

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

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

CARRIE ANN LUCAS,
DEBBIE LANE, and
JULIE REISKIN, on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

KMART CORPORATION,

Defendant.

SETTLEMENT AGREEMENT

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1 Introduction.

- 1.1 This Settlement Agreement (“Agreement”) is entered into by and between Kmart Corporation (“Kmart”) and Carrie Ann Lucas, Debbie Lane, and Julie Reiskin (collectively “Named Plaintiffs”), individually and on behalf of themselves and a class of persons similarly situated (hereinafter referred to as the “Settlement Class” and defined below). Kmart and the Named Plaintiffs (individually and on behalf of the Settlement Class) shall individually be referred to as a “Party” and jointly as the “Parties.”
- 1.2 Kmart owns and operates approximately one thousand four hundred twenty-two (1422) Kmart Stores (as defined below). A list of these stores as of February 7, 2006 is attached as Exhibit 1.
- 1.3 This Agreement applies to all Kmart Stores and to all Subsequently Acquired Stores (as defined below). The provisions of Paragraphs 15, 16, 26.2 and 26.3 of this Agreement also apply to Closed Kmart Stores (as defined below).
- 1.4 Named Plaintiffs each uses a wheelchair or scooter for mobility and each is a person with a disability as that term is used in the Americans with Disabilities Act. Named Plaintiffs all patronize Kmart Stores and intend to continue doing so in the future.
- 1.5 The Named Plaintiffs have brought suit in the United States District Court for the District of Colorado (the “Court”), Civil Action No. 99-cv-01923-JLK-CBS (the “Lawsuit”), in which they allege that Kmart violated Title III of the Americans with Disabilities Act, 42 U.S.C. § 12181 et seq. at its stores nationwide.
- 1.6 On July 13, 2005, the Court certified a nationwide class of individuals who use wheelchairs or scooters and who shop at Kmart Stores nationwide.
- 1.7 The Parties now wish to effect a complete resolution and settlement of all claims, disputes and controversies relating to the allegations of Named Plaintiffs, the Settlement Class and the Damages Settlement Sub-Class, and to resolve their differences and disputes by settling the Lawsuit.
- 1.8 The terms of all Exhibits attached hereto are fully incorporated into this Agreement and are an integral part thereof. The terms of this Agreement, where applicable, are fully incorporated into all Exhibits and are, where applicable, an integral part thereof. To the extent that there are any conflicts or inconsistencies between the terms of this Agreement and any of the Exhibits, the terms of the Agreement shall control.

- 1.9 This Agreement and all Exhibits are binding on Kmart’s subsidiaries, successors and assigns.
- 2 **No Admission of Liability.** By agreeing to and voluntarily entering into this Agreement, there is no admission or concession by Kmart, direct or indirect, express or implied, that Kmart Stores are in any way inaccessible or that Kmart has violated the Americans with Disabilities Act, or any other federal, state, or local law, building code, regulation, order, or rule. Nothing in this Agreement shall operate as an admission by Kmart in any context other than within the settlement of this Lawsuit that any particular standard or standards are applicable under the ADA or any other federal or state law to any Kmart Store.
- 3 **Definitions.** In addition to the terms defined elsewhere in the Agreement, the following terms shall have the meanings set forth below. Any terms not defined herein shall have the meaning ascribed to them in the ADA and/or the Standards.
- 3.1 “Accessible Route” means an unobstructed path that complies with Section 4.3 of the Standards.
- 3.2 “ADA” means Title III of the Americans with Disabilities Act, 42 U.S.C. §§ 12181 et seq., and its implementing regulations.
- 3.3 “Agreement” means this agreement and the exhibits hereto.
- 3.4 “Architectural Barrier” is a defined term only for the purpose of allocating monetary relief provided herein and means an impediment to accessibility to persons who use wheelchairs or scooters for mobility of a structural feature at a Kmart Store, including but not limited to, restrooms, fitting rooms, store entrances, telephones, drinking fountains, parking facilities, and any other fixed features within the stores that are regulated by the ADA.
- 3.5 “Class Counsel” means Amy F. Robertson and Timothy P. Fox of Fox & Robertson, P.C., Bill Lann Lee of Lief Cabraser Heimann & Bernstein, LLP, Kevin W. Williams of the Colorado Cross Disability Coalition, Brian East of Advocacy, Inc., Steven Greenberger of the DePaul University Law School, Mari Mayeda, and Antonio Lawson. The Parties and Class Counsel agree that the primary attorneys who will perform work on behalf of the Settlement Class and/or Damages Settlement Sub-Class after Final Approval are Fox & Robertson, P.C.
- 3.6 “Closed Kmart Store” means a store operated under the Kmart name at any time between May 6, 2003 and February 7, 2006 that ceased to be operated under the Kmart name prior to February 7, 2006. The Closed Kmart Stores are listed in Exhibit 10.

- 3.7 “Costs” means all out-of-pocket expenses reasonably incurred and shall include (but not be limited to) amounts payable to experts.
- 3.8 “Covered Area” means at least eighty (80) percent of the sales floor occupied by all of the Moveable Display Areas of each Covered Store.
- 3.9 “Covered Store” means the Kmart Stores subject to the requirements of Paragraph 12.1 below. Within forty-five (45) days of execution of this Agreement, Kmart will provide Class Counsel with a list of Kmart Stores that are not Covered Stores. This list of non-Covered Stores will contain no more than one hundred and forty-three (143) Kmart Stores. The non-Covered Stores on this list shall be subject to the requirements of Paragraph 12.2 below.
- 3.10 “Damages Settlement Sub-Class” means all Settlement Class Members who, at any time from May 6, 2003 through the Term of this Agreement, shopped or shop at any Kmart Store or Closed Kmart Store in the Statutory Minimum Damages States or who allege that they would have shopped or would shop at one or more Kmart Stores or Closed 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 Kmart Store(s) or Closed Kmart Store(s).
- 3.11 “Damages Settlement Sub-Class Member” means any member of the Damages Settlement Sub-Class.
- 3.12 “Damages Sub-Class Fund” means a fund consisting of eight (8) million dollars in cash and five (5) million dollars in Gift Cards that will be distributed in accordance with the terms of this Agreement.
- 3.13 “Damages Settlement Sub-Class Named Plaintiffs” means the individuals who serve as representative plaintiffs for the Damages Settlement Sub-Class.
- 3.14 “Dispute Resolution” means the process described in Paragraph 19 hereof.
- 3.15 “Drive Aisles” means the main aisles through a Kmart Store and around the perimeter of the store that are a minimum of eight (8) feet wide.
- 3.16 “Final Approval” means the approval of this Agreement by a United States District Judge by signature of an order in a form substantially similar to that submitted by the Parties that, among other things, attaches this Agreement as an exhibit, retains jurisdiction for the Court for the Term of this Agreement in order to enforce this Agreement, and has become final and non-appealable.

- 3.17 “Fixed Displays” means displays on fixtures that are fixed to the floor and/or are rearranged less than once each year. Gondolas, perimeter walls and “T” walls are examples of Fixed Displays.
- 3.18 “Four-Way Rack” means a fixture for the display of clothing or other hanging merchandise that has four (4) arms that protrude in four (4) different directions arranged at 90-degree angles to one another.
- 3.19 “Gift Card” means a card that is redeemable at full face value for purchases of any goods sold at Kmart Stores other than alcohol and tobacco.
- 3.20 “Kmart Personnel” means all persons who are employed by Kmart and who either work in a Kmart Store or who have managerial responsibility for the operations, layout or design of Kmart Stores. This shall include but not be limited to all sales personnel, store managers and district or regional managers who oversee multiple Kmart Stores or regions.
- 3.21 “Kmart Settlement Contact” means a Kmart employee designated as the initial point of contact for Class Counsel with respect to issues concerning this Agreement. Kmart shall notify Class Counsel in writing of the person designated as the Kmart Settlement Contact within ten (10) days of Final Approval. Kmart will also notify Class Counsel in writing should a new individual be designated as the Kmart Settlement Contact during the Term of this Agreement.
- 3.22 “Kmart Store” means any store listed in Exhibit 1. The term shall include all elements and facilities on the site of each Kmart Store that are open to and available for use by the public including but not limited to those parking spaces and sidewalks that Kmart owns or leases or over which Kmart has a right of alteration or control.
- 3.23 “Moveable Displays” means displays that are not affixed, that may be rearranged from time to time throughout the year, and on which clothing, clothing accessories or other goods are displayed. Round racks and Four-Way Racks are examples of Moveable Displays.
- 3.24 “Moveable Display Areas” means the areas in which the following merchandise is displayed:
- 3.24.1 Ladies’ clothing
 - 3.24.2 Girls’ clothing
 - 3.24.3 Men’s clothing
 - 3.24.4 Boys’ clothing
 - 3.24.5 Infants’ clothing
 - 3.24.6 Sleepwear

- 3.24.7 Intimate clothing
 - 3.24.8 Jewelry
 - 3.24.9 Hosiery
 - 3.24.10 Accessories
 - 3.24.11 Shoes
- 3.25 “Mystery Shopper” means an anonymous shopper retained to shop at Kmart Stores pursuant to Kmart’s Mystery Shopper program.
- 3.26 “Named Plaintiffs” means Carrie Ann Lucas, Debbie Lane and Julie Reiskin.
- 3.27 “Notice Deadline” means the deadline for publishing notice to be set by the Court as part of the Preliminary Approval process.
- 3.28 “Other Barrier” is a defined term only for the purpose of allocating monetary relief provided herein and means: (1) an impediment to accessibility to persons who use wheelchairs or scooters for mobility caused by a failure to maintain accessible features, for example, an obstructed aisles, parking spaces, restrooms or fitting rooms, or failure to open Accessible Checkout Lane; or (2) clothing racks or other Moveable Displays that are placed in a manner that impedes accessibility to persons who use wheelchairs or scooters for mobility.
- 3.29 “Preliminary Approval” means the initial approval by the Court of the terms of this Agreement, which shall occur prior to any notice being provided in accordance with Paragraph 23 of this Agreement.
- 3.30 “Settlement Class” means the class of all persons who, at any time from May 6, 2003 through the Term of this Agreement, used, use or will use wheelchairs or scooters for mobility and who shopped or shop at any Kmart Store or any Closed Kmart Store or who allege they would shop or would have shopped at one or more Kmart Stores or Closed Kmart Stores 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 Kmart Store(s) or Closed Kmart Store(s).
- 3.31 “Settlement Class Member” means any member of the Settlement Class.
- 3.32 “Standards” means the Standards for Accessible Design, 28 C.F.R. Part 36, Appendix A. The version of the Standards in existence at the time of Final Approval of this Agreement shall be the version to which this term refers except that, if amendments to or a different version of the Standards are adopted by the Department of Justice, that different version shall govern any actions taken or required to be taken after the effective date thereof. Kmart shall not be required to make alterations to any work it has done prior to that effective date.

