

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 99-cv-01923-JLK-CBS

CARRIE ANN LUCAS,
DEBBIE LANE,
JULIE REISKIN,
EDWARD MUEGGE,
ROBERT G. GEYER,
STACY BERLOFF,
JEAN RYAN,
JAN CAMPBELL,

on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

KMART CORPORATION,

a Michigan corporation,

Defendant.

SECOND AMENDED CLASS ACTION COMPLAINT

Plaintiffs Carrie Ann Lucas, Debbie L. Lane, Julie Reiskin, Edward Muegge, Robert G. Geyer, Stacy Berloff, Jean Ryan, and Jan Campbell, by and through their attorneys, hereby bring this Amended Class Action Complaint against Defendant Kmart Corporation (“Kmart”) for violation of the Americans with Disabilities Act, 42 U.S.C. § 12182 et seq. (“ADA”), the Colorado Anti-Discrimination Act, C.R.S. § 24-34-601 et seq. (“CADA”), the California Unruh Civil Rights Act and the California Disabled Persons Act, Cal. Civ. Code §§ 51(b) & 54.1, Hawai’i’s Chapter 489, Haw. Rev. Stat. § 489 et seq., the Texas Human Resource Code, Tex.

Hum. Res. Code Ann. § 121.001 et seq., the Massachusetts Anti-discrimination law, Mass. Gen. Laws ch. 272, §§ 98 and 92A, the New York Civil Rights Law, N.Y. Civ. Rights § 40 et seq., and N.Y. Exec § 296(2)(a), and the Oregon Unlawful Discrimination against Disabled People, Or. Rev. Stat. § 659A.142(3).

INTRODUCTION

1. This case was originally filed in October, 1999. An Amended Class Action Complaint was filed in May 2000.

2. On July 13, 2005, this Court certified a nationwide class of Kmart shoppers who use wheelchairs or scooters who had claims for injunctive relief under Title III of the ADA. 42 U.S.C. § 12181 et. seq.

3. On February 9, 2006, the parties to this case reached a settlement that resolved not only the ADA claims of the class as certified, but claims for statutory minimum damages of class members who had shopped at Kmart stores in seven states with statutes providing for such damages.

4. Through this Second Amended Class Action Complaint, Plaintiffs allege claims on behalf of class members in the seven Statutory Minimum Damages States (defined below), and request the Court to certify a Damages Settlement Sub-Class and appoint representative plaintiffs and class counsel therefor.

JURISDICTION

5. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. §§ 1331 and 1343 and supplemental jurisdiction over the state law claims alleged herein. Id. § 1367(a).

6. Venue is proper within this District pursuant to 28 U.S.C. § 1391.

PARTIES

7. Plaintiff Carrie Ann Lucas is and was at all times material hereto a resident of Colorado. As a result of a bone infection and bone tumor and related treatment, Ms. Lucas is substantially impaired in several major life activities and requires a wheelchair for mobility. Ms. Lucas has shopped at Kmart stores in various locations in Colorado and other states and plans to continue to do so in the future.

8. Plaintiff Debbie L. Lane is and was at all times material hereto a resident of Colorado. As a result of epilepsy and spastic paraparesis, Ms. Lane is substantially impaired in several major life activities and requires a power wheelchair for mobility. Ms. Lane has shopped at Kmart stores in various locations in Colorado and plans to continue to do so in the future.

9. Plaintiff Julie Reiskin is and was at all times material hereto a resident of Colorado. As a result of multiple sclerosis, Ms. Reiskin is substantially impaired in several major life activities and requires a power wheelchair for mobility. Ms. Reiskin has shopped at Kmart stores in various locations in Colorado and plans to continue to do so in the future.

10. Plaintiff Edward Muegge is and was at all times material hereto a resident of Hawai'i. Mr. Muegge is substantially impaired in several major life activities as a result of a

spinal cord injury and requires a power wheelchair or scooter for mobility. Mr. Muegge has shopped at Kmart stores in Hawai'i and California and plans to continue to do so in the future.

11. Plaintiff Robert G. Geyer is and was at all times material hereto a resident of Texas. Mr. Geyer is substantially impaired in several major life activities as a result of a spinal cord injury and requires a power wheelchair for mobility. Mr. Geyer has shopped at Kmart stores in Texas and plans to continue to do so in the future.

12. Plaintiff Stacy Berloff is and was at all times material hereto a resident of Massachusetts. Ms. Berloff is substantially impaired in several major life activities as a result of multiple neurological conditions and requires a power wheelchair for mobility. Ms. Berloff has shopped at Kmart stores in Massachusetts and plans to continue to do so in the future.

