

**BEFORE THE  
U.S. DEPARTMENT OF ENERGY  
Washington, D.C. 20585**

In the Matter of:

Sear, Roebuck & Co.,  
(freezers)

)  
)  
) Case Number: 2011-SE-1418  
)  
)

**COMPROMISE AGREEMENT**

The U.S. Department of Energy ("DOE") Office of the General Counsel initiated case number 2011-SE-1418 against Sears, Roebuck & Co. ("Sears" or "Respondent") after DOE testing revealed that Midea freezer basic models UL-WD145-D and UL-WD195-D labeled and distributed in the United States by Sears as basic models Kenmore 255.19502010 and Kenmore 255.19702010, respectively, may not meet the applicable energy conservation standards. See 10 C.F.R. § 430.32(a). Respondent and DOE, by their authorized representatives, hereby enter into this Compromise Agreement for the purpose of settling this specific enforcement action.

**I. DEFINITIONS**

For the purposes of this Compromise Agreement, the following definitions shall apply:

- a. "Act" means the Energy Policy and Conservation Act of 1975, as amended, 42 U.S.C. § 6291 *et seq.*
- b. "Basic Model Kenmore 19502" means all units of all freezer models manufactured by Midea that have the same primary energy source and have essentially identical electrical, physical, and functional characteristics that affect energy consumption as basic model UL-WD145-D and that were privately labeled by Sears under the Kenmore brand, including all units of Kenmore-branded model 255.19502010.
- c. "Basic Model Kenmore 19702" means all units of all freezer models manufactured by Midea that have the same primary energy source and have essentially identical electrical, physical, and functional characteristics that affect energy consumption as basic model UL-WD195-D and that were privately labeled by Sears under the Kenmore brand, including all units of Kenmore-branded model 255.19702010.
- d. "Basic Model UL-WD145-D" means, regardless of label, all units of all freezer models manufactured by Midea that have the same primary energy source and have essentially identical electrical, physical, and functional characteristics that effect energy consumption as the freezers distributed as Midea model UL-WD145-D.
- e. "Basic Model UL-WD195-D" means, regardless of label, all units of all freezer models manufactured by Midea that have the same primary energy

source and have essentially identical electrical, physical, and functional characteristics that effect energy consumption as the freezers distributed as Midea model UL-WD195-D.

- f. "DOE" means the U.S. Department of Energy.
- g. "DOE Rules" means DOE's energy conservation regulations found in Title 10, Parts 429 and 430 of the Code of Federal Regulations.
- h. "Kenmore Basic Models" means all units within Basic Model Kenmore 19502 and Basic Model Kenmore 19702.
- i. "Manufacture" means to manufacture, produce, assemble, or import.
- j. "Midea" means Midea America Corp., Hefei Hualing Co., Ltd., and China Refrigeration Industry Co., Ltd., or one or more of those three companies, all of which are subsidiaries or affiliates of GD Midea Holding Co., Ltd.
- k. "Midea Basic Models" means all units of Basic Model UL-WD145-D and Basic Model UL-WD195-D.
- l. "Notice of Noncompliance Determination" means the Notice that DOE issued on June 26, 2012, in case number 2011-SE-1418, finding that Basic Model Kenmore 19502 and Basic Model Kenmore 19702 fail to meet the relevant energy conservation standard, set forth at 10 C.F.R. § 430.32(a).
- m. "Parties" means DOE and Respondent.
- n. "Respondent" means Sears, Roebuck & Co.

The Agreement further incorporates by reference all of the definitions found within 42 U.S.C. § 6291.

## II. RECITALS

WHEREAS, DOE, pursuant to 42 U.S.C. § 6291 *et seq.*, is responsible for the promulgation and enforcement of the energy conservation requirements set forth in DOE Rules; and

WHEREAS, DOE has promulgated energy conservation standards for freezers at 10 C.F.R. § 430.32(a); and

WHEREAS, DOE, pursuant to 42 U.S.C. §§ 6295, 6302, and 6303 and 10 C.F.R. Part 429, Subpart C, is authorized to enforce these conservation standards; and

WHEREAS, all units within the Kenmore Basic Models are "covered product[s]" as defined in 42 U.S.C. § 6292(a)(1) and 10 C.F.R. § 430.2; and

WHEREAS, Respondent admits:

