILCS 5/1-109,  
I certify that the statements set  
forth herein are true and correct.



Sara E. Cook  
McKenna Storer  
Suite 303, 666 Russel Court  
Woodstock, IL 60098  
Phone: (815) 334-9692  
Fax: (815) 334-9697  
email: scook@mckenna-law.com

SERVICE LIST per order of 7/15/2003  
*In re: Kmart Corporation, et al.*  
Case No. 02-20474

Eric S. Meier  
Alan Gocha  
Kmart Corporation  
3100 W. Big Beaver Road  
Troy, MI 48084

William J. Barrett  
Barack Ferrazzano Kirschbaum  
Perlman & Nagelberg  
333 West Wacker Drive, Suite 2700  
Chicago, Illinois 60606

Kathryn M. Gleason, Esq.  
The Office of the United States Trustee  
227 West Monroe, Suite 3350  
Chicago, Illinois 60606

Glenn B. Rice, Esq.  
Scott L. Hazan, Esq.  
Otterbourg, Steindler, Houston & Rosen, P.C.  
230 Park Avenue  
New York, New York 10169

Matthew J. Botica, Esq.  
Winston & Strawn  
35 West Wacker Drive  
Chicago, Illinois 60601-9703

Gary T. Holtzer  
Weil Gotshal & Manges LLP  
767 Fifth Ave.  
New York, NY 10153

Sheldon L. Solow  
Mindy D. Cohn  
Kaye Scholer, LLP  
Three First National Plaza  
70 W. Madison, Suite 4100  
Chicago, IL 60602

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

In re:

KMART CORPORATION, et al.,  
  
Debtors.

Case No. 02-B-02474  
(Jointly Administered)

Chapter 11  
Hon. Susan P. Sonderby

**THE HARTZ MOUNTAIN CORPORATION'S  
REPLY TO OMNIBUS OBJECTION TO OTHER EXECUTORY CONTRACT OR  
UNEXPIRED LEASE (NON-REAL ESTATE) CURE CLAIMS**

The Hartz Mountain Corporation ("Hartz"), by and through its attorneys, Sara E. Cook and McKenna Storer for its Reply to the Omnibus Objection to Cure Claims states as follows:

**I. INTRODUCTION**

This pleading is filed in response to Kmart's Omnibus Objection to the Cure Claim of The Hartz Mountain Corporation ("Omnibus Objection"). As the following discussion demonstrates, the Debtor has assumed the Terms and Conditions Agreement, as well as other Agreements, and the Parties have not reached any agreement regarding cure. Accordingly, pursuant to the confirmed Plan of Reorganization in this case ("Plan"), this court must determine the proper amount of cure to be paid by the Debtor. The Debtor's objection should be overruled, and Hartz's cure claim should be allowed in its entirety.

**II. FACTS**

Hartz, an industry leader in the manufacture and distribution of pet supplies, has had a long-standing relationship with the Debtor. Hartz is the largest vendor of pet

products to Kmart, and has had a "Category Management Contract" with Kmart for many years. On the petition date in this case, Hartz was owed \$1,880,000<sup>1</sup>. Post petition, Hartz is owed \$833,460.07.

On March 28, 2003, the Debtor filed its Exhibit L-3 to the *First Amended Joint Plan of Reorganization of Kmart Corporation and Its Affiliated Debtors and Debtors In Possession* ("Plan"), identifying the bundle of contracts with Hartz which it intended to assume. See Docket Numbers 9840-9874. Included in these exhibits were the following contracts with Hartz: two "Vendor Terms and Conditions Contracts; a Workbench Agreement; two "Defective Disposition Agreements"; and two Category Management Contracts. Kmart indicated that the Vendor Terms and Conditions Contracts would be "amended and assumed." The Plan provided that Kmart would cure defaults in amounts to be agreed between the parties or, if no agreement is reached, in such amount as ordered by the Court. (Section 8.2 of Plan.)

Because of the short time frame to file objections to the assumptions and to vote on the Plan, Hartz filed a *Motion for Additional Time to File its Objection to the Assumption of Contracts or in the Alternative, the Hartz Mountain Corporation's Objection to the Assumption of Contracts* ("Motion"). See Exhibit A. Thereafter, on April 8, 2003, after negotiations with Hartz's counsel, the Debtor, by its attorney Kristin Rooney, agreed to assume the Terms and Conditions Contracts without modification. See Exhibit B<sup>2</sup>. Hartz agreed to withdraw its Motion, provided that its right to assert administrative and cure

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<sup>1</sup>This amount represents a reconciled amount pursuant to an agreement reached with Hartz, which reduces the claimed amount of Hartz's Cure Claim to \$2,713,460.07.

<sup>2</sup>The attached email is redacted to excise Attorney Client communications.

claims was preserved, and Debtor agreed. See Letter to Counsel, Exhibit C; See Notice of Withdrawal, Exhibit D.

After reaching this agreement counsel for Hartz asked counsel for the Debtor if an appearance at the confirmation hearing would be necessary. In this conversation, which took place on April 13, 2003 the day before the hearing, Ms. Rooney said that Hartz's appearance was not required, and that all that was required was that Hartz withdraw its Motion. See Exhibit D. Ms. Rooney assured counsel that she would have the proper modifications made to the Plan Exhibits indicating that the Hartz Terms and Conditions Contract would be assumed without modification. In reliance on Counsel's representations, Hartz withdrew its Motion. See Exhibit E. Hartz was not advised that any rejection was contemplated.

In its Omnibus Objection, Kmart states with respect to the Hartz Cure Claim that Kmart "... did not assume any contract with Claimant under which a monetary cure is due." Omnibus Objection, page 8. In its Objection, Kmart characterizes the assumed contract as "Workbench and Other Vendor Agreements." *Id.* This characterization is misleading. The agreement Hartz reached with Kmart provided that the Debtor agreed to assume the original Terms and Conditions Contracts without modification. See Original Terms and Conditions Contract dated June 22, 1994, attached as Exhibit F. The Terms and Conditions are the linchpin of the relationship between Kmart and Hartz. In fact, all of the other agreements flow from the relationship created by the Terms and Conditions contract.