- 3.33 “State Specific Fund” means the amount from the Damages Sub-Class Fund allocated to a particular Statutory Minimum Damages State. The amount of each State Specific Fund is set forth in Exhibit 8.
- 3.34 “Statutory Minimum Damages” means any minimum damages available in a specified amount by operation of or pursuant to the following state statutes or codes that may be recovered regardless of the amount of actual damages proved: California – Cal. Civil Code §§ 52, 54.3; Colorado – C.R.S. § 24-34-602; Hawaii – Hawaii Statutes § 489-7.5; Massachusetts – M.G.L.A. ch. 272 § 98; New York – N.Y. Civ. R. §§ 40-c, 40-d, N.Y. Exec. § 296(2)(a); Oregon – O.R.S. § 659A.885; and Texas – Tex. Hum. Res. Code §§ 121.003, 121.004, and any other statute, codes or laws (as previously or presently codified, or as they may be codified in the future) providing for minimum damages in a specified amount in such States.
- 3.35 “Statutory Minimum Damages Amount” means the minimum amount of Statutory Damages available in a specified amount pursuant to statute or code in a Statutory Minimum Damages State. The Statutory Minimum Damages Amount as of the date of the execution of this Agreement for each Statutory Minimum Damages State is set forth in Exhibit 8.
- 3.36 “Statutory Minimum Damages States” means California, Colorado, Hawai’i, Massachusetts, New York, Oregon, and Texas.
- 3.37 “Structurally Impracticable” means only those rare circumstances when the unique characteristics of terrain prevent the incorporation of accessibility features.
- 3.38 “Subsequently Acquired Store” means any facility that starts being operated as a Kmart Store after Final Approval of this Agreement.
- 3.39 “Subsequently Relinquished Store” means any Kmart Store that ceases to be operated as a Kmart Store after Final Approval of this Agreement.
- 3.40 “Technically Infeasible” means with respect to an alteration of a building or a facility, that it has little likelihood of being accomplished because existing structural conditions would require removing or altering a load-bearing member which is an essential part of the structural frame; or because other existing physical or site constraints prohibit modification or addition of elements, spaces, or features which are in full and strict compliance with the minimum requirements for new construction and which are necessary to provide accessibility.

4 **Conditions Precedent.** This Agreement shall be conditioned upon and shall be effective only upon the occurrence of all of the following events. Prior to the occurrence of the

following events, the Parties' only obligations pursuant to this Agreement shall be those set forth in Paragraphs 20.1, 22 and 23.

- 4.1 Class Counsel and Kmart shall jointly request a preliminary approval hearing.
 - 4.2 Class Counsel and Kmart shall move jointly for an Order Granting Preliminary Approval of this Agreement, Preliminarily Certifying the Damages Settlement Sub-Class for Settlement Purposes Only, Preliminarily Enjoining Class Members and Damages Settlement Sub-Class Members from Asserting Any Claims to be Released by the Agreement, and Approving Issuance of Notice in Accordance with the Procedures for Providing Notice Submitted by the Parties and such motions are granted by the Court.
 - 4.3 Upon preliminary approval of this Agreement and approval of the Notice and the procedures for providing notice, notice shall be provided to the Settlement Class and the Damages Settlement Sub-Class in accordance with the procedures for providing notice approved by the Court.
 - 4.4 A Fairness Hearing shall be held in accordance with Paragraph 24 below.
 - 4.5 The Court shall grant Final Approval of this Agreement, enjoin Settlement Class Members and Damages Settlement Sub-Class Members from bringing any claims released by this Agreement, and enter Judgment in accordance with the terms set forth herein after a Fairness Hearing has been conducted, and all such orders and approvals have become final and non-appealable. The Judgment shall finally resolve all issues raised in this proceeding.
 - 4.6 Following Final Approval, Kmart shall withdraw its appeal currently pending before the United States Court of Appeals for the Tenth Circuit, No. 05-0504.
- 5 **Term of Agreement.** This Agreement shall have a term ("Term") that expires thirty (30) days after the day on which the last verification is conducted pursuant to Paragraph 7 or the last Dispute Resolution process is concluded, whichever comes later.
- 6 **Kmart Stores to Comply with the Standards.**
- 6.1 Subject to all of the other provisions of this Paragraph, Kmart agrees to bring into compliance with the Standards to the extent that they relate to accessibility for people with disabilities who use a wheelchair or scooter for mobility all of the elements listed in Exhibit 2 hereto at all Kmart Stores.
 - 6.2 Subject to all the other provisions of this Paragraph, Kmart agrees to bring into compliance with the Standards or Title 24 of the California Code of Regulations to the extent that such regulations relate to accessibility for people with

disabilities who use a wheelchair or scooter for mobility, whichever standard requires greater accessibility, all of the elements listed in Exhibit 2 hereto at all Kmart Stores in the State of California. To the extent that the following provisions of Paragraph 6 use the term the “Standards,” that term shall be deemed to mean the “Standards and/or Title 24 of the California Code of Regulations” for the purposes of Kmart Stores in the State of California.

- 6.3 In no event will Kmart be required to do more than comply with the Standards that apply to the elements to be surveyed.
- 6.4 All dimensions are subject to conventional building industry tolerances for field conditions.
- 6.5 Departures from particular technical and scoping requirements of the Standards by the use of other designs and technologies are permitted where the alternative designs and technologies used will provide substantially equivalent or greater access to and usability of the facility.
- 6.6 Kmart is not required to bring any element in any Kmart Store into compliance if doing so would be Structurally Impracticable.
- 6.7 Kmart is not required to bring any element into compliance if doing so would be Technically Infeasible, provided that where compliance is Technically Infeasible, Kmart shall provide access to the maximum extent feasible.
- 6.8 At glass display cases where Section 7.2(1) of the Standards would require a 36-inch-wide auxiliary counter, Kmart may provide a 24-inch-wide auxiliary counter.
- 6.9 Parking lots:
 - 6.9.1 Subject to Paragraph 6.9.3 below, Kmart will ensure that the dimensions and signage of accessible parking spaces and parking access aisles at Kmart Stores comply with the Standards.
 - 6.9.2 Where the slope and/or cross slope of the parking lot (including parking spaces and accessible routes) at a Kmart Store is out of compliance with the Standards but would not require regrading to comply, subject to Paragraph 8.4 below, Kmart will ensure that the slope and/or cross slope comply.
 - 6.9.3 Where the slope and/or cross slope of a parking lot at a Kmart Store are out of compliance with the Standards and would require regrading of the parking lot to comply, Kmart will not be required to regrade provided that

- 6.9.3.1 If the slope and/or cross slope of an Accessible Route are out of compliance, Kmart will use its best efforts to locate a more compliant Accessible Route, and to take such steps as do not require regrading to bring it as close as possible to compliance with the Standards.
 - 6.9.3.2 If the slope and/or cross slope of accessible parking spaces or parking access aisles are out of compliance, Kmart shall attempt to find an area of the parking lot in which the slope and/or cross slope are (if possible) fully compliant and (if full compliance is not possible) more compliant and will create an additional set of accessible parking spaces and parking access aisles such that there are as many parking spaces and parking access aisles as required by Section 4.1.2(5) of the Standards both in the original location and in the new location. Parking spaces in the new location shall, to the greatest extent feasible, be on an Accessible Route.
- 6.10 Elements or facilities that are intended for and marked for use by Kmart Personnel only are not covered by this Agreement.
- 6.11 Commencing on the date of Final Approval of this Agreement, Kmart shall have an eight (8) month period in which to survey the Stores and perform other tasks necessary prior to the commencement of work on the Stores, provided, however, that Kmart is not obligated to complete the surveys of all the Kmart Stores during such period.
- 6.12 Kmart Surveys
 - 6.12.1 Kmart shall determine the order of the Kmart Stores to be surveyed and the order of the Stores at which work is done pursuant to this Paragraph.
 - 6.12.2 Kmart shall retain Evan Terry Associates, P.C. (“Terry”) for the purposes described in this Paragraph. If, during the Term of this Agreement, James Terry becomes unable to perform or supervise the tasks assigned to Terry in this Agreement, the Parties will meet and confer to agree on another individual to perform those tasks.
 - 6.12.3 In consultation with Kmart and Class Counsel, Terry will prepare the mutually agreed upon survey instrument (the “Survey Form”) in keeping with the Agreement’s list of compliance elements (Exhibit 2) that shall be used to survey the Kmart Stores.

- 6.12.4 Terry shall train Kmart Personnel in the proper use of the Survey Form and the proper manner to conduct the surveys.
- 6.12.5 Terry, working in combination with Kmart Personnel, who will accompany Terry's surveyors as part of their training, shall survey the first twenty-five (25) Kmart Stores to be surveyed pursuant to this Agreement. Thereafter, Kmart may, at its option, continue to utilize Terry to survey the Kmart Stores or cause the surveys to be conducted by its employees. In either event, the surveys shall be conducted utilizing the mutually agreed upon Survey Form.
- 6.12.6 Kmart shall enter into a contract with Terry for use of the database ("Database") that has been mutually developed. All completed Survey Forms and evidence of completion of the work required thereby shall be inputted into the Database. In order to permit Class Counsel to verify the compliance of any change made pursuant to this Paragraph, Kmart will take, or will cause its contractors to take, photographs of each changed element. Such photographs will be made available to Class Counsel through the Database. Where the change in question required compliance with a measurable standard, the photograph shall include a measuring device and, if necessary to read the measuring device, a second, close-up, photograph will be taken. Class Counsel shall have access to those portions of the Database containing the completed Survey Forms and evidence of completion of the work required for the duration of the Term of this Agreement. Class Counsel shall be entitled to review the completed Survey Forms and evidence of completion with respect to each Kmart Store to verify Kmart's compliance with this Agreement. Regardless of who performs the surveys, all completed Survey Forms and evidence of completion shall be entered into the Database.
- 6.13 Kmart will bring a minimum of one hundred fifty (150) Kmart Stores into compliance by the end of the twelve (12) month period commencing upon the expiration of the eighth (8th) month after the Final Approval of this Agreement. Kmart will bring an additional two hundred fifteen (215) Kmart Stores into compliance by the end of each subsequent twelve (12) month period until all of the Kmart Stores have been brought into compliance.
- 6.14 All expenses of the survey process in this Paragraph shall be borne by Kmart.
- 6.15 If, after conducting a store survey in accordance with this Agreement and identifying those elements of a Kmart Store that do not fully comply with the Standards, Kmart determines in good faith that the cost of remediation of a particular element at a particular Kmart Store is substantially disproportionate to

the cost to remedy such elements at other Kmart Stores, Kmart shall notify Class Counsel of the issue and the alternative steps, short of full remediation, that it proposes to take to improve the accessibility of that element. The Parties anticipate that this Paragraph will apply only rarely and only to extraordinary and unforeseen circumstances. Under such circumstances, Kmart and Class Counsel shall then meet and confer in good faith to determine how best to remedy this element. Class Counsel, at its option, may agree to permit Kmart to take alternative steps or may insist upon full compliance with the remainder of this Paragraph 6.

7 Verification of Compliance.

- 7.1 Within six (6) weeks after the first five (5) Kmart Stores have been surveyed pursuant to the procedure set forth in Paragraph 6.12.5, the Parties and Terry shall meet and confer on site in each of the five (5) Kmart Stores about the results of the surveys for the purpose of ensuring that there is agreement that the surveys cover the work required to bring the Kmart Stores into compliance. Once any work required pursuant to Paragraph 6 has been completed on these five (5) Kmart Stores, Class Counsel shall be entitled to request that Terry inspect the changes (or “solutions”) made to those Kmart Stores.
- 7.2 Following completion of the process described in Paragraph 7.1, Class Counsel shall be entitled to verify compliance with Paragraph 6 by requesting that Terry inspect any changes (or “solutions”) made in the twenty (20) additional Kmart Stores that Terry will have surveyed pursuant to Paragraph 6.12.5, once any work required pursuant to Paragraph 6 has been completed.
- 7.3 Following completion of the process described in Paragraph 7.2, in addition to having access to the Database, which will contain information on every Kmart Store, Class Counsel shall be entitled to the following:
 - 7.3.1 In the event that all the surveys are conducted by Kmart Personnel:
 - 7.3.1.1 Class Counsel shall be entitled to request that Terry perform a full survey of up to fifteen (15) of the first one hundred (100) Kmart Stores following the twenty-five (25) stores referred to in Paragraphs 7.1 and 7.2 for which any work required pursuant to Paragraph 6 has been completed.
 - 7.3.1.2 If in Terry’s sole view, the surveys referred to in Paragraph 7.3.1.1 are satisfactory, Class Counsel shall be entitled to request that Terry perform a full survey of no more than ten (10) of the next one hundred (100) Kmart Stores. If in Terry’s sole view, the surveys referred to in Paragraph 7.3.1.1

reveal a pattern of deficiencies in the survey process, Paragraph 7.3.1.1 shall apply to the next one hundred (100) stores.