13. Plaintiff Jean Ryan is and was at all times material hereto a resident of New York. Ms. Ryan is substantially impaired in several major life activities as a result of Charcot-Marie-Tooth Disease, a neurological disorder and requires a power scooter or a power wheelchair for all mobility outside her home. Ms. Ryan has shopped at Kmart stores in New York and plans to continue to do so in the future.

14. Plaintiff Jan Campbell is and was at all times material hereto a resident of Oregon. Ms. Campbell is substantially impaired in several major life activities as a result of transversemyelitis and requires a power wheelchair for mobility. Ms. Campbell has shopped at Kmart stores in Oregon and plans to continue to do so in the future.

15. Defendant Kmart Corporation is a corporation incorporated in Michigan with its principal place of business in Troy, Michigan. Kmart is registered to do business in the state of

Colorado. Kmart owns and operates over 1,400 large retail stores selling general merchandise throughout the United States.

CLASS ACTION ALLEGATIONS

16. This Court has certified a nationwide class consisting of individuals who shop at Kmart and rely on wheelchairs or motorized scooters for their mobility in doing so, and appointed Plaintiffs Carrie Ann Lucas, Debbie L. Lane and Julie Reiskin as representative plaintiffs.

17. Plaintiffs also seek to maintain a sub-class to address the damages claims of class members in seven states. This “Damages Settlement Sub-Class” will consist of all class members who -- at any time from May 6, 2003 through the term of the settlement agreement reached among the parties -- shopped or shop at any Kmart store in California, Colorado, Hawai’i, Massachusetts, New York, Oregon or Texas (the “Statutory Minimum Damages States”) or who allege that they would have shopped or would shop at one or more Kmart stores in the Statutory Minimum Damages States but for allegedly being denied on the basis of disability the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of such store. Members of the Damages Settlement Sub-Class seek damages only in the statutory minimum amounts available under the relevant statutes of the Statutory Minimum Damages States.

18. Plaintiffs seek to have this Court appoint Carrie Ann Lucas, Edward Muegge, Robert G. Geyer, Stacy Berloff, Jean Ryan, and Jan Campbell as representatives of the Damages Settlement Sub-Class.

19. The class and sub-class identified in Paragraphs 16 and 17 are both believed to consist of well over 100,000 members, and joinder of all of such members in this lawsuit is impracticable.

20. There are numerous questions of law and fact common to the class and sub-class including, though not limited to, the following:

- a. Whether Kmart stores are “public accommodations” under the ADA;
- b. Whether Kmart stores deny the full and equal enjoyment of their goods, services, facilities, privileges, advantages, or accommodations to people who use wheelchairs, in violation of the ADA;
- c. Whether Kmart is required by the ADA to maintain access for persons who use wheelchairs to its displayed merchandise;
- d. Whether Kmart is required to maintain access for persons who use wheelchairs to accessible restrooms and dressing rooms;
- e. Whether Kmart is required by the ADA to maintain open, accessible, check-out aisles during store hours;
- f. What measures are legally required to bring Kmart stores into compliance with the ADA; and
- g. Whether Kmart’s conduct violated statutes the Statutory Minimum Damages States prohibiting disability discrimination in stores such as Kmart’s.

21. Plaintiffs' claims are typical of the claims of the members of the class and sub-class. They -- like other members of the class and sub-class -- use wheelchairs for mobility and claim Kmart has violated the ADA and state law in the Statutory Minimum Damages States by failing to make its stores accessible to people who use wheelchairs. At least one representative plaintiff has shopped in a Kmart store in each of the Statutory Minimum Damages States within the class period.

22. Plaintiffs will fairly and adequately protect the interests of the class and sub-class. They are all familiar with the requirements of the ADA -- and putative representative plaintiffs in the Damages Settlement Sub-Class are all familiar with the requirements of the state laws in the Statutory Minimum Damages States in which they have patronized Kmart stores -- and all are committed to ensuring access for people who use wheelchairs through enforcement of its provisions. None of the Plaintiffs has any interest that conflicts in any way with the interests of the class and sub-class.

23. In addition, Plaintiffs have retained counsel with extensive experience in litigation, including class action litigation. Two of the entities representing Plaintiffs -- Fox & Robertson and the Colorado Cross Disability Coalition -- have been found by this Court on two other occasions to be qualified to represent a class in bringing claims under the ADA. Additional class counsel include attorneys with extensive experience in civil rights class actions. Two of Plaintiffs' counsel, Timothy Fox and Kevin Williams, are thoroughly familiar with issues concerning people who use wheelchairs because both are tetraplegics and both have used wheelchairs for approximately 20 years.