In addition to the specific objection to Hartz' claim, the Debtor claims to have asserted a global objection to all Terms and Conditions contracts. In the Omnibus Objection at page 9, Kmart states that, although it originally listed Purchase Order Terms

and Conditions Agreements as contracts that Kmart intended to assume, it ultimately decided to reject *all* Purchase Order Terms and Conditions Agreements. In support of this allegation, the Objection cites to "Docket No. 10647", but a review of that document reveals that that entry has nothing to do with a global rejection of all Terms and Conditions Contracts. If the global rejection was actually made in another document, that document has not been identified, and Hartz has received no notice of the rejection. No date is given for when Kmart "ultimately decided" to reject these types of contracts, and a diligent search of the docket for a nameless, dateless document has been futile.

The Objection does not refer to any notice it gave to Hartz or other similar cure claimants about the global rejection of Terms and Conditions Contracts, and the daily review of the morass of documents with hundreds of pages of exhibits, some alphabetized/ some not, did not reveal any such rejection to Hartz. Hartz has endeavored to carefully review all Kmart bankruptcy documents on a daily basis for relevant information, but it also has reasonably relied on the representations made by Kmart counsel.

Although Hartz, through its counsel, has engaged in numerous conversations pre- and post-confirmation with counsel for Kmart regarding the assumption of Hartz' Terms and Conditions Agreement, and the issue of cure, Kmart counsel has never mentioned the purported rejection of the Terms and Conditions Contract with Hartz or the alleged global rejection. Further, Hartz, in reliance on the agreement to assume the Original Terms and Conditions contract, has continued to do business with the post-confirmation Debtor under that original terms and conditions contract.

### III. LAW AND ARGUMENT

**A. *The Terms and Conditions Contract Is Assumed, and Hartz' Cure Claim should be allowed in its entirety.***

The Confirmation Order entered by the Court provides in pertinent part:

Article VIII, Section 8.1(c):

"Except as otherwise provided in this Article 8.1(c), each Other Executory Contract or Unexpired Lease as to which any of the Debtors is a party... shall be deemed automatically rejected in accordance with the provisions and requirements of sections 365 and 1123 of the Bankruptcy Code as of the Effective Date, unless such Other Executory Contract or Unexpired Lease (i) shall have been previously assumed by the Debtors by order of the Bankruptcy Court, (ii) is the subject of a motion to assume pending on or before the Effective Date, (iii) is listed on the schedule of assumed Other Executory Contract or Unexpired Leases annexed hereto as Exhibit L-3, or (iv) is otherwise assumed pursuant to the terms of this Plan."

Hartz' Terms and Conditions contract was at all times listed as an assumed contract in Exhibit L-3, and a search of all the documents identified by Debtor in the Plan as related to or amending that exhibit confirms the fact of assumption. See Exhibit G. The docket entry 10647<sup>3</sup>, identified by the Debtor in the Omnibus Objection as the relevant docket entry does not reject the Terms and Conditions contracts. Moreover, the Debtor is bound by its Counsel's agreement to abide by the original Terms and Agreement Contract. A client is bound by the acts of the client's attorney within the scope of the attorney's authority. See 90 A.L.R. 4<sup>th</sup> 326; See also *Nelson v. Consumers Power Co.*, 198 Mich App 82 (1993.) Counsel is an agent of the Debtor and clearly had authority to enter into such contracts, having reached the same agreement with numerous other vendors. See Docket Entry 10392. Hartz' Terms and Conditions contract was assumed under the Plan without

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<sup>3</sup>It appears the new docket number for this document is 10691.

modification.

The pre-confirmation agreement with counsel and the post-confirmation continuance of the relationship under the original terms and conditions, along with the absence of documentation of the rejection, supports the fact of assumption.<sup>4</sup> The Debtor has not refused to honor the original terms and conditions, and its actions are in conformance with assumption.

On Monday, August 18, 2003, one day before this Brief was due, Debtor's counsel stated in an email that all of the terms and conditions contracts were rejected, and such rejection is found in documents filed around April 14, 2003. See Exhibit H. Debtor provided Hartz's counsel with four docket references that supposedly supported the debtor's position. See Docket Numbers 10647, 10830, 10348, 10875. None of these documents include any specific reference to Hartz or any global rejection of terms and conditions contracts.

***B. Equitable Estoppel Precludes the Debtor from Asserting Rejection of the Terms and Conditions Contract***

The Hartz Terms and Conditions Contract was assumed by the Debtor, or, at the least, the Debtor should be equitably estopped from asserting the rejection of the contract when it gave no meaningful notice to Hartz of the decision to reject, and Hartz reasonably relied to its detriment on the agreement to assume.

Equitable estoppel precludes a litigant from asserting a claim or defense against another party who has detrimentally altered his position in reliance on first part's

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<sup>4</sup>The only real question would be whether the Terms and Conditions were assumed without modification.



misrepresentation or failure to disclose some material fact. *In Re South Motor Company of Dade County*, 161 B. R. 532 (S.D. Fla. 1993.) In *In Re Texaco, Inc.*, 254 B.R. 536 (S.D. New York 2000) the Court explains the importance of equitable estoppel and Constitutional due process in this context. There, numerous motions served on the creditors stated the Debtor's intent to assume all oil and gas agreements. Then, a later Order, instead of granting assumption, provided exactly the opposite. *Texaco* at pp. 561 and 562.