1. Respondent is a private labeler of the Midea Basic Models;
2. Since January 1, 2009, Respondent has distributed in commerce in the United States at least the following numbers of units of the Kenmore Basic Models:
  - a. 175,529 units of Basic Model Kenmore 19502, and
  - b. 74,022 units of Basic Model Kenmore 19702;

3. Basic Model Kenmore 19502 does not meet the applicable federal energy conservation standard, set forth at 10 C.F.R. § 430.32(a), with the units tested by DOE consuming an average of approximately twenty-eight percent (28%) more than the relevant standard; and
4. Basic Model Kenmore 19702 does not meet the applicable federal energy conservation standard, set forth at 10 C.F.R. § 430.32(a), with the units tested by DOE consuming an average of approximately fifty-five percent (55%) more than the relevant standard;

WHEREAS, Respondent has cooperated fully with DOE in connection with this investigation; and

WHEREAS, Respondent has already notified all persons to whom Respondent distributed units of the Kenmore Basic Models as required by the June 26, 2012 Notice of Noncompliance Determination; and

WHEREAS, Respondent has ceased distribution in commerce in the United States of the Kenmore Basic Models; and

WHEREAS, Respondent has exported or destroyed all units of the Kenmore Basic Models that were previously in its possession or control in the United States; and

WHEREAS, DOE, as the agency charged with developing and administering a balanced and coordinated national energy policy, concludes that this Compromise Agreement properly balances the policies recognized in the Energy Policy and Conservation Act and is the appropriate way to resolve this matter;

NOW, THEREFORE, in consideration of the foregoing and the mutual agreements set forth below, the sufficiency and adequacy of which are hereby acknowledged, the Parties agree as follows:

### **III. TERMS OF THE AGREEMENT**

#### **1. Obligations of Respondent.**

- a. Respondent agrees to abide by the terms of the June 26, 2012 Notice of Noncompliance Determination for case number 2011-SE-1418.
- b. As of the effective date of this Compromise Agreement, Respondent will not import, or otherwise distribute in commerce in the United States, any units of the Midea Basic Models under any model number(s), including Kenmore 19502 and Kenmore 19702.
- c. Respondent will ensure that any individual model number used to designate any refrigerator, refrigerator-freezer, or freezer that it imports, or otherwise distributes in commerce in the United States, will be sufficiently distinct from the model numbers used to designate or label the individual models within the Kenmore Basic Models, including Basic Model Kenmore 19502 and Basic Model Kenmore 19702, to avoid confusion in the marketplace.
- d. Respondent will not import, or otherwise distribute in commerce in the United States, a modified or retrofitted version of any of the Kenmore Basic Models under any model number(s) without DOE's express permission in the form of

a Notice of Allowance. Prior to DOE considering whether to issue a Notice of Allowance, Respondent must submit test data and design modification information to DOE demonstrating that the modified basic model's energy consumption characteristics are different from those of the relevant Kenmore Basic Model.

**2. Obligations of DOE.**

- a. In express reliance on the covenants and representations in this Compromise Agreement and to avoid further expenditure of public resources, DOE agrees to accept Respondent's performance pursuant to section III.1 in lieu of taking additional enforcement action against Respondent related to the potential noncompliance of the Kenmore Basic Models.
- b. DOE agrees to terminate this enforcement action with prejudice upon Respondent's completion of its Obligations in accordance with section III.1, above.

**3. Failure to Comply.**

- a. If DOE believes that Respondent has failed to comply with any of its obligations under this Compromise Agreement, DOE will provide written notice to Respondent. DOE will allow Respondent thirty (30) calendar days from the date of the written notice to submit any relevant materials to DOE and to discuss, by telephone or in person at DOE's Washington, DC headquarters, any relevant issues with DOE. If, after reviewing all submitted materials and participating in all discussions, DOE is not satisfied that Respondent has fulfilled its obligations under this Compromise Agreement, DOE will issue a notification of DOE's determination. Any such notification will (a) explain the basis for DOE's determination and (b) indicate the amount that Respondent will pay to the U.S. Treasury, determined pursuant to section III.4 of this Compromise Agreement dependent upon the nature of any such breach of the agreement. DOE may issue multiple notifications if Respondent fails to comply with more than one provision of the Compromise Agreement and/or fails to comply with one provision on multiple occasions.
- b. If Respondent seeks any further review of a determination made by DOE pursuant to this section III.3, Respondent must appeal to DOE's Office of Hearings and Appeals.