24. Certification of both the class and the Damages Settlement Sub-Class is appropriate under Federal Rule of Civil Procedure 23(b)(2) because Kmart's violations of the ADA – including but not limited to inaccessible aisles, insufficient parking, insufficient accessible check-out aisles and inaccessible changing rooms – are applicable to all members of the class. Therefore, an injunction requiring compliance with the ADA is appropriate. Furthermore, because members of the Damages Settlement Sub-Class seek damages only in the statutory minimum amounts available under the relevant statutes of the Statutory Minimum Damages States, the injunctive relief sought in this case predominates over damages, making Rule 23(b)(2) certification appropriate for the Damages Settlement Sub-Class as well.

25. Certification of the Damages Settlement Sub-Class is also appropriate under Rule 23(b)(3). Questions of law or fact common to the sub-class -- including but not limited to those recited above -- predominate over any questions affecting only individual class members and the class action is superior to other available methods for the fair and efficient adjudication of the controversy.

FACTS

26. Plaintiff Carrie Lucas often shops at Kmart stores in Colorado and elsewhere. When she has shopped at Kmart stores -- including but not limited to visits since May 6, 2003 -- she has encountered a number of barriers that have prevented her from full and equal enjoyment of Kmart goods and services based on her disability. Such barriers include but are not limited to those discussed below.

27. In November or December of 1996, Plaintiff Lucas went to Kmart store number 4131 located at 200 W. Belleview Avenue in Englewood, Colorado (“the 200 W. Belleview Kmart”) to shop. At that time, Plaintiff’s disability had not progressed to the point where she required a wheelchair; rather, at that time, she used crutches to ambulate.

28. When she arrived at the 200 W. Belleview Kmart, she was unable to find any accessible parking. It was snowing at that time. Because she had no choice, Ms. Lucas parked in the fire lane in order to be able to leave her car and access the store.

29. During that visit, Ms. Lucas complained to the manager on duty about the parking situation. The manager on duty told Ms. Lucas that she would relay her concerns to the manager.

30. Ms. Lucas returned to the 200 W. Belleview Kmart several months later and discovered that the problem had not been remedied and that, in fact, only four spaces were designated for parking for persons with disabilities in a parking lot of over 400 spaces. The spaces that were so designated were not the correct size. A parking lot of this size should have at least nine accessible spaces with at least one van-accessible space of the dimensions required by the Americans with Disabilities Act Accessibility Guidelines (“ADAAG”).

31. During this second visit, Ms. Lucas wrote a note to the manager, Rick Mercurio and asked the Kmart employees at the customer service counter to relay the message to him. The employees stated they would do so.

32. Ms. Lucas spoke with Mr. Mercurio soon thereafter. She explained the problem with the parking spaces and Mr. Mercurio said he would look into it. A few weeks later Ms. Lucas received a letter from Mr. Mercurio stating that Kmart was looking into the problem and

would come into compliance. She heard nothing further from Mr. Mercurio or Kmart until she contacted the former over a year later in the spring of 1998.

33. Sometime in the spring of 1998, Ms. Lucas again went to the 200 W. Bellevue Kmart. By this time, Ms. Lucas's disability had progressed to the point where she was using a manual wheelchair for mobility. Ms. Lucas attempted to park but was unable to find an accessible parking space. As a result, because she had no choice, she parked in the fire lane in order to be able to exit her vehicle. When she went into the store, she asked to speak with Mr. Mercurio but was told that he was not in the store at the time. Although she had gone to the store to assess the parking situation and contact Mr. Mercurio, she was interested in doing some shopping while she was there. However, there was a great deal of merchandise in the aisles, making shopping difficult. As such, she left without buying anything.

34. Ms. Lucas called Mr. Mercurio after this visit to inquire concerning the parking situation. Mr. Mercurio stated that he believed Kmart had a sufficient number of spaces for the lot.

35. Following this conversation, Ms. Lucas filed a complaint with the Department of Justice ("DOJ"). In or about July of 1998, Ms. Lucas received word from the DOJ that her complaint was being referred to mediation. In October of 1998, she was contacted by Jinu Evan of the Key Bridge foundation. Ms. Evan stated that she had spoken with Kmart and that she did not think the issue would need to go to mediation because Kmart appeared to be willing to remedy the problem.

36. Several weeks later, Ms. Evan contacted Ms. Lucas to report that Kmart claimed to have remedied the problem.

37. On or about November 18, 1998, Ms. Lucas went to the 200 W. Belleview Kmart to ascertain whether the problem had been remedied. It had not: while the proper number of spaces were designated for use by persons with disabilities, very few of them were of the required dimensions. For example, most did not have any access aisles – necessary for people who use wheelchairs or have other mobility impairments to get out of their cars – and none had a van-accessible aisle. In addition, some of the spaces did not have correct signage.

38. Ms. Lucas called Ms. Evan and stated that the parking situation at the 200 W. Belleview Kmart was still out of compliance with the ADA and ADAAG.

