

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 99-cv-01923-JLK

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,

Defendant.

JOINT MOTION TO AMEND SETTLEMENT AGREEMENT

The parties, by and through their respective attorneys, hereby submit this Joint Motion to Amend Settlement Agreement. The Parties propose to amend the Settlement Agreement to permit Kmart to remedy 150 stores during the period between May 8, 2009 and May 8, 2010, rather than the 215 stores called for in the Settlement Agreement. This request is based on changed circumstances -- the current economic crisis and its impact on the retail sector -- and will not undermine the ultimate goal -- or the original timing -- of the Settlement.

BACKGROUND

In February 2006, following years of litigation of claims under the Americans with Disabilities Act (“ADA”), 42 U.S.C. § 12181 - 12189, as well as state law, plaintiffs and Kmart agreed to a ground-breaking settlement resolving claims by a nationwide class of Kmart customers who use wheelchairs or scooters for mobility. The settlement was preliminarily approved by this Court on March 22, 2006, and following notice, the final approval hearing, and the expiration of the period for appeal, the settlement became final on September 8, 2006.

Under the settlement, Kmart agreed (i) to make physical changes to its stores over a seven-and-a-half year period to make them more accessible for customers who use wheelchairs and scooters; (ii) to revise its policies and training materials with respect to customers who use wheelchairs and scooters; and (iii) to pay damages to resolve claims for statutory minimum damages in seven states that provide for such damages. In return, the class released accessibility claims under the ADA and state laws that incorporate or are parallel to the ADA, including claims for statutory minimum damages, and is enjoined from bringing injunctive or statutory minimum damages claims for the seven-and-a-half year remediation period.

Pursuant to the Settlement Agreement, Kmart was required to bring 150 stores into compliance by May 8, 2008, and another 215 during each subsequent twelve-month period. Settlement Agreement ¶ 6.13. By May 8, 2008, Kmart had notified Class Counsel that it had completed work on 150 stores, and the parties have been working diligently to review compliance and resolve all outstanding issues with respect to those stores. Miller Decl. ¶ 3. Kmart recently notified Class Counsel that work had been completed on the 215 stores required

to be completed by the May 8, 2009 deadline. *Id.* ¶ 4. Class Counsel, in turn, have been reviewing photographs documenting the remediation efforts and have completed review of the first 150 stores. These photographs show a very high degree of success in Kmart's remediation efforts. Decl. of Amy F. Robertson ("Robertson Decl.") ¶ 3.

More than just meeting the previous two deadlines, Kmart personnel have been working assiduously with Class Counsel to address questions that have arisen during the survey and remediation process, and have -- in the view of Class Counsel -- taken a very enthusiastic and proactive approach to the implementation of the Settlement Agreement. Robertson Decl. ¶ 4.

As Kmart began planning for the May 8, 2009 - May 8, 2010 time period, it faced one of the worst economic environments in recent memory. As a result of these circumstances, Kmart requested and Plaintiffs agreed that Kmart be required to complete remediation on 150 stores during the next year rather than the required 215. Perhaps most important, by remedying only 150 stores during the next year, the ultimate completion date of the settlement will not be affected. This is because when the parties first agreed to the schedule in Paragraph 6.13, Kmart had approximately 1,420 stores. *See* Settlement Agreement Ex. 1. At the original pace in Paragraph 6.13, remediation would be concluded on May 8, 2014, when Kmart reported on the completion of the final approximately 195 stores. Kmart currently has approximately 1,350 stores, Miller Decl. ¶ 5; even with the requested amendment, the last of these stores will be reported complete on May 8, 2014. There will be no need to extend the Settlement Agreement past its anticipated completion.

Because this matter affects the injunctive class, rather than the damages sub-class, the proposed amendment is signed only by the representatives of the former class and this motion is brought by those representatives only.

The Settlement Agreement requires Court approval for any modification. *Id.* ¶ 30. For the reasons set forth above, the Parties respectfully request that this Court approve the Amendment to Settlement Agreement attached as Exhibit 1 to this Motion.

Respectfully submitted,

FOX & ROBERTSON, P.C.

KMART CORPORATION

/s Amy Farr Robertson
Amy Farr Robertson
Timothy P. Fox
Fox & Robertson, P.C.
104 Broadway
Suite 400
Denver, CO 80203
Voice: 303.595.9700
Fax: 303.595.9705
Email: arob@foxrob.com

/s Lori K. Miller
Lori K. Miller
Assistant General Counsel
Sears Holdings Corporation
3333 Beverly Road
B6-225B
Hoffman Estates, Illinois 60179
Phone: 847.286.4482
Fax: 847.286.6544
Email: lmiller64@searshc.com

Attorneys for Plaintiffs

Attorney for Defendant Kmart Corporation

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