

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
Region 2

**IN THE MATTER OF:
Kmart Corporation**

Respondent

**Kmart #3829, St. Thomas, V.I.
Kmart #3972, St. Croix, V.I.
Kmart #7413, St. Croix, V.I.**

**Proceeding under Section 3008 of the
Solid Waste Disposal Act, as amended,
42 U.S.C. § 6928**

Docket No. RCRA-02-2009-7147

U.S. ENVIRONMENTAL
PROTECTION AGENCY-REG. II
2009 NOV 25 AM 11:03
REGIONAL HEARING
CLERK

ANSWER

Comes now Respondent Kmart Corporation, by and through its undersigned counsel, pursuant to Rule 22.16(a) of the Consolidated Rules of Practice (40 C.F.R. § 22.16(a)) and in Answer to the Administrative Complaint states as follows:

1. Paragraph 1 of the Complaint contains legal conclusions to which no response is required.
2. Respondent admits the allegations made in Paragraph 2.
3. Respondent admits the allegation made in the first sentence of Paragraph 3. In response to the allegations in the second sentence of Paragraph 2, Respondent admits that it previously offered photo developing services at the stores identified in Paragraph 4 of the Complaint and such services subsequently ceased at these stores. Photo developing services later recommenced at Store No. 3829. Except as specifically admitted, Respondent denies the allegations of Paragraph 3.
4. Respondent admits the allegations made in Paragraph 4.

5. Respondent admits the allegations made in Paragraph 5.
6. Respondent admits the allegations made in Paragraph 6.
7. In response to the allegations in Paragraph 7, Respondent admits that the three stores identified in Paragraph 4 each had a photo lab, a hazardous waste storage area, and a fluorescent lamp storage area. Except as specifically admitted, Respondent denies the allegations of Paragraph 7.
8. Paragraph 8 contains legal conclusions to which no response is required.
9. Paragraph 9 contains legal conclusions to which no response is required.
10. Respondent lacks knowledge and information sufficient to form a belief as to the truth of the allegations in Paragraph 10, and therefore denies these allegations.
11. Respondent lacks knowledge and information sufficient to form a belief as to the truth of the allegations in Paragraph 11, and therefore denies these allegations.
12. Respondent lacks knowledge and information sufficient to form a belief as to the truth of the allegations in Paragraph 12, and therefore denies these allegations.
13. Respondent admits the allegations of Paragraph 13.
14. Respondent lacks knowledge and information sufficient to form a belief as to the truth of the allegations in Paragraph 14, and therefore denies these allegations.
15. Respondent admits that it has generated solid waste as part of its operations at the facilities identified in Paragraph 4. Except as specifically admitted, Respondent denies the allegations of Paragraph 15.
16. Respondent admits that the records it provided to EPA on December 2, 2008 speak for themselves. Except as specifically admitted, Respondent denies the allegations of Paragraph 16.

17. Respondent denies the allegations of Paragraph 17.

18. Paragraph 18 contains legal conclusions to which no response is required, but to the extent that a response may be deemed to be necessary, Respondent denies the allegations in Paragraph 18.

19. Paragraph 19 contains legal conclusions to which no response is required.

20. Respondent denies the allegations of Paragraph 20.

21. Paragraph 21 contains legal conclusions to which no response is required, but to the extent that a response may be deemed to be necessary, Respondent denies the allegations in Paragraph 21.

22. Paragraph 22 contains legal conclusions to which no response is required, but to the extent that a response may be deemed to be necessary, Respondent denies the allegations of Paragraph 22.

23. Paragraph 23 contains legal conclusions to which no response is required, but to the extent that a response may be deemed to be necessary, Respondent denies the allegations of Paragraph 23.

24. Respondent lacks knowledge and information sufficient to form a belief as to the truth of the allegations in the first sentence of Paragraph 24 relating to whether the EPA representatives were duly designated. Respondent admits the allegations in the first sentence stating that EPA conducted an inspection at the three facilities. In response to the allegations in the second sentence of Paragraph 24, Respondent lacks knowledge or information sufficient to form a belief as to the truth of the allegations regarding the purpose of the inspections. Respondent admits the allegations in the third sentence. Except as specifically admitted, Respondent denies the allegations of Paragraph 24.

25. Respondent lacks knowledge and information sufficient to form a belief as to the truth of the allegations of Paragraph 25.

26. Respondent lacks knowledge and information sufficient to form a belief as to the truth of the allegations of Paragraph 26, and therefore denies these allegations.

27. In response to the allegations in Paragraph 27, Respondent admits that it received the three NOV's and further responds that the NOV's speak for themselves. Except as specifically admitted, Respondent denies the allegations of Paragraph 27.

28. Respondent admits the allegations in the first sentence. In response to the second sentence, the Responses referred to in Paragraph 28 speak for themselves. Except as specifically admitted, Respondent denies the allegations of Paragraph 28.

29. Respondent admits the allegations in Paragraph 29.

30. Paragraph 30 characterizes Complainant's claims and therefore requires no response.

Count 1

31. Respondent's responses to Paragraphs 1 through 30 are incorporated by reference.

32. Paragraph 32 contains legal conclusions to which no response is required.

33. Paragraph 33 contains legal conclusions to which no response is required.

34. Paragraph 34 contains legal conclusions to which no response is required.

35. Respondent denies the allegations in the first sentence of Paragraph 35.

Respondent lacks knowledge and information sufficient to form a belief as to the truth of the allegations in the second sentence of Paragraph 35, and therefore denies these allegations.

36. Respondent lacks knowledge and information sufficient to form a belief as to the truth of the allegations of Paragraph 36, and therefore denies these allegations.