**4. Penalties for Failure to Comply.**

- a. If DOE determines that Respondent has failed to comply with the terms of the Notice of Noncompliance Determination, Respondent agrees to pay \$1,000,000.
- b. If DOE determines that Respondent has imported, or otherwise distributed in commerce in the United States, any units of any of the Kenmore Basic Models, regardless of label, after the effective date of this Compromise Agreement, as prohibited under paragraph III.1.b, Respondent agrees to pay a base sum of \$500,000, plus an additional \$200 per unit of the Kenmore Basic Models that DOE determines Respondent has distributed in commerce in the

United States after the effective date of this Compromise Agreement.

- c. If DOE determines that Respondent has not complied with the requirement, under paragraph III.1.c, to ensure that future model numbers are sufficiently distinct from the model numbers used to designate or label the individual models within the Kenmore Basic Models to avoid confusion in the marketplace, Respondent agrees to pay \$1,000 for each individual model number that DOE determines may cause confusion in the marketplace.
  - d. If DOE determines that Respondent has, contrary to the requirements of paragraph III.1.d of the Compromise Agreement, imported, or otherwise distributed in commerce in the United States, units of a basic model that DOE determines is a modified or retrofitted version of any of the Kenmore Basic Models (under any model number(s) or label(s)) without DOE's express permission in the form of a Notice of Allowance, Respondent agrees to pay \$200 for each unit imported, or otherwise distributed in commerce in the United States, after the effective date of this Compromise Agreement.
5. **Jurisdiction.** This Compromise Agreement is entered pursuant to DOE's authority to interpret and enforce its rules for energy efficiency and to enter into its own agreements interpreting and applying those rules. The Parties agree that DOE has jurisdiction over Respondent and primary jurisdiction over the matters contained in this Compromise Agreement and has the authority to enter into this Compromise Agreement.
  6. **Payment Instructions and Late Payments.** The Parties agree that all payments shall be made in a timely manner in a method set forth in the attached "Payment Instructions." Respondent acknowledges and agrees to comply with the "Late Payment" provisions provided therein, including potential interest, late-payment penalties, and administrative costs associated with late payment.
  7. **Effective Date.** The Parties agree that this Compromise Agreement shall become effective on the date on which DOE signs this Compromise Agreement.
  8. **Limitations.** Nothing in this agreement binds any other agency of the United States government beyond DOE.
  9. **Waivers.** Respondent agrees not to seek judicial review or otherwise contest or challenge the validity of the terms and penalties set out in this Compromise Agreement. Respondent reserves the right to seek review of a determination DOE issues pursuant to section III.3 of this Compromise Agreement before the DOE Office of Hearing and Appeals. Respondent agrees that the decision of the DOE Office of Hearing and Appeals shall be final and binding and agrees not otherwise to seek review of a determination DOE issues pursuant to section III.3 of this Compromise Agreement. If either Party (or the United States on behalf of DOE) brings a judicial action to enforce the terms of this Compromise Agreement, neither Respondent nor DOE shall contest the validity of the Compromise Agreement, and Respondent waives any statutory right to a trial *de novo*. Respondent hereby agrees to waive any claims it may otherwise have under the Equal Access to Justice Act, 5 U.S.C. § 504, relating to the matters addressed in this Compromise Agreement.

10. **Final Settlement.** The Parties agree and acknowledge that this Compromise Agreement shall constitute a final settlement between the Parties. This Compromise Agreement resolves only issues addressed in the Compromise Agreement.
11. **Merger.** This Compromise Agreement constitutes the entire agreement between the Parties and supersedes all previous understandings and agreements between the Parties, whether oral or written.
12. **Modifications.** This Compromise Agreement cannot be modified without the advance written consent of both Parties.
13. **Severability.** If any provision of this agreement is held to be invalid, illegal, void, or unenforceable, then that provision is to be construed by modifying it to the minimum extent necessary to make it enforceable.
14. **Authorized Representative.** Each party represents and warrants to the other that it has full power and authority to enter into this Compromise Agreement.
15. **Counterparts.** This Compromise Agreement may be signed in any number of counterparts (including by facsimile or electronic mail), each of which, when executed and delivered, shall be an original, and all of which counterparts together shall constitute one and the same fully executed instrument.

/S/

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\_\_\_\_\_  
 Laura L. Barhydt  
 Assistant General Counsel  
 for Enforcement  
 U.S. Department of Energy

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 (Signature)  
 Name: A Nolan Pyle III  
 Title: VP/GM - Kenmore  
 Company Name: Sears Holdings Corp

Date

5/6/13

Date

5/6/13