7.3.1.3 If in Terry's sole view, the surveys in the ten (10) Stores referred to in Paragraph 7.3.1.2 are satisfactory, Class Counsel shall be entitled to request that Terry perform a full survey of no more than five (5) percent of the remainder of the Kmart Stores. If in Terry's sole view, the surveys in referred to in Paragraph 7.3.1.2 reveal a pattern of deficiencies in the survey process, Paragraph 7.3.1.2 shall apply to the next one hundred (100) stores.

7.3.1.4 Under any circumstances in which Terry determines that a set of surveys reveals a pattern of deficiencies in the survey process, the Parties shall meet and confer to discuss any adjustments necessary to the survey process or the training of surveyors.

7.3.1.5 In addition to the provisions of Paragraphs 7.3.1.1 through 7.3.1.4, Class Counsel shall be entitled to request that Terry inspect the changes (or "solutions") made as a result of the surveys in an additional five (5) of the Kmart Stores for every one hundred (100) stores for which any work required pursuant to Paragraph 6 has been completed.

7.3.2 In the event that Kmart exercises its option, pursuant to Paragraph 6.12.5, to have Terry survey additional stores beyond the initial twenty-five (25) Kmart Stores surveyed;

7.3.2.1 With respect to the additional Kmart Stores surveyed by Terry, Class Counsel shall be entitled to request that Terry inspect the changes (or "solutions") made as a result of the surveys in ten (10) percent of the Kmart Stores for which any work required pursuant to Paragraph 6 has been completed.

7.3.2.2 With respect to any additional Kmart Stores not surveyed by Terry, Paragraphs 7.3.1.1 through 7.3.1.5 shall apply.

7.4 Kmart shall notify Class Counsel within thirty (30) days of the completion of the work required pursuant to Paragraph 6 in the Kmart Stores in question. Terry will complete the appropriate verification pursuant to Paragraphs 7.1, 7.2 or 7.3 within ninety (90) days of Class Counsel's receipt of such notice.

- 7.5 Class Counsel shall notify Kmart of any store they are requesting Terry to inspect or survey pursuant to this Paragraph by noon the business day before the inspection or survey will take place. Class Counsel shall instruct Terry to use its best efforts not to interfere with the operation of the Kmart Store during such inspections or surveys.
- 7.6 Within thirty (30) days after any inspection or survey conducted by Terry for Class Counsel pursuant to this Paragraph, Terry shall notify Kmart of any areas of non-compliance with the provisions of Paragraph 6 of this Agreement that were encountered at the Kmart Store.
- 7.7 Kmart shall remedy any areas of non-compliance identified pursuant to Paragraph 7.6 within ninety (90) days of receipt of the notice described in that Paragraph if it is practically feasible to do so and shall notify Class Counsel of the completion of any measures required by this Paragraph within fifteen (15) days after they are completed. If Kmart determines that such remediation cannot be achieved within ninety (90) days, the Parties shall confer in good faith to agree upon a schedule for completion. Following completion, Class Counsel may, at their option, request that Terry reinspect the areas that had been noted as non-compliant in the Kmart Store in question. If Kmart disputes any item identified pursuant to Paragraph 7.6, either party may submit the matter to Dispute Resolution. In the event that Kmart disputes any such item, its time period for remedying any area of non-compliance shall not commence until it has been finally determined, through the Dispute Resolution process, that such area of non-compliance exists.
- 7.8 Any inspections or surveys conducted by Terry for Class Counsel shall be conducted using the Survey Form.
- 7.9 If the inspections or surveys conducted pursuant to this Paragraph reveal a pattern of non-compliance with the provisions of Paragraph 6, the Parties shall meet and confer to attempt to address the issue. If any disputes remain following this meet and confer, either Party may submit the matter to Dispute Resolution.
- 7.10 All expenses of the verification process in this Paragraph shall be borne by Kmart.

8 Permits and Consent.

- 8.1 Kmart may be required to obtain building or other permits or consent for some of the measures required to comply with Paragraph 6 or Paragraph 7. Kmart shall use its reasonable best efforts to obtain such permits or consent, including drafting applications in good faith to enhance the possibility of approval.
- 8.2 If a permit for a measure required by Paragraph 6 or Paragraph 7 is issued on a conditional basis or is denied outright, Kmart shall notify Class Counsel of the

conditions or denial in a sufficiently timely fashion to permit Class Counsel to take whatever action they deem necessary -- including, but not limited to, consultation with building officials, administrative remedies, or court action -- to obtain required permits or consent. Kmart shall support Class Counsel's actions to obtain such permits or consent to the extent that it determines in good faith that such efforts are reasonable.

8.3 If Class Counsel succeeds in obtaining the required permit or consent, Kmart shall be responsible for Class Counsel's reasonable attorneys' fees and Costs in connection with that permit or consent, provided that Class Counsel shall first make a good faith effort to recover such fees and Costs from any third party opposing their actions and provided that Kmart will not be required to pay for any work by Class Counsel that amounts to economic waste, i.e., the costs are far greater than the potential benefit to the Settlement Class.

8.4 Kmart shall take such measures as are required to bring parking lots and other common elements in common areas into compliance with Paragraph 6 and Paragraph 7 to the extent to which such elements and areas are the obligation of Kmart to repair or improve under the relevant store lease. Where such elements or areas are not the obligation of Kmart to repair or improve under the relevant store lease, the following provisions will apply:

8.4.1 Kmart will write to the relevant landlord, informing it of its legal obligations to comply with the ADA, describing the specific ways in which the area in question does not comply with the ADA, and requesting that it comply with the ADA.

8.4.2 If the landlord does not commit within sixty (60) days of such letter to perform such actions as are necessary in order for the area in question to come into compliance with the ADA, Kmart and Class Counsel shall meet and confer in order to determine the most reasonable way to achieve compliance with the ADA. If the Parties are unable to reach agreement on how to proceed, Class Counsel may, at its option, proceed unilaterally to attempt to obtain landlord compliance.

9 **New Construction and Subsequently Acquired Stores.**

9.1 Any Kmart Store that is built after Final Approval of this Agreement shall be constructed and maintained in compliance with the ADA in the manner set forth in this Agreement.

9.2 Each Subsequently Acquired Store shall be subject to the requirements of this Agreement.

9.3 Annually beginning no later than one year after Final Approval of this Agreement, Kmart shall provide Class Counsel with a list of Subsequently Acquired Stores.

10 Subsequently Relinquished Stores.

10.1 Each Subsequently Relinquished Store shall cease to be subject to the terms of this Agreement as of the date it becomes a Subsequently Relinquished Store. Nothing herein will prohibit Kmart from selling, closing or otherwise terminating operations at any location. If a Subsequently Relinquished Store has not yet been brought into compliance with Paragraphs 6 and Paragraph 7 hereof, it will not be covered by the Release of Injunctive Claims in Paragraph 26.1 below, but it will be covered by the Release of Statutory Minimum Damages in Paragraph 26.2 and the provisions of Paragraph 26.3 below.

10.2 Annually beginning no later than one year after Final Approval of this Agreement, Kmart shall provide Class Counsel with a list of Subsequently Relinquished Stores.

11 Maintenance of Access. Kmart agrees to maintain in operable and working condition those elements of Kmart Stores that are covered by this Agreement and its Exhibits in the condition required by this Agreement and its Exhibits, provided, however, that nothing in this Agreement shall prohibit isolated or temporary interruptions in service or access due, for example, to maintenance or repair.

12 Policies, Practices and Procedures.

12.1 To the extent if any that it has not already done so, within three (3) months after Final Approval of this Agreement, Kmart shall adopt and implement the following policies in all Covered Areas in all Covered Stores:

12.1.1 There will be a distance of at least thirty-two (32) inches between garments on any side of a Four-Way Rack that is adjacent to another Four-Way Rack.

12.1.2 There will be a distance of at least thirty-two (32) inches between the front and back sides (*i.e.*, the longer sides) of any table used to display merchandise and the front and back sides of any other table used to display merchandise.

12.1.3 At a minimum, there will be a path of at least thirty-two (32) inches to at least one side of each Moveable Display in all Covered Areas. In order

to avoid “dead ends” that would cause Settlement Class Members to have to drive their wheelchairs or scooters backwards among Moveable Displays, to the extent architectural elements permit, all such thirty-two (32) inch paths will connect at each end with another path of at least thirty-two 32 inches in width.

12.2 To the extent if any that it has not already done so, within three months after Final Approval of this Agreement, Kmart shall adopt and implement the following policies in eighty (80) percent of the Moveable Display Areas in Kmart Stores that are non-Covered Stores:

12.2.1 There will be a distance of at least thirty (30) inches between garments on any side of a Four-Way Rack that is adjacent to another Four-Way Rack.

12.2.2 There will be a distance of at least thirty (30) inches between the front and back sides (*i.e.*, the longer sides) of any table used to display merchandise and the front and back sides of any other table used to display merchandise.

12.3 Customer service relating to access to apparel and furniture:

12.3.1 Kmart shall post signs near each entrance of each store that will:

12.3.1.1 state that Kmart offers a service for customers who are disabled and use a wheelchair or scooter for mobility, and who may experience difficulty accessing furniture and merchandise on apparel racks; and

12.3.1.2 inviting such customers to come to the customer service desk for assistance.

12.3.2 The signs referred to in Paragraph 12.3.1 shall be at least two (2) feet high and one and a half (1½) feet wide, shall be mounted approximately forty-eight (48) inches above the finished floor, and shall be substantially in the form of Exhibit 3 hereto.