39. In approximately late November, 1998, Ms. Evan contacted Ms. Lucas and told her that Kmart did not want to mediate, so the Key Bridge Foundation would be sending the complaint back to the DOJ.

40. On or about November 18, 1998, Ms. Lucas shopped at Kmart store number 7303 at 363 S. Broadway in Denver, Colorado (“the 363 S. Broadway Kmart”). When she arrived, the handbaskets were stacked so high that she could not reach them, some of the aisles were blocked by merchandise, and no accessible check-out aisles were open. When Ms. Lucas inquired why no such aisle was open, she was told by a Kmart employee that the cashier was on break. There were other – non-accessible – check-out aisles open at that time. Finally, the automatic door was broken and the other doors were too heavy for Ms. Lucas to open on her own.

41. On or about November 27, 1998, Ms. Lucas shopped at Kmart store number 4224 at 2150 S. Monaco Parkway, Denver, Colorado (“the 2150 S. Monaco Kmart”). On prior occasions when Ms. Lucas had shopped at this location, no accessible check-out aisles had been open. When she entered the store on this occasion, one such line was open. However, by the time she had completed her shopping and was ready to check out, there were no accessible check-out aisles open. When she complained to the manager about this situation, she was told that the cashier was on break. There were other, non-accessible, check-out aisles open at that time. In addition, throughout the store merchandise was left in aisles, and in other places displayed in the aisles. In the clothing sections the racks were too close together. This impeded Ms. Lucas’s access to merchandise and caused her to knock some clothing off of racks and onto the floor.

42. In or about May, 1999, Ms. Lucas shopped at the 2150 S. Monaco Kmart. Again, when she entered the store an accessible check-out line was open. And again, by the time she had completed her shopping and was ready to check out, there were no accessible check-out aisles open though there were other, non-accessible, check-out aisles open at that time. Ms. Lucas went to the customer service counter to request that an accessible check-out aisle be opened and Kmart did so.

43. On or about August 20, 1999, Ms. Lucas shopped at Kmart store number 3627 at 8500 W. Crestline Avenue in Littleton (“the 8500 W. Crestline Kmart”). As she entered the store, Ms. Lucas noted that there were two accessible check-out aisles, but that neither of them was open. She paused after she came through the door at which point a Kmart employee at the

customer service counter by the name of Jennifer asked Ms. Lucas if she needed help. As such, Kmart was aware that Ms. Lucas – now using a power wheelchair – was shopping in the store.

44. Ms. Lucas was unable to access parts of the gardening, school supplies, furniture and household departments because numerous aisles were blocked by merchandise and other items. The electronics check-out counter was 41 inches high throughout. The women's fitting room had no bench and had clothes hooks that were mounted at a height of approximately 60 inches.

45. When Ms. Lucas went to check out, neither of the accessible check-out aisles was open. She got in the shortest inaccessible line but when she reached the front of the line, was unable to get through the aisle. She informed the clerk that she was unable to get through the aisle and that there were no accessible aisles open. The clerk responded by leaving the aisle – and Ms. Lucas and the line of customers behind her. Several minutes later the store opened another aisle – though still not one of the accessible aisles. Ms. Lucas continued to wait at the now-abandoned aisle but when the clerk did not return and no accessible aisle opened, she proceeded to the customer service counter to complain. The woman by the name of Jennifer – who had initially asked Ms. Lucas whether she needed help – made clear that she knew Kmart was required to keep an accessible check-out aisle open but informed Ms. Lucas that the clerk on that aisle was on break.

46. Ms. Lucas asked to speak with a manager. She explained the problem to floor manager Craig Bass. Mr. Bass shrugged and offered to help Ms. Lucas at the customer service counter. While this counter had a lowered portion, it was covered with boxes, notebooks and

merchandise and, as such, was not usable by Ms. Lucas. Mr. Bass refused to open an accessible check-out aisle.

47. The 8500 W. Crestline Kmart has approximately 363 total parking spaces, only four of which are accessible and none of which is wide enough to be van-accessible. Two of the four allegedly accessible spaces do not comply with the requirements of ADAAG. Two additional spaces on the north end of the building are marked as if to be accessible but were blocked by a roll-off trash container on the day Ms. Lucas shopped there. There is, in any event, no curb cut to the sidewalk near those two spaces.

48. On or about August 20, 1999, Ms. Lucas shopped at the 200 W. Belleview Kmart. She was unable to access merchandise in various areas throughout the store because of items blocking the aisles. In addition, the single accessible fitting room was unusable because it was filled with a shopping cart full of merchandise. The electronics checkout counter was 41 inches high throughout.