The Court stressed the close relationship between equitable estoppel and the due process requirement of full and fair disclosure in bankruptcy. Quoting *In Re Momentum Mfg. Corp.*, 25 F3d 1132 (2d Cir. 1994) the court stated, "[o]f prime importance in the reorganization process is the principle of disclosure." Explaining further, "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. *Texaco*, citing *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S.Ct. 652, 94 L.Ed. 865 (1950). "Fair or adequate notice has two basic elements: content and delivery. If the notice is unclear, the fact that it was received will not make it adequate." *Texaco*, citing *Fogel v. Zell*, 221 F 3d 955, 962 (7<sup>th</sup> Cir. 2000)

Hartz is still searching for the document which clarifies that its contract was rejected. Hartz believes it does not exist. In light of the ongoing dialogue between the parties, a simple phone call, email or letter between negotiating counsel would have been clear notice. Certainly, the fact of the agreed assumption influenced Hartz's decision regarding its vote on the Plan, its cooperation with the Debtor, and its decision to continue to do

business with the Debtor post confirmation. Failure to inform Hartz of any purported rejection was clearly material to the relationship between the parties.<sup>5</sup> The lack of meaningful notice of rejection of the Terms and Conditions contract requires that equitable estoppel must be invoked to prevent injustice.

**C. Assumption of Any Hartz Contract Requires That All Sums Due Hartz are Subject to the Cure Requirement.**

Kmart appears to be asserting that it has assumed some of its contracts with Hartz, but is rejecting that contract which would require the cure. Such cherry-picking is tantamount to attempting a partial assumption and partial assumption of contracts is not allowed. *National Gypsum Co.* 208 F.3d 498, 505 (5<sup>th</sup> Cir. 2000), cert denied 531 U.S. 871. Kmart's entire contractual relationship with Hartz is predicated on the Terms and Conditions Contract which is the cornerstone of their business relationship. All of the agreements running between Hartz and Kmart must be read together. It is well established that when there are multiple contracts, they are properly read as one if they are part of an integrated contractual relationship. *McKinney v. Gannett Co. Inc.* 660 F.Supp. 984 (D. New Mexico, 1981)

The test for whether the contracts are part of an indivisible agreement is governed by state law. *In re Kafakis*, 162 B.R. 719 (E.D. Pa. 1993) All of the contracts with the Debtor have choice of law provisions requiring the application of Michigan law. Under

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<sup>5</sup>The Debtor filed its plan which stated that the parties would agree upon cure amounts or the court would order the amount to cure. See Plan, Section 8.2. Then the Debtor filed its list of assumed contracts. Seven volumes of vendors with terms and conditions contracts were identified. Each volume contained 200 vendors. Thereafter, on April 4, 2003, votes on and objections to the Plan had to be submitted. The confirmation hearing commenced on April 14, 2003, and purportedly rejected all 1400 terms and conditions contracts.

Michigan law, the test is whether if there were a default under one agreement would that create a breach of contract under the other agreements. See *e.g. In re Cole Brothers*, 137 B.R. 647 (W.D. Mich. 1992). That is precisely the case in this instance.

To suggest that there are no Terms and Conditions contracts assumed and therefore in place, not only undermines the entire relationship between the parties, but renders the remaining assumed contracts *non sequiturs*. For instance, Hartz serves as a Category Manager for the Debtor, which demonstrates its substantial role in supplying Kmart with these product lines. The predicate for that role for Hartz is that it has a long standing and well established business relationship as a substantial vendor of the Debtor, which is governed by the Terms and Conditions contract. Hartz has always wanted to work with the Debtor and maintain its relationship. Certainly, if Hartz had elected to not try to sustain this relationship and instead, to pursue the default of Kmart in payment and terminated its role as a vendor, Hartz would not have been able to continue as a Category Manager, or to maintain workbench agreements. In that hypothetical scenario, all of the contracts would have been terminated, because notwithstanding the physical existence of multiple paper agreements, they are all part of the same contract with Hartz.

The Terms and Conditions contract is the linchpin of the relationship and a default under that agreement, triggers a default under all of the contracts requiring that the Debtor cure the default in order to assume any of the contracts. Thus, even though the contracts are not drafted as a single document, all of the contracts which form the relationship between the parties must be read together and the default in payment under the Terms and Conditions Contracts must be cured by the Debtor.

***D. The Full Cure Claim of Hartz Should Be Allowed.***

Once a contract is assumed, cure is mandatory. The duty to cure defaults under an assumed contract is unambiguous in the Code. 11 U. S. C 365(b)(1)(A). The amount necessary to cure Kmart's pre- and post-petition defaults with Hartz is \$2,713,460.07. See Exhibit A. It is well-established that creditors that are required to do business with the Debtor will be made whole at the time of the contract assumption. *National Gypsum Co., supra*. There can be no partial assumption, and all obligations and benefits of the contract are assumed. *Id.* A discharge in bankruptcy does not reach to the duty to cure. *Id.* At the time of the assumption of the contracts, there were no other agreements reached with the Debtor regarding Cure. Hartz therefore, is entitled to have the defaults cured in the full amount of \$2,713,460.07.

This right to cure includes the Debtor's post petition default in payment. See *Collier on Bankruptcy* Section 365.02[2]. Although Hartz has also filed an administrative claim for unpaid post petition sums, its primary basis for receiving payment for these monies is its entitlement to the cure of all defaults. Since the right to cure is not limited to prepetition sums due the creditor, all defaults must be cured. Notably, having resolved the amount of Hartz' prepetition claim, the Debtor raises no objection to the calculation of cure claim, and therefore the amount should be allowed in its entirety.

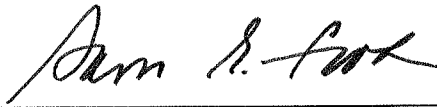
If the court determines that Hartz is not entitled to the cure for the post petition sums, then it is entitled to allowance and payment of its administrative claim. Hartz, of course recognizes that it can only obtain one satisfaction of the post petition claim whether it is denominated a cure amount or an administrative claim.

#### IV. CONCLUSION

The Hartz Cure Claim based on an assumed contract was timely filed and properly documented. Under the Code, it should be paid in accordance with the Plan.