12.3.3 All customers who are disabled and use a wheelchair or scooter for mobility will be offered the following options by the customer service desk:

12.3.3.1 A member of Kmart Personnel will be made available to assist the customer in accessing apparel or furniture that is inaccessible; or

- 12.3.3.2 A two-way communication device will be made available to the customer. The customer would be able to use that device to contact the customer service desk if and when the customer runs into difficulty accessing merchandise items and requires assistance in doing so. At such time, the customer service desk will arrange for a member of Kmart Personnel to assist the customer in accessing apparel or furniture that is inaccessible.
 - 12.3.3.3 Kmart will use its best efforts to ensure that Kmart Personnel will begin providing assistance within three (3) minutes of a request under Paragraph 12.3.3.1 or a contact by the two-way communication device requesting assistance.
- 12.4 If a customer who uses a wheelchair or scooter requests assistance from Kmart Personnel in accessing inaccessible merchandise, the person receiving the request shall provide such assistance regardless of whether he or she is assigned to the area of the store in which assistance is requested.
- 12.5 At least one checkout lane at the front of the store that complies with Section 7.3 of the Standards (“Accessible Checkout Lane”) shall be open and staffed at all times that the Kmart Store in question is open. If there is only one Accessible Checkout Lane at the front of the store that is open and staffed, its use shall not be limited in any way, for example, to “express checkout” for customers with fewer than a designated number of items. It is adequate for these purposes for the Accessible Checkout Lane to be the Service Desk if the Service Desk is the only checkout lane open for all customers and if it complies with the Standards.
- 12.6 Kmart Stores shall be maintained so that people who use wheelchairs or scooters have access to each Kmart Store and to all facilities and merchandise within each Kmart Store as follows:
 - 12.6.1 All merchandise displayed on Fixed Displays shall be on an Accessible Route, provided that, boxes or other containers of merchandise that are being used in the stocking process may obstruct access to merchandise if the associate engaged in stocking is in attendance, working with the boxes or containers in question, provided further that the boxes or containers may be left unattended for a brief period of time when, for example, the associate is required to assist a customer. Access to merchandise on Fixed Displays may not be obstructed by ladders, equipment or, with the exception set forth in Paragraph 12.6.4, Aisle Stacks, provided that a ladder or piece of equipment may be left in an aisle if it is being attended by an associate or is left unattended for a brief

period of time when, for example, the associate is required to assist a customer.

- 12.6.2 All appliances that are displayed directly on the sales floor shall be on an Accessible Route.
- 12.6.3 There shall be a path of thirty-six (36) inches to all merchandise displayed in a Drive Aisle.
- 12.6.4 “Aisle Stacks,” defined as displays of merchandise placed in an aisle adjacent to shelving, are permitted only in the Pantry of a Big K Kmart Store or the Grocery of a SuperK Kmart Store. Furthermore, Aisle Stacks must be placed so that they do not obstruct access for people who use wheelchairs or scooters to any category of merchandise.
- 12.6.5 Fitting rooms required under the Standards to be accessible shall be on an Accessible Route, shall be free and clear of obstructions, and shall only be locked if all other fitting rooms are locked.
- 12.6.6 Restrooms required under the Standards to be accessible shall be on an Accessible Route, shall be free and clear of obstructions, shall only be locked if all other restrooms are locked, and shall be accessible through a door that requires no more than five pounds of force to open.
- 12.6.7 Parking spaces and parking access aisles required under the Standards to be accessible shall be on an Accessible Route and shall be free and clear of obstructions. Periodic restriping shall be conducted so that the parking spaces and access aisles are in compliance with the Standards.
- 12.6.8 If merchandise is displayed for sale on a sidewalk or in a parking lot at a Kmart Store, it will be arranged so that an Accessible Route is maintained to the merchandise so displayed and to an accessible entrance to the Kmart Store.
- 12.6.9 Each service counter that is not a checkout counter shall be on an Accessible Route. At each service counter that is not a checkout lane but that contains a cash register, the lowered portion of such counter shall be clear and free of obstructions, including but not limited to the cash register or there shall be a flip down counter that provides substantially equivalent access to the maximum extent practicable, which flip down counter shall be maintained in working condition, free and clear of obstructions.

- 12.6.10 Access to an entire area of a Kmart Store may be blocked if access is blocked for all customers, regardless of disability.
- 12.6.11 It is understood between the Parties that the footwear departments of the Kmart Stores are operated by a third party pursuant to a license agreement. Kmart will use its reasonable best efforts to attempt to ensure compliance with Paragraph 12 of this Agreement by such third party, provided that failure by such third party to comply shall not subject Kmart to any remedies under this Agreement. If a pattern of noncompliance is identified in the footwear departments of Kmart Stores pursuant to Paragraph 14 below, Kmart will write to the entity that controls the footwear department in question, inform it of its legal obligations to comply with the ADA, describe the specific ways in which the area in question does not comply with the ADA, and request the entity to bring the area in question into compliance. Kmart shall provide a copy of any such correspondence to Class Counsel at the same time it is sent to the addressee entity.
- 12.6.12 Kmart will ensure that any future contracts, licenses or other arrangements through which it permits a third party to conduct retail operations within a Kmart Store will require the third party to comply with Title III of the ADA.
- 12.7 Kmart shall use its best efforts to ensure that all of its employees who work in the public spaces of Kmart Stores provide requested assistance to people who use wheelchairs or scooters, including, but not limited to, retrieving merchandise and carrying purchases to vehicles, provided that Kmart Personnel may request that the vehicle be moved to a reasonable location. Kmart Personnel shall use their reasonable best efforts in attempting to identify the driver of any vehicle blocking a vehicle belonging to a person who uses a wheelchair or scooter, such as by making announcements on the public address system and will, in the course of regular restriping of its parking lots and to the extent it is responsible for such restriping, cause the words "No Parking" to be painted into all parking access aisles in letters at least twelve (12) inches in height.
- 12.8 Kmart shall permit individuals who use wheelchairs or scooters to be accompanied by a service animal while shopping in a Kmart Store to the extent required by the ADA, the Department of Justice regulations and written guidance on service animals.

13 Operations, Policy and Training Materials.

- 13.1 Kmart shall train Kmart Personnel to follow the requirements of this Agreement and to treat customers with disabilities with respect and courtesy.

- 13.2 Within one hundred and twenty (120) days of Final Approval, Kmart shall provide to Class Counsel a draft of the materials it proposes to use to implement Paragraph 13.1. These materials shall include the following elements:
- 13.2.1 Kmart shall produce a training videotape, the sole topic of which is providing service to people with disabilities, including but not limited to the policies in Paragraph 12. This videotape shall be shown to all store employees once per year and to all new store employees.
 - 13.2.2 Kmart will instruct its store managers and its assistant store managers as to the specific obligations of Kmart under this Agreement and the legal consequences of failing to comply with it. As part of this process, Kmart will provide its store managers and its assistant store managers with a copy and summary of this Agreement.
 - 13.2.3 The policies required by Paragraph 12 shall be explained prominently in any training and policy materials that address the specific operational areas in question, for example, stocking, store layout, merchandising, cleaning and maintenance.
 - 13.2.4 Kmart will produce materials to train store managers, assistant store managers, and any employees responsible for the layout of merchandise on Moveable Displays with respect to the policies required by Paragraph 12 of this Agreement.
 - 13.2.5 Kmart will instruct Kmart Personnel who work on the sales floor of any Kmart Stores that,
 - 13.2.5.1 upon request by a customer who uses a wheelchair or scooter to assist in accessing inaccessible merchandise, they must provide assistance regardless of whether they are assigned to the area of the store in which assistance is requested; and
 - 13.2.5.2 they must respond to a customer service request pursuant to Paragraph 12.3.3 within three (3) minutes.
 - 13.2.6 Kmart will train Kmart Personnel responsible for arranging Moveable Displays to be aware that many Kmart customers use wheelchairs and scooters and to attempt to provide as much access as possible to the merchandise on Moveable Displays and at a minimum such access as is required by Paragraphs 12.1 and 12.2 (as appropriate) of this Agreement.

- 13.2.7 Kmart Personnel shall periodically be reminded of the need to ensure the accessibility of the store for people who use wheelchairs and scooters by, for example, including that information in periodic bulletins or in-store training.
- 13.2.8 The senior member of store management on duty in each Kmart Store shall be designated to respond to customer questions concerning accessibility for people who use wheelchairs and scooters and about this Agreement.
- 13.3 Class Counsel shall have sixty (60) days from receipt of the proposed materials required by Paragraph 13.2 to notify Kmart whether they object to or have comments on any part of it.
- 13.4 If Class Counsel notify Kmart of any objection or comments pursuant to Paragraph 13.3, the Parties shall meet and confer within thirty (30) days to attempt to address the objections or comments. If any objections remain following this meet and confer, either party may submit the matter to Dispute Resolution.

14 **Monitoring of Compliance.**

- 14.1 The Parties shall monitor Kmart's compliance with Paragraph 12 as more fully described in this Paragraph.
- 14.2 Class Counsel shall be entitled to visit any Kmart Store at any time without notice for the purpose of evaluating compliance with Paragraph 12. Class Counsel will not take any photographs, take any measurements, or undertake any similar activities unless Class Counsel has reasonably in advance discussed their desire to do so with the Kmart Settlement Contact so that the Kmart Settlement Contact can alert the relevant store manager or manager on duty that Class Counsel intend to take photographs, take measurements or undertake similar activities.
- 14.3 Starting by the date six (6) months from Final Approval, Kmart shall employ Mystery Shoppers to evaluate Kmart's compliance with Paragraph 12 in accordance with the following:
- 14.3.1 It is understood that Kmart has in place an ongoing program of employing Mystery Shoppers who visit each Kmart Store one time per month. To the extent this program continues, it is agreed that Kmart's compliance with Paragraph 12 may be evaluated by the incorporation into such program of a set of at most fifteen (15) questions, to be agreed upon between Kmart and Class Counsel, addressing substantially the subjects listed in Exhibit 4 hereto.

- 14.3.2 Kmart will make a good faith effort to ensure that at least ten (10) percent of the Mystery Shoppers are people who require a wheelchair or scooter for mobility. Kmart will make a good faith effort to ensure that ten (10) percent of the Mystery Shopper visits to Kmart Stores are by people who require a wheelchair or scooter for mobility, and that each Kmart Store is visited by a Mystery Shopper who uses a wheelchair or scooter at least once each year. Mystery Shopper forms will require the Mystery Shopper to state whether or not he or she uses a wheelchair or scooter for mobility.
- 14.3.3 Kmart and Class Counsel will meet and confer to agree on additions to the Mystery Shopper training sufficient to permit Mystery Shoppers to understand the significance of the questions referred to in Paragraph 14.3.1 to people who use wheelchairs or scooters.
- 14.3.4 Kmart shall ensure that a Mystery Shopper visits each Kmart Store at least once each month.
- 14.3.5 Kmart shall provide copies of the portions of the completed Mystery Shopper forms relating to compliance with Paragraph 12 and any compilations or summaries, in whole or in part, relating to compliance with Paragraph 12 prepared by the company that runs the Mystery Shopper program to Class Counsel on a monthly basis.
- 14.3.6 All expenses of the Mystery Shopper program shall be borne by Kmart.
- 14.3.7 If Kmart discontinues or materially changes its Mystery Shopper program, it will notify Class Counsel at least sixty (60) days before such action is to be taken. The Parties will meet and confer concerning how to put in place a system that provides, at Kmart's expense, a monitoring system as effective as the Mystery Shopper program.
- 14.4 Starting by the date six (6) months from Final Approval, Kmart shall establish a toll-free telephone number that customers may call and an accessible website that customers may use to convey to Kmart their comments concerning the accessibility of Kmart Stores.
- 14.4.1 During the term of this Agreement, Kmart shall post and maintain signs prominently throughout each Kmart Store, informing customers who use wheelchairs or scooters that it is soliciting their comments, and providing both the toll-free telephone number and the website address. The signs shall be substantially in the form of Exhibit 5 hereto and shall be posted in at least the following locations so as to be visible to

individuals who use wheelchairs or scooters: at each exit (facing in); and at the customer service counter (facing the customer).