49. On or about August 20, 1999, Ms. Lucas shopped at Kmart store number 4187 located at 2770 W. Evans Avenue in Denver, Colorado ("the 2770 W. Evans Kmart"). She was unable to access merchandise in various areas throughout the store because of items blocking the aisles. In addition, the route to the accessible fitting room was blocked so that Ms. Lucas was unable to get to it. The electronics checkout counter was 41 inches high throughout. The women's restroom did not have an accessible stall.

50. The 2770 W. Evans Kmart has approximately 423 total parking spaces only seven of which are accessible. Many of the spaces are improperly marked, causing confusion and often leading to the situation in which cars are parked too close to one another for proper access.

51. On or about October 19, 1999, Ms. Lucas was in the Nashville, Tennessee area to attend to matters related to the adoption of her daughter. At that time, she went to Kmart store number 3716 at 4646 Lebanon Pike in Hermitage, Tennessee. She needed to get some pictures developed and to purchase a few other items. She had trouble finding an accessible space in which to park her rented van. When she attempted to make her purchases, most of the aisles she attempted to enter were blocked by merchandise. Because she was ultimately unable to access the merchandise she had come to purchase, she left without buying anything.

52. On a number of occasions since October, 1999, Ms. Lucas has shopped at the 363 S. Broadway Kmart. On several of these occasions, she was accompanied by her daughter who also uses a wheelchair. Each time, Ms. Lucas and, at times, her daughter, have encountered barriers, policies and treatment that deny them the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of the store, including but not limited to: problems related to parking; aisles obstructed by merchandise; failure to open an accessible check-out aisle and/or failure to open a sufficient number of accessible check-out aisles; failure of store employees to assist in removal of barriers; and rude treatment in response to requests for reasonable accommodation.

53. Plaintiff Debbie L. Lane often shops at Kmart stores. She has shopped at Kmart stores in Colorado and elsewhere. Her experiences shopping at Kmart stores include but are not limited to those described below.

54. On a number of occasions since October, 1999, Ms. Lane has shopped at Kmart store number 4181, located at 3325 28th Street in Boulder, Colorado (the "28th Street Kmart"). On many of the occasions she has shopped at the 28th Street Kmart, Ms. Lane has encountered aisles that are blocked by merchandise. Because of these barriers to access, she has been unable to get to the merchandise on her own and has had to enlist the assistance of a non-disabled friend to move items out of her way or to reach merchandise she was blocked from reaching. In addition, on none of the occasions that she has shopped at the 28th Street Kmart has there been an accessible check-out aisle open. On more than one occasion, Ms. Lane has asked store personnel to open an accessible check-out aisle. She has been instructed to use the customer service counter instead. Although she was able to pay for her merchandise at the customer service counter, this transaction was rendered more difficult because the customer service counter is too high.

55. Plaintiff Julie Reiskin often shops at Kmart stores in Colorado. Her experiences shopping at Kmart stores include but are not limited to those described below.

56. On at least ten occasions over the past seven years, Ms. Reiskin has shopped at the 363 S. Broadway Kmart. On many of those occasions, Ms. Reiskin has encountered barriers, policies and treatment that deny her the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of the store, including but not limited to: aisles

obstructed by merchandise; display racks situated too close together; failure to open an accessible check-out aisle and/or failure to open a sufficient number of accessible check-out aisles; and designation of the only accessible check-out aisle as limited to patrons buying a limited number of items.

57. Plaintiff Edward Muegge shops at Kmart stores in Hawai'i. He has shopped at Kmart stores in Hawai'i within the past year. While shopping at Kmart, Mr. Muegge has encountered barriers, policies and treatment that denied him the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of the store.

58. Although he lives in Hawai'i, Plaintiff Edward Muegge visits California and shops at Kmart stores in California. He has shopped at Kmart stores in California within the past year. While shopping at Kmart, Mr. Muegge has encountered barriers, policies and treatment that denied him the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of the store.

59. Plaintiff Robert G. Geyer shops at Kmart stores in Texas. He has shopped at a Kmart store in Texas within the past year. While shopping at Kmart, Mr. Geyer has encountered barriers, policies and treatment that denied him the full use and enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of the store.

60. Plaintiff Stacy Berloff shops at Kmart stores in Massachusetts. She has shopped at a Kmart store in Massachusetts within the past year. While shopping at Kmart, Ms. Berloff has encountered barriers, policies and treatment that denied her the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of the store.

61. Plaintiff Jean Ryan shops at Kmart stores in New York. She has shopped at a Kmart store in New York within the past year. While shopping at Kmart, Ms. Ryan has encountered barriers, policies and treatment that denied her the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of the store.

62. Plaintiff Jan Campbell often shops at Kmart stores in Oregon. She has shopped at a Kmart store in Oregon within the past year. While shopping at Kmart, Ms. Campbell has encountered barriers, policies and treatment that denied her the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of the store.