Respectfully submitted,

THE HARTZ MOUNTAIN CORPORATION

By:   
Sara E. Cook, one of its attorneys

Sara E. Cook  
ARDC 03126995  
McKenna Storer  
Suite 303, 666 Russel Court  
Woodstock, IL 60098  
815-334-9692  
Fax: 815-334-9697  
email: [scCook@mckenna-law.com](mailto:scCook@mckenna-law.com)

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE NORTHERN DISTRICT OF ILLINOIS  
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In re:

KMART CORPORATION, et al.,  
  
Debtors.

Case No. 02-B-02474  
(Jointly Administered)

Chapter 11  
Hon. Susan P. Sonderby

**THE HARTZ MOUNTAIN CORPORATION'S  
MOTION FOR ADDITIONAL TIME TO FILE ITS OBJECTION TO THE ASSUMPTION  
OF CONTRACTS OR IN THE ALTERNATIVE, THE HARTZ MOUNTAIN  
CORPORATION'S OBJECTION TO THE ASSUMPTION OF CONTRACTS**

The Hartz Mountain Corporation ("Hartz"), by and through its attorneys, Sara E. Cook and McKenna Storer for its Motion for Additional Time states as follows:

1. Hartz is in the business of manufacturing and distributing pet-related products. Kmart has been a long standing customer of Hartz pursuant to one or more executory contracts. On the petition date in this case, January 22, 2002, Kmart owed Hartz Two Million Two Hundred Eighty Six Thousand Seven Hundred Thirty Five Dollars and ten cents (\$2,286,735.10). Post petition the Debtor owes Hartz \$833,460.07 for a total due Hartz of \$3,120,195.17.

2. In its 2800 page Plan Exhibit filing on March 28, 2003 which was first available to creditors on March 31, 2003<sup>1</sup>, Kmart indicated its intent to assume the following executory contracts with Hartz:

- A. Workbench Agreement.
- B. Two "Defective Disposition Agreements."
- C. Two "Vendor Terms and Conditions Contracts."

3. Prior to March 31, 2003, Hartz had no notice that any of the contracts were being assumed. Hartz received two overnight form letters on March 31, 2003 from the Debtor about (1) the assumption of the Workbench Agreement and (2) the assumption of a Category Management Agreement. No other documents were provided to Hartz.

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<sup>1</sup> Counsel on the service list received notice that the Plan Exhibits were available on line.

Hartz received no letter relating to either the Defective Disposition Contracts or the Vendor Terms and Conditions Contracts.

On Friday, April 4, 2003 at 9:41 am, Counsel for Hartz first learned of "amended" terms and condition for the Vendor Terms and Conditions contract. Greg Ralko, the individual working on the contract hotline for the Debtor, provided a copy of a form letter with the proposed amended Terms and Conditions which had been sent to various vendors.

Notwithstanding Hartz receiving a letter about a "Category Management Agreement", Mr. Ralko had no indication that a Category Management Agreement with Hartz was being assumed by the Debtor.

Hartz does not have copies of any of these agreements. Mr. Ralko is attempting to locate the agreements from the Debtor's records.

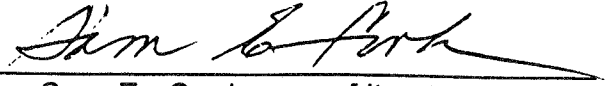
4. Hartz has not had an opportunity to evaluate the conditions for assumption of the contracts, including the cure provisions, nor has it had sufficient time to evaluate the amended business terms of the "Terms and Conditions" contract. Finally, it is very unclear whether the Category Management Contract with respect the Hartz even exists.

5. Notwithstanding this Motion, Hartz has every intention of continuing to supply the Debtor and to do business with the Debtor. However, before Hartz can acquiesce in the assumption of contracts, it must have a reasonable amount of time to evaluate the contracts and the proposed treatment of Hartz without waiving any of its rights. Accordingly, Hartz requests that the deadline for its evaluation of the Debtor's proposal to assume the above listed contracts be enlarged until the commencement of the confirmation hearing or such further date as the Court may set for hearing on assumed contracts, or alternatively, that the Court treat this motion as an objection which Hartz can withdraw up until the commencement of the confirmation hearing or such further date as the Court may set for hearing on assumed contracts, to allow Hartz sufficient time to make a fully informed decision about the structure of its contractual relationship with the Debtor.

WHEREFORE, Hartz prays that this Court grant its motion to enlarge the time to respond to the Debtors request to assume contracts with Hartz; or in the alternative, treat this motion as Hartz's objection to the Debtor's Assumption with the right to withdraw such objection anytime prior to the commencement of the confirmation hearing, and for such further relief as is equitable and just.

Respectfully submitted,

THE HARTZ MOUNTAIN CORPORATION

By:   
Sara E. Cook, one of its attorneys

Sara E. Cook  
ARDC 03126995  
McKenna Storer  
Suite 303, 666 Russel Court  
Woodstock, IL 60098  
815-334-9692  
Fax: 815-334-9697  
email: scook@mckenna-law.com



From: Cook, Sara  
Sent: Tuesday, April 08, 2003 11:15 AM  
To: 'maxmarx@hartz.com'  
Subject: Kmart

Max--I just spoke to Skadden--Krisitn Rooney -- and she proposed that they would agree to the existing Terms and Conditons rather than the revised one. I have sent you that old Terms and Conditions agreement this morning by fax--it appears to be terms and conditions from 1994.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

ATTORNEY CLIENT PRIVILEGED  
WORK PRODUCT PROTECTED



**McKENNA, STORER, ROWE, WHITE & FARRUG**  
A PARTNERSHIP INCLUDING LIMITED LIABILITY COMPANIES  
666 RUSSEL COURT  
WOODSTOCK, ILLINOIS 60098  
(815) 334-9690 - FAX: (815) 334-9697  
CHICAGO • WAUKEGAN • WOODSTOCK  
<http://www.mckenna-law.com>

SARA E. COOK, LLC - PARTNER  
(815) 334-9692  
[scook@mckenna-law.com](mailto:scook@mckenna-law.com)

IN REPLY REFER TO FILE NO.