- 14.4.2 The website shall pose specific questions covering substantially the areas listed in Exhibit 6 hereto, as well as provide an opportunity for individuals to make comments in their own words. Kmart will provide a link to the website on its main page (currently <http://www.kmart.com/home.jsp>) that is close enough to the top of the page to be visible in the first frame. Kmart will use its good faith efforts to design and generate each page of the website so that each substantially complies with Priorities 1 and 2 of the Web Content Accessibility Guidelines found at www.w3.org.
- 14.4.3 Kmart shall maintain comment forms at the customer service counter. The comment forms shall be postcard-sized forms that provide a space for general comments and also list the url for the website referred to in Paragraph 14.4.2 and the telephone number referred to in Paragraph 14.4.4, and shall include a mailing address to which the forms are intended to be sent. Upon request, Kmart Personnel will provide assistance in filling out the form.
- 14.4.4 Kmart maintains a toll-free telephone number for customer comments. Kmart shall provide an option on this telephone number for commenting on the accessibility of Kmart Stores to customers with disabilities.
- 14.4.5 Kmart shall provide copies of the responses and comments generated by the website and the in-store forms and records of the calls received at the toll-free telephone number relating to the accessibility of Kmart Stores to individuals who use wheelchairs or scooters to Class Counsel on a monthly basis.
- 14.4.6 All expenses of the website, toll-free telephone number, and comment forms in this Paragraph shall be borne by Kmart. In addition, Kmart shall bear the expense of ensuring that the information from the website and the comment forms is entered into a single database, to which Kmart and Class Counsel both have access. At its option, Kmart will either enter the information itself, or reimburse Class Counsel for entering the information.
- 14.5 If any of the materials provided to Class Counsel pursuant to Paragraphs 14.2 through 14.4 reveal a pattern of noncompliance with this Agreement, the Parties shall meet and confer to attempt to address the issue. If any disputes remain following this meet and confer, either party may submit the matter to Dispute Resolution.

- 14.6 Starting by the date six (6) months from Final Approval through a date two (2) years from when such monitoring commences, Kmart will monitor compliance with Paragraphs 12.1 and 12.2 as follows:
- 14.6.1 Once per week, the store manager or an assistant store manager in each Kmart Store will review all Moveable Displays in all Moveable Display Areas using a thirty-two (32) inch or thirty (30) inch measuring device (as appropriate), to ascertain whether those Moveable Displays are in compliance with Paragraph 12.1 or 12.2 (as appropriate). If the store manager or an assistant store manager discovers that the Store is out of compliance with Paragraph 12.1 or 12.2 (as appropriate) he or she will cause the noncompliance to be remedied within the same business day.
 - 14.6.2 No less than once each month, the Kmart employee who conducted the reviews referenced in Paragraph 14.6.1 will record the results of the review into a form based on Exhibit 7.
 - 14.6.3 Kmart shall provide copies of the forms referenced in Paragraph 14.6.2 to Class Counsel on a monthly basis.
 - 14.6.4 In the event that Class Counsel believes there is a pattern of noncompliance with the policies set forth in Paragraphs 12.1 and 12.2, the Parties shall meet and confer to attempt to address the issue. In addressing the issue, the Parties shall take into account, among other things, the extent to which Kmart is out of compliance, the reasons for noncompliance, the season, and any changes to Kmart business strategies that may occur during the Term of this Agreement.
- 14.7 Kmart shall ensure that the results of the monitoring described in this Paragraph, including but not limited to the results of the Mystery Shopper program, shall be one of the criteria in the evaluations used in consideration of salaries, bonuses and advancement for Kmart store management, so that Kmart store management will be encouraged to maintain an accessible store, and discouraged from permitting inaccessible conditions to persist.

15 **Monetary Relief and Claims Procedure.**

15.1 Monetary Settlement Funds

- 15.1.1 To satisfy and settle all claims for damages of the Named Plaintiffs in the Lawsuit, and all claims for Statutory Minimum Damages of members of the Damages Settlement Sub-Class, Kmart will pay thirteen million and thirty-six thousand (13,036,000) dollars, to be split as follows:

(a) ten thousand (10,000) dollars each to the three (3) Named Plaintiffs; (b) one thousand (1,000) dollars each to the six (6) Damages Settlement Sub-Class Named Plaintiffs; and (c) eight million (8,000,000) dollars in cash and five million (5,000,000) dollars in Gift Cards, comprising the Damages Sub-Class Fund, to be allocated among the Damages Settlement Sub-Class in the manner set forth in Paragraph 15.5.

15.1.2 Creation of Funds

15.1.2.1 Within thirty (30) days after Final Approval of this Agreement, Kmart shall transfer to an interest-bearing trust account (the “Account”) the sum of thirty-six thousand (36,000) dollars (the “Named Plaintiff Fund”), and the sum of eight million (8,000,000) dollars (the “Cash Fund”) representing the cash portion of the Damages Sub-Class Fund. All interest earned on the Account between the time the Funds are deposited and the time the Funds are distributed to the Named Plaintiffs, Damages Settlement Sub-Class Named Plaintiffs, and Damages Settlement Sub-Class, less taxes owed on such interest, shall be used to pay the Named Plaintiffs, Damages Settlement Sub-Class Named Plaintiffs, and Damages Settlement Sub-Class in accordance with the provisions of this Agreement. In addition, in accordance with generally accepted accounting principles, Kmart shall establish and maintain a segregated account on its books, in the amount of five million (5,000,000) dollars (the “Gift Card Fund”) representing the Gift Card portion of the Damages Sub-Class Fund. Together, the Cash Fund and the Gift Card Fund (collectively, the “Funds”) shall be used to satisfy and settle claims of and make payments to and/or provide Gift Cards to members of the Damages Sub-Class who are determined to be “Eligible Claimants” (as that term is defined in Paragraph 15.3 herein).

15.1.2.2 Kmart shall retain an independent claims administrator (the “Claims Administrator”), who is mutually selected by the Parties, to: (1) distribute notice and Claims Forms; (2) receive and track returned Claims Forms; (3) obtain supplemental information from claimants, as necessary; (4) receive and forward to the Parties and the Court Opt-Out Statements and Objections; (5) verify the validity of each claim submitted and certify those who are Eligible Claimants; (6) administer and disburse awards from the Funds; and (7) perform such other duties as agreed by the Parties that are

necessary to carry out the provisions of the Agreement. The Claims Administrator shall be an organization or entity experienced and qualified in the administration of class action monetary settlement distribution and/or claims proceedings. Kmart shall be responsible for all reasonable fees, expenses, and costs incurred by the Claims Administrator. Kmart shall provide the Claims Administrator check-writing authority on the Account as necessary and appropriate to satisfy its responsibilities under this Agreement.

- 15.2 Payments to the Named Plaintiffs. Within thirty-five (35) days after Final Approval of the Agreement, the Claims Administrator shall make payment of \$36,000 from the Named Plaintiff Fund to the Named Plaintiffs and Damages Settlement Sub-Class Named Plaintiffs as follows:

| | |
|---|--------------|
| Carrie Lucas | \$10,000 |
| Debbie Lane | \$10,000 |
| Julie Reiskin | \$10,000 |
| Damages Settlement Sub-Class Named Plaintiffs | \$1,000 each |

The Claims Administrator shall cause to be mailed, via certified mail, return receipt requested, checks in the amounts specified in this paragraph and 1099 forms to the Named Plaintiffs and Damages Settlement Sub-Class Named Plaintiffs.

- 15.3 Eligibility for Payments from the Damages Sub-Class Fund. To be an “Eligible Claimant” and be eligible for an award from the Damages Sub-Class Fund, an individual must satisfy each and all of the following criteria:

- 15.3.1 Return a completed “Claim Form” (in a form substantially similar to that attached hereto as Exhibit 9) that is postmarked by no later than the deadline stated in the Claim Form;
- 15.3.2 State under oath that he/she is an individual who used or uses a wheelchair or scooter for mobility who has been to a Kmart Store or Closed Kmart Store located in a Statutory Minimum Damages State between May 6, 2003 and the deadline for Opt-Out Statements;
- 15.3.3 State under oath the approximate location(s) of the Kmart Store(s) or Closed Kmart Store(s) that he or she went to, including at a minimum the city(ies) and state(s) in which the Store(s) are located;

- 15.3.4 State under oath that, during a visit to one of the Kmart Stores or Closed Kmart Stores, (a) he/she encountered an Architectural Barrier that hindered his/her access at the Store or (b) he/she encountered an Other Barrier that hindered his/her access at the Store; and (c) describe the manner in which his/her access was hindered at the Store. A visit that complies with Paragraphs 15.3.2 and 15.3.4 shall be referred to as a “Qualifying Visit.”
- 15.3.5 Not previously have released his/her claims against Kmart; and
- 15.3.6 Not have validly opted out of any claim for damages as permitted by Paragraph 16 of this Agreement.
- 15.3.7 Notwithstanding Paragraph 15.2, Named Plaintiffs shall be eligible for payments from the Damages Sub-Class Fund in accordance with the same criteria and procedures applicable to other Eligible Claimants.

15.4 Claims Determination Process

- 15.4.1 **Distribution of Claim Forms.** Commencing with the Notice Deadline set by the Court and continuing through the Claim-filing deadline provided in Paragraph 15.4.2 herein, the Claims Administrator shall mail a Claim Form to each potential Damages Settlement Sub-Class Member who makes a written or telephone request therefor. For any request for a Claim Form received prior to fourteen (14) days before the Claim-filing deadline, the Claims Administrator shall mail the Claim Form within seven (7) days after receiving a written or telephone request. Thereafter, and until the Claim-filing deadline, the Claims Administrator shall mail a Claim Form within three (3) business days after receiving a written or telephone request for a Claim Form from a potential Damages Settlement Sub-Class Member. Any written request for Claim Forms received by Class Counsel or Kmart’s counsel shall be forwarded to the Claims Administrator by electronic mail or facsimile within forty-eight (48) hours (excluding weekends and holidays) of its receipt, and within three (3) business days of receipt by the Claims Administrator, the Claims Administrator shall mail a Claim Form to the potential claimant. Any potential claimant who telephones Class Counsel or Kmart’s counsel and requests a Claim Form shall immediately be referred to the Claims Administrator.
- 15.4.2 **Filing of Completed Claim Forms.** All claims for monetary payment or Gift Cards from the Damages Sub-Class Fund shall be made in writing using the Claim Form. All Claim Forms must be signed by the claimant under penalty of perjury. Each potential Damages Settlement Sub-Class

Member, including minors, must submit his/her own Claim Form. A parent, legal guardian or next of kin may complete and sign a Claim Form on behalf of a minor. A designated representative may complete and sign a Claim Form on behalf of a claimant who, because of disability, cannot sign his or her name. If a potential Damages Settlement Sub-Class Member experienced more than one discriminatory incident, all such incidents must be detailed on one (1) Claim Form. All Claim Forms must be mailed to the Claims Administrator and postmarked by no later than the date that is twenty (20) days after the final approval hearing.

- 15.4.3 Review of Claim Forms. The Claims Administrator shall initially review all Claim Forms to determine if the form is filled out completely and is signed properly. If the Claim Form is incomplete or is not signed properly, the Claims Administrator shall return the Claim Form to the claimant and the claimant shall be given thirty (30) days from the date of that mailing within which to return to the Claims Administrator the Claim Form completed and/or signed properly. The failure of a claimant to complete, sign and return his or her Claim Form within thirty (30) days shall result in a denial of his or her claim.
- 15.4.4 Approval of Claims. The Claims Administrator shall then conduct a review of all Claim Forms to determine whether they present valid claims in accordance with the terms and provisions of this Agreement. All claimants whose claims are determined to be valid by the Claims Administrator shall be eligible for an award from the Damages Sub-Class Funds.
- 15.4.5 Disputed Claims. If upon initial review of the Claim Form, the Claims Administrator is unable to determine the validity of the claim, the Claims Administrator shall so notify the claimant in writing and state the reasons why the information contained on the Claim Form is insufficient to determine the validity of the claim. The claimant shall be given thirty (30) days from the date of mailing of the notification in which to supplement or amend the Claim Form or provide such other information he or she wishes to assist the Claims Administrator in determining the validity of the claim. Upon further review of the Claim Form, including such additional information as may be submitted by the claimant, the Administrator shall (i) approve the claim, in which case, the claimant is eligible for an award from the Funds; or (ii) reject the claim.
- 15.4.6 Rejected Claims. If the Claims Administrator rejects a claim as not meeting the terms or provisions of this Agreement, the Administrator shall so notify the claimant in writing.