63. On information and belief, Kmart has over 1,400 stores nationwide, many of which have the same and other features that deny the full and equal enjoyment of their goods, services, facilities, privileges, advantages, or accommodations to people who use wheelchairs or scooters in violation of the ADA and state law

FIRST CLAIM FOR RELIEF

(On behalf of all Plaintiffs and all others similarly situated
for violation of the Americans with Disabilities Act)

64. Plaintiffs reallege and incorporate by reference the allegations set forth in this Second Amended Class Action Complaint as if fully set forth herein.

65. 42 U.S.C. § 12182(a) of the ADA provides that:

No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.

66. Kmart owns, operates, leases and/or leases to places of public accommodation.

67. Through the actions and architectural barriers described above and other barriers and policies at its stores and its failure to provide facilities that are readily accessible to and usable by persons in wheelchairs, Defendant Kmart has denied to Plaintiffs the full and equal enjoyment of its goods, services, facilities, privileges, advantages, or accommodations in violation of the Americans with Disabilities Act, including but not limited to 42 U.S.C. §§ 12182 and 12183 and their implementing regulations.

68. Plaintiffs and similarly-situated individuals have been damaged and will continue to be damaged by this discrimination as more fully set forth above.

69. Plaintiffs intend to continue to shop at Kmart stores in the near future.

SECOND CLAIM FOR RELIEF

(On behalf of Plaintiff Carrie Ann Lucas and other Damages Settlement Sub-Class members for violation of the Colorado Anti-Discrimination Act)

70. Plaintiffs reallege and incorporate by reference the allegations set forth in this Second Amended Class Action Complaint as if fully set forth herein.

71. The Colorado Anti-Discrimination Act (“CADA”) states, “It is a discriminatory practice and unlawful for a person, directly or indirectly, to refuse, withhold from, or deny to an individual or a group, because of disability, race, creed, color, sex, marital status, national origin, or ancestry, the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation . . .” Colo. Rev. Stat. § 24-34-601(2).

72. The CADA defines a “place of public accommodation” to include “any place of business engaged in any sales to the public and any place offering services, facilities, privileges,

advantages, or accommodations to the public, including but not limited to any business offering wholesale or retail sales to the public . . .” Id. § 24-34-601(1).

73. Kmart stores are places of public accommodation as defined in the CADA.

74. Plaintiff Carrie Ann Lucas and Damages Settlement Sub-Class Members who shopped at Kmart stores in Colorado or would have shopped at such stores but for allegedly discriminatory barriers seek minimum statutory damages under § 24-34-602.

75. By maintaining architectural barriers and policies that discriminate against people with disabilities and through the other actions described above, Kmart has, directly and/or indirectly, refused, withheld from, and denied to Plaintiff Carrie Ann Lucas and other Damages Settlement Sub-Class members, because of their disabilities, the full and equal enjoyment of its goods, services, facilities, privileges, advantages, or accommodations.

76. Plaintiff Carrie Ann Lucas and other Damages Settlement Sub-Class members have been damaged and will continue to be damaged by this discrimination as more fully set forth above.

THIRD CLAIM FOR RELIEF

(On behalf of Plaintiff Edward Muegge and other Damages Settlement Sub-Class members for violation of California’s Unruh Civil Rights Act and Disabled Persons Act)

77. Plaintiffs reallege and incorporate by reference the allegations set forth in this Second Amended Class Action Complaint as if fully set forth herein.

78. The California Unruh Civil Rights Act states, “[a]ll persons within the jurisdiction of this state are free and equal, and no matter what their . . . disability, medical condition . . . are

entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever.” Cal. Civ. Code § 51(b).

79. Kmart stores are business establishments under the Unruh Act, § 51(b).

80. The California Disabled Persons Act states, “[i]ndividuals with disabilities shall be entitled to full and equal access, as other members of the general public, to accommodations, advantages, facilities . . . and privileges of all . . . places of public accommodation, amusement, or resort, and other places to which the general public is invited . . .” Id. § 54.1.

81. Plaintiff Edward Muegge and Damages Settlement Sub-Class Members who shopped at Kmart stores in California or would have shopped at such stores but for allegedly discriminatory barriers seek minimum statutory damages under § 52(a).

82. By maintaining architectural barriers and policies that discriminate against people with disabilities and through the other actions described above, Kmart has, directly and/or indirectly, refused, withheld from, and denied to Plaintiff Edward Muegge and other Damages Settlement Sub-Class members, because of their disabilities, the full and equal accommodations, advantages, facilities, privileges, or services at Kmart stores in California.

83. Plaintiff Edward Muegge and other Damages Settlement Sub-Class members have been damaged and will continue to be damaged by this discrimination as more fully set forth above.