April 11, 2003

**Facsimile 407-8559**  
**and E-Mail [krrooney@skadden.com](mailto:krrooney@skadden.com)**

Kristin E. Rooney, Esq.  
SKADDEN, ARPS, SLATE, MEAGHER & FLOM  
333 West Wacker Drive  
Chicago, Illinois 60606

Re; Hartz Mountain Contracts

Dear Kristin:

My client has reviewed the available contracts and will withdraw its objection to assumption of all the contracts running between Hartz and Kmart referenced in the plan exhibits, however, Hartz does so with the express reservation of its rights to file a cure claim for the unpaid amounts due Hartz, as well as an administrative claim for the goods provided to Kmart post petition for which payment has not been received.

As I told you, I believe that it would be useful to have a dialogue with the decision makers at Kmart regarding my client's claims. The person they have dealt with the most is John Given, the merchandising manager or buyer for the Hartz product. Please let me know if he is a decision maker or, if not, who is the decision maker who works most closely with him that can discuss the outstanding claims.

If you have any questions, please do not hesitate to call. I will be in court on Monday, sometime before the hearing commences at 11 am.

Sincerely,

A handwritten signature in black ink, appearing to read "Sara E. Cook".

Sara E. Cook

cc: Max Marx, Esq. via email only

**EXHIBIT C**

TIME : 04/11/2003 15:13  
NAME : CHICAGO  
FAX : 3125588348  
TEL : 13125583900

DATE, TIME	04/11 15:13
FAX NO./NAME	4078559-99999
DURATION	00:00:27
PAGE(S)	01
RESULT	OK
MODE	STANDARD
	ECM

Case 02-02474 Doc 32196 Filed 06/23/10 Entered 06/23/10 12:56:42 Desc Main Document Page 20 of 29					Page
Hours	Status	Task Code	Matter / Client	Description	
0.3	Finalized		43580.51825	KMART CORPORATION BANKRUPTCY HARTZ MOUNTAIN CORPORATION, THE TELEPHONE CONFERENCE WITH KRISTIN ROONEY.	
Total Hours: 1.0		Time Entries: 2			

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

**EOP APR 15 2003**

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

**APR 14 2003**

**KENNETH A. GARDNER, CLU  
PS REP. - SW**

In re:

KMART CORPORATION, et al.,  
  
Debtors.

Case No. 02-B-02474  
(Jointly Administered)

Chapter 11  
Hon. Susan P. Sonderby

**NOTICE OF (1) WITHDRAWAL OF THE HARTZ MOUNTAIN CORPORATION'S  
MOTION FOR ADDITIONAL TIME TO FILE ITS OBJECTION TO THE ASSUMPTION  
OF CONTRACTS OR IN THE ALTERNATIVE, THE HARTZ MOUNTAIN  
CORPORATION'S OBJECTION TO THE ASSUMPTION OF CONTRACTS  
AND (2) PRESERVATION OF RIGHTS**

The Hartz Mountain Corporation ("Hartz"), by and through its attorneys, Sara E. Cook and McKenna Storer files this Notice of Withdrawal of the Hartz Mountain Corporation's Motion for Additional Time to File its Objection to the Assumption of Contracts or in the Alternative, the Hartz Mountain Corporation's Objection to the Assumption of Contracts ("Hartz Motion") and Reservation of Rights; and in support thereof states:

1. Hartz is in the business of manufacturing and distributing pet-related products. Kmart has been a long standing customer of Hartz pursuant to one or more executory contracts. On the petition date in this case, January 22, 2002, Kmart owed Hartz Two Million Two Hundred Eighty Six Thousand Seven Hundred Thirty Five Dollars and ten cents (\$2,286,735.10). Post petition the Debtor owes Hartz \$833,460.07 for a total due Hartz of Three Million One Hundred Twenty Thousand and One Hundred Ninety Five Dollars and seventeen cents (\$3,120,195.17). (collectively "Debt")

2. In its 2800 page Plan Exhibit filing on March 28, 2003, which was first available to creditors on March 31, 2003<sup>1</sup>, Kmart indicated its intent to assume the following executory contracts with Hartz:

- A. Workbench Agreement.
- B. Two "Defective Disposition Agreements."
- C. Two "Vendor Terms and Conditions Contracts" which contracts were to be amended and then assumed.


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<sup>1</sup> Counsel on the service list received notice that the Plan Exhibits were available on line.

3. The Debtors and Hartz have agreed to the assumption of the contracts listed in Exhibit M filed by the Debtor on March 28, 2003 with one modification. The Terms and Conditions Contracts with Hartz will be assumed without modification or amendment of any terms or conditions. The Debtor has filed, or will file, an amendment to Exhibit M, prior to the entry of an order of confirmation, consistent with the Debtor's agreement to assume the Hartz Terms and Conditions Contracts without amendment. The assumption of the Hartz contracts is without prejudice to Hartz's rights to file a Cure Claim for its prepetition debt and to file a claim for Administrative Priority for unpaid post petition goods. Based upon these agreements reached with the Debtor, the Hartz Motion is withdrawn.

Respectfully submitted,

THE HARTZ MOUNTAIN CORPORATION

By:   
Sara E. Cook, one of its attorneys

Sara E. Cook  
ARDC 03126995  
McKenna Storer  
Suite 303, 666 Russel Court  
Woodstock, IL 60098  
815-334-9692  
Fax: 815-334-9697  
email: scook@mckenna-law.com



Kmart Corporation  
International Headquarters  
3100 West Big Beaver Road  
Troy MI 48084-3163

JUNE 22 19 94

S-810-9158

Dear Sir/Madam:

This letter will confirm that the Purchase Order Terms and Conditions on the reverse side hereof (the "Terms") shall apply to all purchase orders issued to Vendor by Kmart, whether by telephone, hard copy, electronically or otherwise. Please note that the instructions in item 11 of the Terms are applicable to Distribution Center purchase orders only.

Receipt of this confirmation is **required** before Vendor will be authorized to receive purchase orders from Kmart Corporation.