- 15.4.7 Deadline for Administrator Review of All Claims. The Claims Administrator shall complete its review and issue a determination as to claim eligibility of all Claim Forms within ninety (90) days of the deadline for submission of Claim Forms set forth in Paragraph 15.4.2.
- 15.4.8 Determination – Final and Binding. All determinations of the Claims Administrator shall be final, binding, and non-appealable. Kmart shall have no responsibility for or role in the claims determination process.

15.5 Class Monetary Distribution.

15.5.1 The purpose of this Paragraph is to distribute the Damages Sub-Class Fund by: (a) determining the State Specific Fund for each Statutory Minimum Damages State; and (b) distributing each State Specific Fund to Eligible Claimants who visited Kmart Stores or Closed Kmart Stores in that state.

15.5.2 Determining State Specific Funds.

15.5.2.1 The purpose of this Paragraph is to determine the State Specific Fund for each Statutory Minimum Damages State in a manner that reflects the number of Kmart Stores and Closed Kmart Stores in each Statutory Minimum Damages State, and the Statutory Minimum Damages Amount in each Statutory Minimum Damages State.

15.5.2.2 To accomplish this purpose, each Statutory Minimum Damages State will be assigned a “Factorial,” which is the product of the number of Kmart Stores and Closed Kmart Stores in that state times that state’s Statutory Minimum Damages Amount. For example, there are 130 Kmart Stores and Closed Kmart Stores in California, and California’s Minimum Statutory Damages Amount is \$4,000. Thus the California Factorial is 520,000 (the product of 130 times 4,000). The percentage of the Damages Sub-Class Fund allocated to a Statutory Minimum Damages State is determined by dividing that state’s Factorial by the combined sum of the Factorials of all Statutory Minimum Damages States. Exhibit 8 sets forth the Factorials and the State Specific Funds for each Statutory Minimum Damages State.

15.5.3 Distribution of State Specific Funds.

- 15.5.3.1 Each State Specific Fund will be distributed only to Eligible Claimants who visited one or more Kmart Stores or Closed Kmart Stores in that State, or to the designated Cy Pres recipient for that State Specific Fund as set forth in Paragraph 15.6.
- 15.5.3.2 For each Qualifying Visit to a Kmart Store or Closed Kmart Store located in a Statutory Minimum Damages State, an Eligible Claimant shall receive from that State Specific Fund a pro rata award worth up to the state's Statutory Minimum Damages Amount.
- 15.5.3.3 The maximum number of visits to Kmart Stores or Closed Kmart Stores for which an Eligible Claimant may obtain recovery is two (2). An Eligible Claimant who has been to Kmart Stores or Closed Kmart Stores in more than one Statutory Minimum Damages State will obtain recovery from the State Specific Fund with the greatest Statutory Minimum Damages Amount. By way of illustration, an Eligible Claimant who made four (4) Qualifying Visits to Kmart Stores in California, and four (4) Qualifying Visits to Kmart Stores in Colorado, would obtain a pro rata recovery from the California Specific Fund for two (2) California visits because the California Statutory Minimum Damages Amount is greater than the Colorado Statutory Minimum Damages Amount.
- 15.5.3.4 To the extent that the claims submitted and found to be eligible with respect to a State Specific Fund exceed the amount of the State Specific Fund, the Claims Administrator shall make pro rata reductions in the awards from that State Specific Fund.
- 15.5.3.5 Eligible Claimants may express a preference for receiving their award in cash or in Gift Cards. The Claims Administrator shall take such elections into consideration to the extent reasonably possible. The Claims Administrator's distribution formula, allocation determinations, and award amounts shall be final and binding on all class members and not subject to appeal.
- 15.5.3.6 No later than ten (10) days after the deadline for completion of the claims determination process set forth in Paragraph 15.4.7, the Claims Administrator shall provide Class Counsel

and Kmart with a list of the names, addresses, telephone numbers, email addresses, a copy of the claims forms, and the pro rata amount of the validated claim from the Cash Fund and Gift Card Fund, of all persons who have submitted claims in connection with the Lawsuit. Each Gift Card shall be issued in increments of twenty-five (25) dollars or fifty (50) dollars with some minimum number of Gift Cards being issued in a lesser amount for purposes of rounding. Kmart will forward the Gift Cards to the Claims Administrator within thirty (30) days of receiving the list from the Claims Administrator.

15.5.3.7 Not later than ten (10) business days after receiving the Gift Cards from Kmart, the Claims Administrator shall cause to be mailed, via certified mail, return receipt requested, checks and/or Gift Cards in the amounts specified in the claims determination process, and 1099 forms to Eligible Claimants. All checks shall be negotiable for no more than one (1) year from the date of mailing. Gift Cards shall have no expiration date.

15.5.3.8 All returned checks and Gift Cards of claimants for whom no additional address is obtained shall be held by the Claims Administrator for sixty (60) days. If no claim is made for such checks or Gift Cards during this time period, the funds from such checks and half of the Gift Cards (by value) shall become part of the funds to be allocated to the Cy Pres and distributed in accordance with Paragraph 15.6 of this Agreement. The other half of such Gift Cards (by value) shall be cancelled.

15.6 Cy Pres.

15.6.1 In the event that any portion of a State Specific Fund has not been distributed as provided for by this Agreement after a period of four hundred (400) days has elapsed from the date on which settlement checks are mailed by the Claims Administrator, then such remaining amounts shall be used first to pay any otherwise valid claims against that State Specific Fund that were excluded from the Class Monetary Distribution through error or omission of the Claims Administrator. If, after such further actions, Gift Cards or funds that were available to be distributed through Gift Cards still have not been distributed, Kmart may cancel half the total value of such remaining Gift Cards or amount available to be distributed through Gift Cards and shall release half the

amount remaining in the Gift Card Fund attributable to the relevant State Specific Fund. Any further balance remaining in such State Specific Fund, including all remaining cash and the other half of the Gift Cards (by value), shall be paid as follows:

- 15.6.1.1 Remaining funds from the State Specific Fund for California shall be paid to the Disability Rights Education & Defense Fund, 2212 Sixth Street, Berkeley, CA 94710.
- 15.6.1.2 Remaining funds from the State Specific Fund for Colorado shall be paid to the Colorado Cross-Disability Coalition, 655 Broadway, Suite 775, Denver, CO 80203.
- 15.6.1.3 Remaining funds from the State Specific Fund for Hawai'i shall be paid to the Hawai'i Disability Rights Center, 900 Fort Street Mall, Suite 1040, Honolulu, Hawaii 96813.
- 15.6.1.4 Remaining funds from the State Specific Fund for Massachusetts shall be paid to the Disability Law Center, Inc., 11 Beacon Street, Suite 925, Boston, MA 02108.
- 15.6.1.5 Remaining funds from the State Specific Fund for New York shall be paid to the Anti-Discrimination Center of Metro New York, 299 Broadway, Suite 1820, New York, NY 10007-1913.
- 15.6.1.6 Remaining funds from the State Specific Fund for Oregon shall be paid to the Oregon Advocacy Center, 620 SW Fifth Ave., 5th Floor, Portland, OR 97204-1428.
- 15.6.1.7 Remaining funds from the State Specific Fund for Texas shall be paid to Advocacy, Inc., 7800 Shoal Creek Boulevard, Suite 171-E, Austin, Texas 78757-1024.

15.6.2 The Cy Pres recipients may raffle, donate, transfer, or use Gift Cards in order to support their exempt purposes and activities.

16 **Opt-Out Right.**

- 16.1 Any potential Damages Settlement Sub-Class Member (but not a Named Plaintiff) may request exclusion from the sub-class for purposes of monetary relief only. Potential Damages Settlement Sub-Class Members who wish to opt out of the sub-class for purposes of participation in the monetary portion of the settlement must submit a written and signed request for exclusion ("Opt-Out Statement") to

the Claims Administrator. Opt-Out Statements must be postmarked and mailed to the Claims Administrator not later than sixty (60) days after the Notice Deadline set by the Court. The Opt-Out Statement shall, at minimum, contain the following language:

I wish to opt out of the monetary portion of the settlement of this case. I understand that by requesting to be excluded from the class monetary settlement, I will receive no money or Gift Cards from the settlement funds created in accordance with the Agreement entered into by Kmart. I understand that if I am excluded from the class monetary settlement, I may bring a separate action seeking damages. I understand that in any separate lawsuit, I may receive nothing or less than I would have received if I had filed a claim under the monetary provisions of this Agreement. I also understand that I may not seek exclusion from the non-monetary relief set forth in the Agreement, and that I will be bound by the class injunctive provisions of the Agreement entered into by Kmart if the Agreement is approved by the Court.

- 16.2 To the extent a potential Damages Settlement Sub-Class Member submits an Opt-Out Statement with language that differs from the foregoing, either party reserves the right to seek review of the Court to have the Opt-Out Statement declared valid or invalid. All potential Damages Settlement Sub-Class Members who do not timely opt out of the damages provisions of this Agreement shall be bound by the resolution of any and all issues arising in connection with the Damages Settlement Sub-Class claims for damages and attorneys' fees.
- 16.3 No Settlement Class Member may opt out of the injunctive relief provisions of this Agreement. No Named Plaintiff may opt out of any of the provisions of this Agreement.
- 16.4 The Claims Administrator shall stamp the date received on the original of any Opt-Out Statement it receives and serve copies of the Statement on Class Counsel and Kmart's counsel not later than three (3) business days after receipt thereof and shall file the date-stamped originals of any Opt-Out Statements with the Clerk of the Court not later than ten (10) business days prior to the date set for the final approval hearing. The Claims Administrator shall retain copies of all Opt-Out Statements in its files until such time as the Claims Administrator is relieved of its duties and responsibilities under this Agreement.

17 **Additional Information to Class Counsel.**

- 17.1 Class Counsel may request additional information regarding any matter covered by this Agreement if such additional information is necessary to determine whether or not Kmart is in compliance with this Agreement.

17.2 Kmart shall provide such additional information or state its objection to providing such information within fourteen (14) days of its receipt of a written request by Class Counsel.

17.3 If either Party disagrees concerning information to be provided pursuant to this Paragraph, either Party may submit the matter to Dispute Resolution.

18 Periodic Meetings Between the Parties and Annual Report to the Court.

18.1 Class Counsel and Kmart will meet once every ninety (90) days until the first anniversary of Final Approval, and once every one hundred twenty (120) days thereafter, to discuss and review the implementation of this Agreement. Such meetings may be either in person or by telephone, as the Parties agree.

18.2 Each year on the anniversary of the date of Final Approval, the Parties shall submit a report to the Court, stating the status of the implementation of this Agreement and identifying any outstanding issues on which the Parties are then in disagreement.