FOURTH CLAIM FOR RELIEF

(On behalf of Plaintiff Edward Muegge and other Damages Settlement Sub-Class members for violation of Hawai'i Revised Statutes, Chapter 489)

84. Plaintiffs reallege and incorporate by reference the allegations set forth in this Second Amended Class Action Complaint as if fully set forth herein.

85. Hawai'i law prohibits "[u]nfair discriminatory practices which deny, or attempt to deny, a person the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of a place of public accommodation on the basis of race, sex, color, religion, ancestry, or disability. . ." Haw. Rev. Stat. § 489-3.

86. "'Place of public accommodation' means a business . . . of any kind whose goods, services, facilities, privileges, advantages, or accommodations are extended, offered, sold, or otherwise made available to the general public as customers, clients, or visitors." Id. § 489-2. The list of examples includes "any establishment that sells goods or services at retail." Id. § 489-2(4).

87. Kmart stores are places of public accommodation as defined in the § 489-2.

88. Plaintiff Edward Muegge and Damages Settlement Sub-Class Members who shopped at Kmart stores in Hawai'i or would have shopped at such stores but for allegedly discriminatory barriers seek minimum statutory damages under § 489-7.5(a)(1).

89. By maintaining architectural barriers and policies that discriminate against people with disabilities and through the other actions described above, Kmart has, directly and/or indirectly, refused, withheld from, and denied to Plaintiff Edward Muegge and Damages

Settlement Sub-Class Members, because of their disabilities, the full and equal enjoyment of its goods, services, facilities, privileges, advantages, and accommodations.

90. Plaintiff Edward Muegge and Damages Settlement Sub-Class Members have been damaged and will continue to be damaged by this discrimination as more fully set forth above.

FIFTH CLAIM FOR RELIEF

(On behalf of Plaintiff Robert G. Geyer and other Damages Settlement Sub-Class members for violation of the Texas Human Resource Code)

91. Plaintiffs reallege and incorporate by reference the allegations set forth in this Second Amended Class Action Complaint as if fully set forth herein.

92. The Texas code states “[p]ersons with disabilities have the same right as the able-bodied to the full use and enjoyment of any public facility in the state.” Tex. Hum. Res. Code Ann. § 121.003(a).

93. “‘Public facilities’ includes . . . any other place of public accommodation, . . . [or] convenience, . . . to which the general public or any classification of persons from the general public is regularly, normally, or customarily invited.” Id. § 121.002(5).

94. Kmart stores are public facilities as defined in § 121.002(5).

95. Plaintiff Robert G. Geyer and Damages Settlement Sub-Class Members who shopped at Kmart stores in Texas or would have shopped at such stores but for allegedly discriminatory barriers seek minimum statutory damages under § 121.004(b).

96. By maintaining architectural barriers and policies that discriminate against people with disabilities and through the other actions described above, Kmart has, directly and/or indirectly, refused, withheld from, and denied to Plaintiff Robert G. Geyer and Damages

Settlement Sub-Class Members, because of their disabilities, the full use and enjoyment of its stores.

97. Plaintiff Robert G. Geyer and Damages Settlement Sub-Class Members have been damaged and will continue to be damaged by this discrimination as more fully set forth above.

SIXTH CLAIM FOR RELIEF

(On behalf of Plaintiff Stacy Berloff and other Damages Settlement Sub-Class members for violation of the Massachusetts Anti-Discrimination Law)

98. Plaintiffs reallege and incorporate by reference the allegations set forth in this Second Amended Class Action Complaint as if fully set forth herein.

99. Massachusetts prohibits “. . . any distinction, discrimination or restriction on account of . . . any physical or mental disability, . . . [in] his treatment in any place of public accommodation. . .” Mass. Gen. Laws ch. 272, § 98.

100. A place of public accommodation is any place “which is open to and accepts or solicits the patronage of the general public” and includes a “retail store or establishment.” Id. 272, §§ 92A & 92A(3).

101. Kmart stores are a public accommodation as defined in 272, § 92A.

102. Plaintiff Stacy Berloff and Damages Settlement Sub-Class Members who shopped at Kmart stores in Massachusetts or would have shopped at such stores but for allegedly discriminatory barriers seek minimum statutory damages under 272, § 98.

103. By maintaining architectural barriers and policies that discriminate against people with disabilities and through the other actions described above, Kmart has, directly and/or

indirectly, refused, withheld from, and denied to Plaintiff Stacy Berloff and Damages Settlement Sub-Class Members, because of their disabilities, the full and equal enjoyment of its stores.

104. Plaintiff Stacy Berloff and Damages Settlement Sub-Class Members have been damaged and will continue to be damaged by this discrimination as more fully set forth above.