Please have the chairman, president or a vice president of Vendor confirm that the Terms will apply to all Kmart orders issued to Vendor by signing and returning one original of this letter (**with no changes of any kind**) to the address below no later than 7 business days from the above date. Retain the other original or a copy for your files. This letter must be signed by the company which is paid by Kmart.

Very truly yours,  
Kmart Corporation

DARREL SCHMIDT

Signature

BUYER

Title

THE HARTZ MOUNTAIN CORP.  
Registered Legal Name of Vendor

700 FRANK E. RODGERS BLVD, SOUTH  
Address

HARRISON W. J. 07029-2387  
City State Zip

Thomas E. Cogan  
Vendor Officer Signature  
(Chairman, President or Vice President only)

THOMAS E. COGHAN  
Print Name

V. P. GENERAL SALES MANAGER  
Title

**Return To:**

ATTN Janie Cipielewski  
KMART CORPORATION  
3100 WEST BIG BEAVER ROAD  
TROY MI 48084-3163

EXHIBIT F

# Purchase Order Terms and Conditions

Vendor and Kmart Corporation ("Buyer") agree to be bound by all terms and conditions contained or incorporated herein, all of which are a part of each Purchase Order issued to Vendor by Buyer ("Order") and should be carefully read. Any provisions in Vendor's invoices, billing statements, acknowledgment forms or similar documents which are inconsistent with the provisions of an Order shall be of no force or effect. The cost price set forth in each Order includes the cost of manufacturing, packaging, labeling and shipping unless otherwise specified in the Order.

1. **Vendor's Acceptance.** Vendor's commencement of or promise of shipment of the Merchandise shall constitute Vendor's agreement that it shall deliver the Merchandise in accordance with the terms and conditions of the applicable Order. Vendor agrees to follow the shipping and invoicing instructions issued by Buyer's stores, warehouses, buying offices and Transportation and Accounting Departments, which instructions are incorporated by reference into the applicable Order.
2. **Vendor's Representations and Warranties.** Vendor represents and warrants to Buyer, in addition to all warranties implied by law, that each item of merchandise described on the face of an Order (or in an EDI or telephone Order), together with all related packaging and labeling and other material furnished by Vendor ("Merchandise"), shall (a) be free from defects in design, workmanship and/or materials including, without limitation, such defects as could create a hazard to life or property; (b) conform in all respects with all applicable federal, state and local laws, orders and regulations, including, without limitation, those regarding occupational safety and health; (c) not infringe or encroach upon Buyer's or any third party's personal, contractual or proprietary rights, including, without limitation, patents, trademarks, copyrights, rights of privacy or trade secrets; (d) conform to all of Buyer's specifications and to all articles shown to Buyer as Merchandise samples.
3. **Vendor's Indemnification of Buyer.** Vendor agrees to reimburse, indemnify, hold harmless and to defend at its expense (or to pay any attorney's fees incurred by Buyer) Kmart Corporation and its subsidiary and affiliate companies against all damage, loss, expense, claim, liability or penalty, including, without limitation, claims of infringement of patents, copyrights, trademarks, unfair competition, bodily injury, property or other damage, arising out of any use, possession, consumption or sale of said Merchandise and from any failure of Vendor to properly perform on Order. Vendor shall obtain adequate insurance to cover such liability under each Order and shall provide copies of the applicable certificate(s) of insurance upon request to Buyer.
4. **Defective or Non-conforming Merchandise.** If any Merchandise is defective, unsuitable, does not conform to all terms hereof and of the Order and all warranties implied by law, Buyer may at its option return it to Vendor for full credit or refund of the purchase price or repair it at Vendor's expense, and may charge Vendor such price or expense and the cost of any incurred inbound and outbound freight and a handling, storage and inspection charge of 7½% of the returned Merchandise invoice price.
5. **Buyer's Right to Cancel.** Buyer may terminate and rescind all or part of an Order in the event Vendor breaches or fails to perform any of its obligations in any material respect, or in the event Vendor becomes insolvent or proceedings are instituted by or against Vendor under any provision of any federal or state bankruptcy or insolvency laws or Vendor ceases its operation. Time is of the essence to each Order, and Vendor's failure to meet any delivery date shall constitute a material breach of the Order.
6. **Special Features.** All Merchandise designs, patents and trade names which are supplied by Buyer to Vendor or which are distinctive of Buyer's private label merchandise ("Special Features") shall be the property of Buyer and shall be used by Vendor only for Buyer. Buyer may use the Special Features on or with respect to goods manufactured by others and obtain legal protection for the Special Features including, without limitation, patents, patent designs, copyrights and trademarks. Merchandise with Special Features which is not delivered to Buyer for any reason shall not be sold or transferred to any third party without written authorization of Buyer and unless and until all labels, tags, packaging and markings identifying the Merchandise to Buyer have been removed.
7. **Deductions and Set Off.** Any sums payable to Vendor shall be subject to all claims and defenses of Buyer, whether arising from this or any other transaction, and Buyer may set off and deduct against any such sums all present and future indebtedness of Vendor to Buyer. Buyer shall provide a copy of the deduction voucher(s) for debits taken by Buyer against Vendor's account as a result of any returns or adjustments. Vendor shall be deemed to have accepted each such deduction unless Vendor, within 90 days following receipt of the deduction voucher, notifies Buyer in writing as to why a deduction should not be made and provides documentation of the reason(s) given. Such written notice shall be directed to: Vendor Audit Department, Kmart Corporation, 3100 West Big Beaver Road, Troy, Michigan 48064-3163. Buyer shall not be liable to Vendor for any interest or late charges.
8. **Michigan Contract and Jurisdiction.** EACH ORDER SHALL BE CONSTRUED AND ENFORCED IN ACCORDANCE WITH THE INTERNAL LAWS OF THE STATE OF MICHIGAN, AND IT IS AGREED THAT VENDOR SHALL EXERCISE ANY RIGHT OR REMEDY THEREUNDER EXCLUSIVELY IN, AND HEREBY CONSENTS TO THE JURISDICTION OF, THE STATE OF MICHIGAN COURTS OF OAKLAND COUNTY, MICHIGAN OR THE UNITED STATES DISTRICT COURT IN DETROIT, MICHIGAN.
9. **Miscellaneous.** (a) All rights granted to Buyer hereunder shall be in addition to and not in lieu of Buyer's rights arising by operation of law. (b) Any provisions of a hard copy Order which are typewritten or handwritten by Buyer shall supersede any contrary or inconsistent printed provisions therein. (c) No modification of terms of an Order shall be valid without the written authorization of Buyer. (d) Should any of the provisions of an Order be declared by a court of competent jurisdiction to be invalid, such decision shall not effect the validity of any remaining provisions.
10. **Direct to Store and Distribution Center Invoice & Shipping Instructions.** (a) Each invoice shall include Buyer's Order number, Vendor's stock numbers, and Buyer's code numbers for each item on the invoice. No substitutions of Merchandise shall be made without the written authorization of Buyer. (b) Each Order must be invoiced separately. (c) An Order may not be filled at a price higher than that shown on its face or transmitted without the written authorization of Buyer. (d) If freight costs are to be paid by Buyer, Vendor shall ship via the method and/or route specified in the instructions provided by Buyer's Transportation Department, shall make ONE COMPLETE shipment of the Merchandise and shall NOT make PARTIAL shipments without the written authorization of Buyer. (e) Vendor shall make NO PACKAGE QUANTITY CHANGE on an Order without the written authorization of Buyer.
11. **Additional Distribution Center Invoice & Shipping Instructions.** (a) Vendor shall mail Distribution Center invoices in duplicate. The applicable bill of lading must be attached to the invoice or must be delivered to the Distribution Center at time of Merchandise delivery. (b) Vendor shall mark the contents of each Distribution Center carton clearly on the outside of the carton, case, or package. (c) Merchandise not packaged or shipped in quantities ordered by Buyer shall at Buyer's option be returned to Vendor at Vendor's expense. Vendor shall be charged a handling charge of 7½% of the Merchandise invoice price on all Merchandise not packaged or shipped as ordered.
12. **Merchandise Testing.** Merchandise shall, at Buyer's option, be subject to domestic or overseas testing. Vendor agrees to pay for all fees and costs associated with such testing (which fees and costs are set forth in Buyer's current Quality Assurance Manual or other documentation provided to Vendor). The testing of Vendor's Merchandise by or on behalf of Kmart is not a substitute for Vendor's own testing and other quality assurance related obligations in connection with its sale of Merchandise to Buyer, and such testing shall not limit Buyer's rights, or diminish or remove any of Vendor's