19 Dispute Resolution. The Parties shall address disputes relating to the provisions of this Agreement as follows.

19.1 Informal dispute resolution

19.1.1 If either Party believes that a dispute exists relating to the provisions of this Agreement, it shall notify the other Party in writing, describing the dispute. The other Party shall respond in writing to such notice within fifteen (15) business days of receipt of the notice.

19.1.2 Within fifteen (15) business days of receipt of the response described in Paragraph 19.1.1, counsel for both Parties shall meet and confer by telephone or in person and attempt to resolve the issue informally. If the Parties believe it would be useful to enter mediation on the issue in dispute, they may agree to do so.

19.1.3 Kmart shall be responsible for all reasonable attorneys' fees and Costs incurred by Class Counsel in pursuing informal dispute resolution pursuant to this Paragraph 19.1.

19.2 Submission to the Court

19.2.1 If the meet and confer process pursuant to Paragraph 19.1 above does not result in a resolution of the dispute within a reasonable time, any Party

may make a motion for resolution of the dispute by Judge John Kane or any other United States District Judge who may be assigned to the case.

19.2.2 In the event either Party finds that it is necessary to seek resolution of the dispute by the Court, the Court shall award reasonable attorneys' fees and Costs incurred in pursuing dispute resolution as set forth in this Paragraph 19.2 of the Agreement in accordance with the prevailing party standards under the ADA.

20 Attorneys' Fees and Costs up to the Date of Final Approval.

20.1 Subject to the presentation of appropriate documentation by Class Counsel, Kmart shall pay an amount not greater than \$125,000 on account of disbursements actually incurred by Class Counsel through execution of this Agreement within the later of ten (10) days after the presentation of appropriate documentation or the execution of this Agreement by sending a check made out to Fox & Robertson, P.C., to 910 16th Street, Suite 610, Denver, CO 80202.

20.2 Subject to Court approval, Kmart shall pay Class Counsel's reasonable attorneys' fees incurred in connection with this matter up to and including the date of Final Approval of this Agreement by the Court in the amount of \$3,250,000. Kmart shall pay the amount on account of attorneys' fees within ten (10) days of Final Approval by sending a check made out to Fox & Robertson, P.C., to 910 16th Street, Suite 610, Denver, CO 80202.

20.3 If the amount paid to Class Counsel for disbursements pursuant to Paragraph 20.1 is less than \$125,000, subject to the presentation of proper documentation by Class Counsel, Kmart shall pay additional amounts on account of disbursements actually incurred by Class Counsel through Final Approval, but only up to an amount such that the total payment on account of disbursements prior to Final Approval does not exceed \$125,000. Under such circumstances, Kmart shall pay any such additional amounts within the later of ten (10) days after the presentation of proper documentation or the Final Approval of this Agreement by sending a check made out to Fox & Robertson, P.C., to 910 16th Street, Suite 610, Denver, CO 80202.

21 Attorneys' Fees and Costs after Final Approval.

21.1 Kmart shall pay reasonable attorneys' fees and Costs incurred by Class Counsel after Final Approval of this Agreement for work performed by Class Counsel pursuant to this Agreement or as necessary to defend this Agreement. Kmart recognizes that such Costs include, but are not limited to, any fees, costs and expenses incurred by Class Counsel in retaining an expert to assist with such work.

- 21.2 Monthly during the term of this Agreement, beginning one month after Final Approval, Class Counsel shall submit to Kmart a statement of reasonable attorneys' fees and Costs incurred pursuant to this Agreement. This submission shall include a statement of the work performed, the persons performing the work, the hourly rate of each such person and a description of the particular Costs and expenses.
- 21.3 If Kmart disagrees with the amount of attorneys' fees and Costs requested, it may submit the matter to Dispute Resolution. Kmart concedes, by operation of Paragraph 21.1 above, that it is obligated to pay to Class Counsel reasonable attorneys' fees and Costs for work performed following Final Approval, provided, however, that Kmart retains the right to dispute the reasonableness of issues raised or disputes pursued by Class Counsel and the reasonableness of the incurrence of fees or expenses in connection therewith.
- 21.4 Kmart shall pay Class Counsel all reasonable attorneys' fees and Costs that Class Counsel claim pursuant to Paragraph 21.2 within sixty (60) days of Kmart's receipt of Class Counsel's submission. If Kmart disputes this amount pursuant to Paragraph 21.3, it shall pay the undisputed portion of the amount within sixty (60) days of Kmart's receipt of Class Counsel's submission and the remaining amount, if any, within thirty (30) days of resolution of any dispute.

22 Preliminary Approval, Objections and Fairness Hearing.

- 22.1 Promptly after execution of this Agreement, the Parties shall jointly request that the Court schedule a preliminary approval hearing within ten (10) days of the request or as soon thereafter as the Court may set the hearing and that the Court preliminarily approve the Agreement, preliminarily certify the Damages Settlement Sub-Class for settlement purposes only, preliminarily enjoin Settlement Class Members and Damages Settlement Sub-Class Members from bringing any claims to be released pursuant to this Agreement, and approve the proposed form of Notice and plan for providing notice submitted by the Parties.
- 22.2 Class Counsel and Kmart shall ask the Court to schedule a fairness and final approval hearing for eighty (80) days after the Notice Deadline set by the Court, or as soon thereafter as the Court may set the hearing.
- 22.3 Class Counsel and Kmart shall ask the Court to order the following procedures for objections: Any Settlement Class Member or Damages Settlement Sub-Class Member may object to the proposed Agreement by filing, within sixty (60) days after the Notice Deadline set by the Court, written objections with the Clerk of the Court. Only such objecting Settlement Class Members and Damages Settlement Sub-Class Members shall have the right, and only if they expressly seek it in their

objection, to present objections orally at the Fairness Hearing. Responses by Kmart and Class Counsel to any timely-filed objections shall be made no less than five (5) days before the Fairness Hearing.

23 **Notice:** At Kmart's expense, notice of this Agreement (the "Notice"), which shall be in a form agreed to by the Parties, will be provided to the Settlement Class and the Damages Settlement Sub-Class, informing class members of at least the following: (1) a general description of the terms of this Agreement; (2) their right to object to the Agreement; (3) their right to opt out of the damages provisions of this Agreement; and (4) with respect to members of the Damages Settlement Sub-Class, the prerequisites for recovery from the Damages Sub-Class Fund. The Notice and the plan for providing notice must satisfy the requirements of Federal Rule of Civil Procedure 23 and applicable legal precedent, and must be approved by the Court. In their motion seeking preliminary approval of the Agreement, the Parties will propose a Notice Deadline and the proposed Notice Deadline will be as soon as reasonably possible.

24 **Judgment, Final Approval and Dismissal.**

24.1 At the time of the Fairness Hearing, Kmart and Class Counsel shall jointly request that the Court enter a Final Judgment and Order in a form agreeable to the Parties granting Final Approval of this Agreement, finally certifying the Damages Settlement Sub-Class for settlement purposes only, and enjoining Settlement Class Members and Damages Settlement Sub-Class Members from asserting any Released Injunctive Claims or Released Damages Claims. Among other things, the Final Judgment and Order shall attach this Agreement as an exhibit and shall provide that the Court retains jurisdiction through the Term of the Agreement in order to enforce this Agreement.

24.2 This Lawsuit shall be dismissed with prejudice pursuant to Rule 41 of the Federal Rules of Civil Procedure, no later than thirty (30) days following the expiration of the Term of this Agreement.

25 **Terms Not Confidential; Communication with the Press.**

25.1 The terms of this Agreement shall not be confidential.

25.2 At a time mutually agreeable to the parties, Fox & Robertson, P.C., on behalf of Class Counsel may issue a press release concerning the Agreement. Fox & Robertson will show a draft of such press release to Kmart prior to issuing it and will provide Kmart a reasonable opportunity to comment on, and have input into, the press release. With respect to the preparation of such press release, Class Counsel acknowledges that this Agreement was negotiated at arm's length in good faith and that Kmart, as part of the settlement process, has worked diligently and in good faith to ensure adequate accessibility for the disabled at Kmart Stores.

25.3 Fox & Robertson or Kmart may discuss the Agreement with members of the media provided that neither shall make any statement to the media that is inconsistent with the third sentence of Paragraph 25.2 or its duties under Paragraph 34.

26 **Releases:**

26.1 Release of Claims for Injunctive Relief

26.1.1 Effective on the date of Final Approval, Named Plaintiffs and all Settlement Class Members and each of their executors, successors, heirs, assigns, administrators, agents and representatives (collectively, the “Injunctive Releasing Parties”), in consideration of the relief set forth herein, the sufficiency of which is expressly acknowledged, unconditionally and forever do fully and finally release, acquit, and discharge Kmart and its present and former parents and subsidiaries and each of their respective present, former or future officers, directors, employees, shareholders, administrators, executors, affiliates, successors and assigns (collectively, the “Kmart Parties”) from the Released Injunctive Claims as defined below.

26.1.2 The “Released Injunctive Claims” are any and all claims, rights, demands, charges, complaints, actions, suits and causes of action, whether known or unknown, suspected or unsuspected, accrued or unaccrued, for injunctive, declaratory or other non-monetary relief, however described, based on conduct preceding Final Approval of this Agreement that were brought, could have been brought or could be brought now or in the future that relate in any way to the accessibility of Kmart Stores to persons who use wheelchairs or scooters under:

26.1.2.1 Title III of the Americans with Disabilities Act, 42 U.S.C. §§ 12181 et seq., and all rules and regulations promulgated thereunder;

26.1.2.2 Cal. Code Regs., Title 24 and all rules and regulations promulgated thereunder, and any other provision of California law to the extent it grants a right of action for alleged violations of the foregoing; and

26.1.2.3 Any state or local statutory, administrative, regulatory or code provisions that either (a) directly incorporate Title III of the Americans with Disabilities Act or any of the rules or regulations promulgated thereunder or (b) set forth

standards or obligations coterminous with or equivalent to Title III of the Americans with Disabilities Act or any of the rules or regulations promulgated thereunder.

26.1.3 The “Released Injunctive Claims” also include all claims, rights, demands, charges, complaints, actions, suits, causes of action or liabilities of any kind for injunctive, declaratory or other non-monetary relief, however described, (collectively, for this subparagraph, “claims”) based on conduct that occurs after Final Approval of this Agreement and during the Term of this Agreement to the extent that such claims arise out of or relate to actions, omissions, or conduct (including physical conditions at Kmart Stores) that are in compliance with the terms of this Agreement.

26.1.4 **Covenant Not to Sue:** Effective on the date of Final Approval, the Injunctive Releasing Parties, in consideration of the relief set forth herein, the sufficiency of which is expressly acknowledged, covenant and agree never to file or institute against any of the Kmart Parties any claim, right, demand, charge, complaint, suit, cause of action, action or proceeding of any kind or nature whatsoever, whether at law, in equity or otherwise, in or before any court, administrative agency, arbitral panel or other tribunal wherever situated, asserting, directly or indirectly, any Released Injunctive Claim or any claim, demand, cause or right of action of any kind or nature whatsoever, whether known or unknown, contingent or absolute, suspected or unsuspected, disclosed or undisclosed, hidden or concealed, based upon or arising out of the Released Injunctive Claims.

26.2 Release of Claims for Statutory Minimum Damages

26.2.1 Effective on the date of Final Approval, Named Plaintiffs and all Damages Settlement Sub-Class Members and each of their executors, successors, heirs, assigns, administrators, agents and representatives (collectively, the “Damages Releasing Parties”), in consideration of the relief set forth herein, the sufficiency of which is expressly acknowledged, unconditionally and forever do fully and finally release, acquit, and discharge the Kmart Parties from the Released Damages Claims as defined below.