SEVENTH CLAIM FOR RELIEF

(On behalf of Plaintiff Jean Ryan and other Damages Settlement Sub-Class Members for violation of New York Civil Rights Law)

105. Plaintiffs reallege and incorporate by reference the allegations set forth in this Second Amended Class Action Complaint as if fully set forth herein.

106. New York law states that “[a]ll persons within the jurisdiction of this state shall be entitled to the full and equal accommodations, advantages, facilities and privileges of any places of public accommodations. . .” N.Y. Civ. Rights § 40.

107. New York prohibits “any person . . . because of the race, creed, color, national origin, sexual orientation, military status, sex, or disability or marital status of any person, directly or indirectly . . . [to deny] such person any of the accommodations, advantages, facilities or privileges thereof . . .” N.Y. Exec. § 296(2)(a).

108. A place of public accommodation “shall be deemed to include . . . retail stores and establishments. . .” N.Y. Civ. Rights § 40.

109. Kmart stores are a public accommodation as defined in § 40.

110. Plaintiff Jean Ryan and Damages Settlement Sub-Class Members who shopped at Kmart stores in New York or would have shopped at such stores but for allegedly discriminatory barriers seek minimum statutory damages under § 40-d.

111. By maintaining architectural barriers and policies that discriminate against people with disabilities and through the other actions described above, Kmart has, directly and/or indirectly, refused, withheld from, and denied to Plaintiff Jean Ryan and Damages Settlement Sub-Class Members, because of their disabilities, the full and equal enjoyment of its stores.

112. Plaintiff Jean Ryan and Damages Settlement Sub-Class Members have been damaged and will continue to be damaged by this discrimination as more fully set forth above.

EIGHTH CLAIM FOR RELIEF

(On behalf of Plaintiff Jan Campbell and other Damages Settlement Sub-Class Members for violation of the Oregon Unlawful Discrimination against Disabled People)

113. Plaintiffs reallege and incorporate by reference the allegations set forth in this Second Amended Class Action Complaint as if fully set forth herein.

114. Oregon prohibits any place of public accommodation, resort or amusement from making “any distinction, discrimination or restriction because a customer or patron is a disabled person.” Or. Rev. Stat. § 659A.142(3).

115. A place of public accommodation “means any place or service offering to the public accommodations, advantages, facilities or privileges whether in the nature of goods, services, lodgings, amusements or otherwise.” Id. § 659A.400(1).

116. Kmart stores are places of public accommodation as defined in § 659A.400(1).

117. Plaintiff Jan Campbell and Damages Settlement Sub-Class Members who shopped at Kmart stores in Oregon seek minimum statutory damages under § 659A.885(3)(a).

118. By maintaining architectural barriers and policies that discriminate against people with disabilities and through the other actions described above, Kmart has, directly and/or

indirectly, refused, withheld from, and denied to Plaintiff Jan Campbell and Damages Settlement Sub-Class Members, because of their disabilities, the full and equal enjoyment of its stores.

119. Plaintiff Jan Campbell and Damages Settlement Sub-Class Members have been damaged and will continue to be damaged by this discrimination as more fully set forth above.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully pray:

1. That this Court assume jurisdiction;
2. That this Court certify the class and sub-class described in Paragraphs 16 and 17 pursuant to Rule 23(b)(2) and/or 23(b)(3) of the Federal Rules of Civil Procedure;
3. This Court appoint Plaintiffs Carrie Ann Lucas, Debbie L. Lane and Julie Reiskin as representative plaintiffs for the class and Plaintiffs Carrie Ann Lucas, Edward Muegge, Robert G. Geyer, Stacy Berloff, Jean Ryan, and Jan Campbell representative plaintiffs of the Damages Settlement Sub-Class;
4. That the Court appoint the undersigned as Class Counsel for both the class and the sub-class;
5. That this Court issue an Order declaring Defendant to be in violation of the ADA and of the laws of the Statutory Minimum Damages States recited in the Second through Eighth Claims for Relief;

6. That this Court issue an injunction ordering Kmart to bring all Kmart stores into compliance with the ADA and all Kmart stores in California into compliance with California's Title 24;

7. That this court award statutory minimum damages to Damages Settlement Sub-Class members pursuant to each state's statute (Colo. Rev. Stat. § 24-34-602, Cal. Civ. Code § 52(a), Haw. Rev. Stat. § 489-7.5, Tex. Hum. Res. Code Ann. § 121.004(b), Mass. Gen. Laws ch. 272, § 98, N.Y. Civ. Rights § 40-d, and Or. Rev. Stat. § 659A.885(3)(a));

8. That this Court award Plaintiffs their reasonable attorneys' fees and costs; and

9. That this Court award such additional or alternative relief as may be just, proper and equitable.

Respectfully submitted,

FOX & ROBERTSON, P.C.

s/Amy Farr Robertson

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