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

In re: ) Case No. 02-B02474  
 ) (Jointly Administered)  
 KMART CORPORATION, et al., ) Chapter 11  
 ) Judge Susan Pierson Sonderby  
 Debtors. )

**PLAN EXHIBIT L-3:**  
**LIST OF ASSUMED OTHER EXECUTORY CONTRACTS**  
**AND UNEXPIRED LEASES**

**VOLUME 2**

All Plan Exhibits are subject to all of the provisions of the First Amended Joint Plan of Reorganization of Kmart Corporation and Its Affiliated Debtors and Debtors-in-Possession (Docket No. 8896)(as subsequently modified or amended, the "Plan"), including, without limitation, Article 15.2, under which the Debtors have reserved the right to alter, amend or modify the Plan or any Exhibits thereto under § 1127(a) of the Bankruptcy Code at any time on or prior to the Confirmation Date.

Please take notice that all Plan Exhibits are subject to all of the provisions of the Plan, including, without limitation, Section 15.2, under which the Debtors have reserved the right to alter, amend or modify the plan or any Exhibits thereto under §1127(a) of the Bankruptcy Code at any time on or prior to the Confirmation Date. Neither the exclusion nor inclusion of a contract or lease by the Debtors on this Plan Exhibit, nor anything contained herein, shall constitute an admission by the Debtors that any such lease or contract is an unexpired lease or executory contract or that any Debtor, or its respective Affiliates, has any liability thereunder.

**Sub List G (Vendor PO Terms and Conditions Agreements)**

Name and Mailing Address, including Zip Code, of Notice Parties to Lease or Contract	Description of Lease or Contract and Nature of Debtor's Interest
HARTLEYS POTATO CHIPS 2157 BACK MAITLAND ROAD LEWISTOWN, PA 17044	Type of Contract: Terms & Conditions Contract Number: 85035 Contracting Entity: Kmart Corporation Description: Vendor Terms and Conditions Agreement
HARTS NURSERY OF JEFFERSON PO BOX 1070 JEFFERSON, OR 97352	Type of Contract: Terms & Conditions Contract Number: 51073716 Contracting Entity: Kmart Corporation Description: Vendor Terms and Conditions Agreement
HARTZ MOUNTAIN CORP 400 PLAZA DRIVE SECAUCUS, NJ 07094	Type of Contract: Terms & Conditions Contract Number: 58109158 Contracting Entity: Kmart Corporation Description: Vendor Terms and Conditions Agreement
HARTZ MOUNTAIN CORPORATION 400 PLAZA DRIVE SECAUCUS, NJ 07094	Type of Contract: Terms & Conditions Contract Number: 425678 Contracting Entity: Kmart Corporation Description: Vendor Terms and Conditions Agreement
HARVEST MANUFACTURING STE A 8F NORTH CAPE COMMERCIAL BLDG 388 KINGS RD , HONG KON	Type of Contract: Terms & Conditions Contract Number: 236104 Contracting Entity: Kmart Corporation Description: Vendor Terms and Conditions Agreement
HARVEST TRADING GROUP INC 2 KEITH WAY UNIT 5 HINGHAM, MA 02043	Type of Contract: Terms & Conditions Contract Number: 613203728 Contracting Entity: Kmart Corporation Description: Vendor Terms and Conditions Agreement