37. Respondent lacks knowledge and information sufficient to form a belief as to the truth of the allegations of Paragraph 37, and therefore denies these allegations.

38. Paragraph 38 contains legal conclusions to which no response is required, but to the extent that a response may be deemed to be necessary, Respondent denies the allegations of Paragraph 38.

39. Respondent denies the allegations of Paragraph 39.

40. Paragraph 40 contains legal conclusions to which no response is required.

Count 2

41. Respondent's responses to Paragraphs 1 through 30 are incorporated by reference.

42. Paragraph 42 contains legal conclusions to which no response is required.

43. Paragraph 43 contains legal conclusions to which no response is required.

44. Respondent lacks knowledge and information sufficient to form a belief as to the truth of the allegations of Paragraph 44, and therefore denies these allegations.

45. Respondent denies the allegations of Paragraph 45.

46. Respondent denies the allegations of Paragraph 46.

47. Paragraph 47 contains legal conclusions to which no response is required, but to the extent that a response may be deemed to be necessary, Respondent denies the allegations of Paragraph 47.

48. Respondent lacks knowledge and information sufficient to form a belief as to the truth of the allegations of Paragraph 48, and therefore denies these allegations.

49. Paragraph 49 contains legal conclusions to which no response is required.

50. Respondent lacks knowledge and information sufficient to form a belief as to the truth of the of Paragraph 50, and therefore denies these allegations.

51. Respondent denies the allegations of Paragraph 51.

52. Respondent denies the allegations of Paragraph 52.

53. Respondent denies the allegations of Paragraph 53.

Count 3

54. Respondent's responses to Paragraphs 1 through 30 are incorporated by reference.

55. Paragraph 55 contains legal conclusions to which no response is required.

56. Paragraph 56 contains legal conclusions to which no response is required.

57. Respondent admits the first sentence of Paragraph 57. Respondent lacks knowledge and information sufficient to form a belief as to the truth of the allegations in the second sentence of Paragraph 57, and therefore denies the allegations. In response to the third sentence, the responses referred to in Paragraph 57 speak for themselves. Except as specifically admitted, Respondent denies the allegations of Paragraph 57.

58. In response to Paragraph 58, the responses referred to in Paragraph 58 speak for themselves.

59. Paragraph 59 contains legal conclusions to which no response is required.

60. Respondent lacks knowledge and information sufficient to form a belief as to the truth of the allegations of Paragraph 60, and therefore denies these allegations.

61. Paragraph 61 contains legal conclusions to which no response is required.

62. Paragraph 62 contains legal conclusions to which no response is required.

63. Respondent lacks knowledge and information sufficient to form a belief as to the truth of the allegations of Paragraph 63, and therefore denies these allegations.

64. Respondent lacks knowledge and information sufficient to form a belief as to the truth of the allegations of Paragraph 64, and therefore denies these allegations.

65. Paragraph 65 contains legal conclusions to which no response is required, but to the extent that a response may be deemed to be necessary, Respondent denies the allegations of Paragraph 65.

Proposed Civil Penalty

Respondent denies that EPA is entitled to the proposed civil penalty.

General Denial

To the extent the Answer does not contain a response to any allegations in the Complaint, Respondent generally denies such allegations.

Affirmative Defenses

Without limiting or waiving any defenses otherwise available, Respondent hereby asserts the following defenses:

1. The complaint, in whole or in part, fails to state a claim or cause of action upon which relief may be granted.

Factual Disputes

The Complaint alleges claims based on facts in dispute regarding the nature of the materials stored at the Facilities and the applicable requirements under RCRA. Respondents are in the process of determining the facts surrounding the claims alleged in the Complaint but believe at this time, pending further investigation, that the silver bearing water and/or fluorescent lamps and ballasts which are the subject of the claims in the Complaint may have been non-waste recycled materials and/or did not exhibit toxicity characteristic and therefore were not subject to the requirements underlying the claims. Further, even if certain requirements were applicable to the silver-bearing wastewater, the Respondents dispute the applicability of one or more regulations cited in the Complaint. An additional area of dispute relates to the quantities of

silver-bearing wastewater generated and stored at Respondent's facilities. Respondent is also investigating the status of container labels and on-site records at the time of the inspections and therefore disputes the facts alleged in the Complaint in this regard. Respondents also dispute the allegation that no waste determination was made for the spent fluorescent lamps and spent non-PCB fluorescent ballasts.

Basis for Opposing Relief

For the reasons stated herein, Respondents believe that the proposed civil penalty is unwarranted inasmuch as it is based on alleged violations that are not supported by the facts. Even assuming the soundness of the alleged violations, Respondents believe the proposed civil penalty calculation is unjustified with respect to the gravity components, the multiple violation multiplier, and the upward adjustments for willingness/negligence. The proposed civil penalty is not consistent with the nature, extent and environmental impact of the alleged violations or with the civil penalties obtained by EPA in cases addressing similar violations.

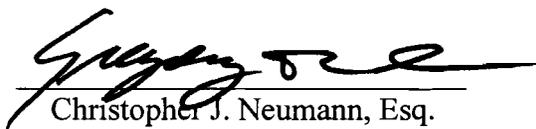
Request for a Hearing

Respondent hereby requests a hearing on this matter.

Dated: November 24, 2009

Respectfully Submitted,

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ATTORNEYS FOR KMART
CORPORATION

I certify that the foregoing **ANSWER**, dated November 24, 2009, was sent this day in the following manner to the addressees listed below:

Original and Copy by Federal Express
Overnight Delivery to:

Regional Hearing Clerk
U.S. EPA - Region 2
290 Broadway, 16th floor - Room 1631
New York, NY 10007-1866

Copy by U.S. Mail to:

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Dated: November 24, 2009