26.2.2 The “Released Damages Claims” are any and all claims, rights, demands, charges, complaints, actions, suits, causes of action, and liabilities of any kind, whether known or unknown, suspected or unsuspected, accrued or unaccrued, for Statutory Minimum Damages based on conduct preceding Final Approval of this Agreement that were brought, could have been brought or could be brought now or in the future that relate in any way to

the accessibility of Kmart Stores or Closed Kmart Stores to persons who use wheelchairs or scooters.

26.2.3 The “Released Damages Claims” also include all claims, rights, demands, charges, complaints, actions, suits, causes of action or liabilities of any kind for Statutory Minimum Damages (collectively, for this subparagraph, “claims”) based on conduct that occurs after Final Approval of this Agreement and during the Term of this Agreement to the extent that such claims arise out of or relate to actions, omissions, or conduct (including physical conditions at Kmart Stores) that are in compliance with the terms of this Agreement.

26.2.4 The Released Damages Claims do not include any claims, rights, demands, charges, complaints, actions, causes of action or liabilities for any damages other than Statutory Minimum Damages.

26.2.5 **Covenant Not to Sue:** Effective on the date of Final Approval, the Damages Releasing Parties, in consideration of the relief set forth herein, the sufficiency of which is expressly acknowledged, covenant and agree never to file or institute against any of the Kmart Parties any claim, right, demand, charge, complaint, suit, cause of action, action, liability or proceeding of any kind or nature whatsoever, whether at law, in equity or otherwise, in or before any court, administrative agency, arbitral panel or other tribunal wherever situated, asserting, directly or indirectly, any Released Damages Claim or any claim, demand, cause or right of action of any kind or nature whatsoever, whether known or unknown, contingent or absolute, suspected or unsuspected, disclosed or undisclosed, hidden or concealed, based upon or arising out of the Released Damages Claims.

26.3 **Known or Unknown Claims.** The Damages Releasing Parties and the Injunctive Releasing Parties shall collectively be referred to as the “Releasing Parties.” The Releasing Parties understand and expressly agree that this AGREEMENT extends to all claims of every nature and kind, known or unknown, suspected or unsuspected, past, present, or future, arising from or attributable to any conduct of the Kmart Parties, whether known by the Releasing Parties or whether or not any Releasing Party believes he may have any claims, and that any and all rights granted to the Releasing Party under Section 1542 of the **California Civil Code** or any analogous state law or federal law or regulations, are hereby expressly WAIVED, if applicable. Said Section 1542 of the **California Civil Code** reads as follows:

A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN BY HIM

MUST HAVE MATERIALLY AFFECTED HIS SETTLEMENT WITH THE DEBTOR.

27 **No Third Party Beneficiaries.**

27.1 Nothing in this Agreement, express or implied, is intended to or shall confer upon any person or entity not a Party to this Agreement any right, benefit or remedy of any nature whatsoever under or by reason of this Agreement.

27.2 For purposes of interpreting or enforcing this Agreement, individual class members shall not be deemed to be third-party beneficiaries of this Agreement. Only the Named Plaintiffs through Class Counsel may seek to enforce the terms of this Agreement through the Dispute Resolution process provided for herein or before the Court. To the extent individual class members have complaints regarding Kmart's implementation of the terms of this Agreement, they should bring them to the attention of the Named Plaintiffs and/or Class Counsel.

28 **Entire Agreement.** This Agreement contains all the agreements, conditions, promises and covenants among Kmart, Named Plaintiffs, Class Counsel, the Settlement Class, and the Damages Settlement Sub-Class regarding matters set forth in it and supersedes all prior or contemporaneous agreements, drafts, representations or understandings, either written or oral, with respect to the subject matter of the present Agreement.

29 **Communications to Kmart And Class Counsel.** All notices or communications required by this Agreement shall be in writing by facsimile and U.S. Mail or overnight delivery service addressed as follows:

29.1 To Named Plaintiffs, Class Counsel or the Settlement Class:

Amy F. Robertson
Fox & Robertson, P.C.
910 - 16th Street Suite 610
Denver, CO 80202
303.595.9700
facsimile: 303.595.9705
arob@foxrob.com

29.2 To Kmart:

General Counsel
Sears Holding Corporation
3333 Beverly Road
Hoffman Estates, IL 60179
facsimile: 847.286.2471

Amy R. Wolf
Wachtell, Lipton, Rosen & Katz
51 West 52nd Street
New York, NY 10019
facsimile: 212.403.2000

Kmart may change the individuals to whom notices and communications required by this Agreement shall be sent by providing Fox & Robertson, P.C. with written notification that it wishes to do so.

- 30 **Modification.** Prior to Final Approval, this Agreement can only be amended by written agreement of the Parties hereto. Following Final Approval, no modification of this Agreement shall be effective unless it is pursuant to Court Order.
- 31 **Severability.** If any provision or any part of this Agreement thereof shall at any time be held unlawful, or inconsistent with applicable law, in whole or in part, under any federal, state, county, municipal or other law, ruling or regulation, then the remaining provisions of this Agreement shall remain effective and enforceable.
- 32 **Drafting of this Agreement.** This Agreement is deemed to have been drafted by all Parties hereto, as a result of arm's length negotiations among the Parties. Whereas all Parties have contributed to the preparation of this Agreement, it shall not be construed more strictly against one Party than another.
- 33 **Execution by Facsimile and in Counterparts.** This Agreement may be executed by the Parties hereto by facsimile and in separate counterparts, and all such counterparts taken together shall be deemed to constitute one and the same agreement.
- 34 **Duty to Support and Defend Agreement.** Named Plaintiffs, Class Counsel and Kmart each agree to abide by all of the terms of this Agreement in good faith and to support it fully, and shall use their best efforts to defend this Agreement from any legal challenge, whether by appeal or collateral attack.
- 35 **Continuing Jurisdiction.** The Parties agree that the United States District Court for the District of Colorado shall have continuing jurisdiction throughout the Term of this Agreement to interpret and enforce this Agreement.
- 36 **Stay of Appeal.** On or about the date of execution of this Agreement, the Parties will jointly request that the appeal currently pending before the United States Court of Appeals for the Tenth Circuit, No. 05-0504, shall be stayed up to and including the date set for the fairness and final approval hearing. The Parties will request such additional stays as appropriate beyond the date set for the fairness and final approval hearing in order to effectuate the terms of this Agreement, including seeking a stay to cover the

time, if any, that the decision to finally approve the Agreement is sub judice with the Court.

- 37 **Deadlines.** The Parties and the Court recognize that from time to time unforeseen events, such as exigent business circumstances, labor disputes, natural disasters, personnel issues, and negotiations with third parties, cause delays in the accomplishment of objectives no matter how well intentioned and diligent the Parties may be. Accordingly, with regard to the provisions of this Agreement that require that certain acts be taken within specified periods, the Parties understand and agree that Court approval shall not be required for reasonable extensions of deadlines. In the event that any Party determines that an action required by this Agreement cannot be taken within the specified time period, that Party shall promptly notify the other Parties that it anticipates a delay, the reasons for the delay and a proposed alternative deadline. The Parties shall endeavor to cooperate in reasonably rescheduling such deadlines. However, if the other Party does not agree to the proposed delay, the Parties shall submit the matter to Dispute Resolution.

Carrie Ann Lucas

Date:

Debbie L. Lane

Date:

Julie Reiskin

Date:

APPROVED AS TO FORM & CONTENT:

FOX & ROBERTSON, P.C.

Kmart Corporation

By: _____

Its _____

Date: _____

WACHTELL, LIPTON, ROSEN & KATZ

By: _____

Amy F. Robertson
Timothy P. Fox
910 - 16th Street
Suite 610
Denver, CO 80202

By: _____

Meyer G. Koplou
51 West 52nd Street
New York, New York 10019

Counsel for Kmart Corporation

Counsel for Named Plaintiffs and the
Settlement Class

Carrie Ann Lucas



Date: 02/09/06

Kmart Corporation

By: _____

Its _____

Date: _____

Debbie L. Lane

Date:

Julie Reiskin

Date:

APPROVED AS TO FORM & CONTENT:

FOX & ROBERTSON, P.C.

WACHTELL, LIPTON, ROSEN & KATZ

By: _____

Amy F. Robertson
Timothy P. Fox
910 - 16th Street
Suite 610
Denver, CO 80202

By: _____

Meyer G. Koplow
51 West 52nd Street
New York, New York 10019

Counsel for Kmart Corporation

Counsel for Named Plaintiffs and the
Settlement Class

Carrie Ann Lucas

Kmart Corporation

Date: 2/9/06

By: _____

Its _____

Date: _____

Debbie L. Lane

Debbie L. Lane

Date:

Julie Reiskin

Date:

APPROVED AS TO FORM & CONTENT:

FOX & ROBERTSON, P.C.

WACHTELL, LIPTON, ROSEN & KATZ

By: _____

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Timothy P. Fox
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Denver, CO 80202

By: _____

Meyer G. Koplou
51 West 52nd Street
New York, New York 10019

Counsel for Kmart Corporation

Counsel for Named Plaintiffs and the
Settlement Class

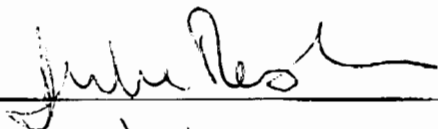
Carrie Ann Lucas

Date:

Debbie L. Lane

Date:

Julie Reiskin



Date: 2/9/06

APPROVED AS TO FORM & CONTENT:

FOX & ROBERTSON, P.C.

Kmart Corporation

By: _____

Its _____

Date: _____

WACHTELL, LIPTON, ROSEN & KATZ

By: _____

Amy F. Robertson
Timothy P. Fox
910 - 16th Street
Suite 610
Denver, CO 80202

By: _____

Meyer G. Koplow
51 West 52nd Street
New York, New York 10019

Counsel for Kmart Corporation

Counsel for Named Plaintiffs and the
Settlement Class

Carrie Ann Lucas

Date:

Debbie L. Lane

Date:

Julie Reiskin

Date:

APPROVED AS TO FORM & CONTENT:

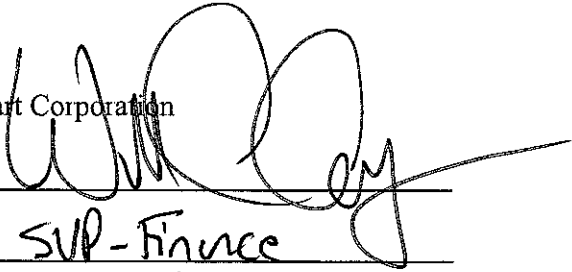
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Carrie Ann Lucas

Kmart Corporation

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Its _____

Date: _____

Date:

Debbie L. Lane

Date:

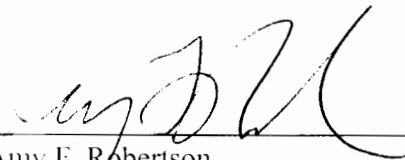
Julie Reiskin

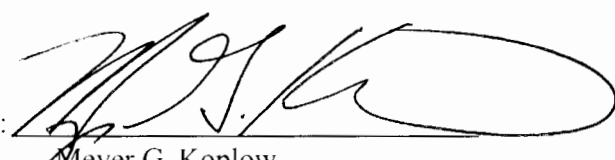
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