Old NIBS No.	New Docket No.	Description
9809	9840	EXHIBIT[S] L-3: List of Assumed Other Executory Contracts and Unexpired Leases, Sub List A [Information Technology] RE: Item# 8927 [DR] Original NIBS Entry Number: 9809
9811	9842	EXHIBIT[S] L-3: List of Assumed Other Executory Contracts and Unexpired Leases, Sub List B [Corporate] RE: Item# 8927 [DR] Original NIBS Entry Number: 9811
9813	9844	EXHIBIT[S] L-3: List of Assumed Other Executory Contracts and Unexpired Leases, Sub List C [Store Operations] RE: Item# 8927 [DR] Original NIBS Entry Number: 9813
9815	9846	EXHIBIT[S] L-3: List of Assumed Other Executory Contracts and Unexpired Leases, Sub List D [Pharmacy Agreements] RE: Item# 8927 [DR] Original NIBS Entry Number: 9815
9817	9848	EXHIBIT[S] L-3: List of Assumed Other Executory Contracts and Unexpired Leases, Sub List E [Workbench Agreements] RE: Item# 8927 [DR] Original NIBS Entry Number: 9817
9819	9850	EXHIBIT[S] L-3: List of Assumed Other Executory Contracts and Unexpired Leases, Sub List F [Workbench Agreements] RE: Item# 8927 [DR] Original NIBS Entry Number: 9819
9821	9852	EXHIBIT[S] L-3: List of Assumed Other Executory Contracts and Unexpired Leases, Sub List G [Vendor PO Terms and Conditions Agreements] Volume 1 RE: Item# 8927 [DR] Original NIBS Entry Number: 9821
9823	9854	EXHIBIT[S] L-3: List of Assumed Other Executory Contracts and Unexpired Leases, Sub List G [Vendor PO Terms and Conditions Agreements] Volume 2 RE: Item# 8927 [DR] Original NIBS Entry Number: 9823
9825	9856	EXHIBIT[S] L-3: List of Assumed Other Executory Contracts and Unexpired Leases, Sub List G [Vendor PO Terms and Conditions Agreements] Volume 3 RE: Item# 8927 [DR] Original NIBS Entry Number: 9825

EXHIBIT G

Old NIBS No.	New Docket No.	Description
9827	9858	EXHIBIT[S] L-3: List of Assumed Other Executory Contracts and Unexpired Leases, Sub List G [Vendor PO Terms and Conditions Agreement] Volume 4 RE: Item# 8927 [DR] Original NIBS Entry Number: 9827
9829	9860	EXHIBIT[S] L-3: List of Assumed Other Executory Contracts and Unexpired Leases, Sub List G [Vendor PO Terms and Conditions Agreements] Volume 5 RE: Item# 8927 [DR] Original NIBS Entry Number: 9829
9831	9862	EXHIBIT[S] L-3: List of Assumed Other Executory Contracts and Unexpired Leases, Sub List G [Vendor PO Terms and Conditions Agreements ] Volume 6 RE: Item# 8927 [DR] Original NIBS Entry Number: 9831
9833	9864	EXHIBIT[S] L-3: List of Assumed Other Executory Contracts and Unexpired Leases, Sub List G [Vendor PO Terms and Conditions Agreements] Volume 7 RE: Item# 8927 [DR] Original NIBS Entry Number: 9833
9835	9866	EXHIBIT[S] L-3: List of Assumed Other Executory Contracts and Unexpired Leases, Sub List H [Vendor Defective and Disposition Agreements] Volume 1 RE: Item# 8927 [DR] Original NIBS Entry Number: 9835
9837	9868	EXHIBIT[S] L-3: List of Assumed Other Executory Contracts and Unexpired Leases, Sub List H [Vendor Defective and Disposition Agreements] Volume 2 RE: Item# 8927 [DR] Original NIBS Entry Number: 9837
9839	9870	EXHIBIT[S] L-3: List of Assumed Other Executory Contracts and Unexpired Leases, Sub List H [Vendor Defective and Disposition Agreements] Volume 3 RE: Item# 8927 [DR] Original NIBS Entry Number: 9839
9841	9872	EXHIBIT[S] L-3: List of Assumed Other Executory Contracts and Unexpired Leases, Sub List H [Vendor Defective and Disposition Agreements] Volume 3 RE: Item# 8927 [DR] Original NIBS Entry Number: 9839
9843	9874	EXHIBIT[S] L-3: List of Assumed Other Executory Contracts and Unexpired Leases, Sub List I [Category Management] RE: Item# 8927 [DR] Original NIBS Entry Number: 9843

Old NIBS No.	New Docket No.	Description
9845	9876	EXHIBIT[S] L-3: List of Assumed Other Executory Contracts and Unexpired Leases, Sub List J [Real Estate] RE: Item# 8927 [DR] Original NIBS Entry Number: 9845
10348	10392	AMENDED Plan Exhibit L-3 Lists A-1 [List of Assumed Other Executory Contracts] Changed Pages Only RE: Item# 8927 [DR] Original NIBS Entry Number: 10348
10647	10691	NOTICE of Filing Second Amended Plan Exhibit L-3 Lists A-1 [List of Assumed Other Executory Contracts] Changed Pages Only [DR] Original NIBS Entry Number: 10647
10648	10692	NOTICE of Filing Amended Plan Exhibit L-3 List J [List of Assumed Unexpired Leases] [DR] Original NIBS Entry Number: 10648
10830	10874	NOTICE of Filing of Second Modifications, Dated 4/22/03, to Plan Exhibit L-3 Changed Pages Only [DR] Original NIBS Entry Number: 10830
10875	10919	NOTICE of Filing of Modifications, dated 4/22/03, to Plan Exhibit L-3 Changed Pages Only [DR] Original NIBS Entry Number: 10875
10879	10923	NOTICE of Filing Amended Plan Exhibit L-3 List J-II. [Unexpired Subleases] Changed Pages Only [DR] Original NIBS Entry Number: 10879

EXHIBIT G