IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 99-K-1923

CARRIE ANN LUCAS,
DEBBIE LANE, and
JULIE REISKIN, for themselves and all others similarly situated,

Plaintiffs,

v.

KMART CORPORATION,

Defendant.

PLAINTIFFS' SUPPLEMENTAL PLEADING REGARDING BANKRUPTCY, CLASS CERTIFICATION AND ATTORNEYS' FEES

Pursuant to this Court's Order of June 23, 2003, Plaintiffs, by and through their counsel, hereby submit this Supplemental Pleading.

This brief will demonstrate that:

- The bankruptcy of Defendant Kmart Corporation ("Kmart") does not affect Plaintiffs' ability to pursue injunctive relief under Title III of the Americans with Disabilities Act, 42 U.S.C. § 12181 - 12189 ("ADA" or "Title III"), on a class-wide basis; and
- Should Plaintiffs succeed in obtaining injunctive relief under Title III, Plaintiffs will be entitled to recover their reasonable attorneys' fees and costs for time spent both before and after Kmart's bankruptcy.

Background

Plaintiffs brought this case to challenge violations of the ADA at Kmart's stores nationwide. Plaintiffs allege that Kmart has company-wide policies, practices and physical conditions that present barriers to -- and therefore discriminate against -- its customers who use wheelchairs.

On June 7, 2001, Plaintiffs moved to certify this case as a nationwide class action pursuant to Rule 23 of the Federal Rules of Civil Procedure. Briefing of that motion was completed on January 4, 2002. On January 22, 2002, Defendant Kmart filed a voluntary Petition for Relief under Chapter 11 of the Bankruptcy Code, 11 U.S.C. §§ 101 et seq., in the Bankruptcy Court for the Northern District of Illinois. Pursuant to 11 U.S.C. § 362, that filing automatically stayed the present litigation. On August 29, 2002, this Court administratively closed this case.

On April 23, 2003, the Bankruptcy Court confirmed Kmart's Plan of Reorganization, which terminated the automatic stay. On May 9, 2003, Plaintiffs moved to reopen this case and requested a status conference. On May 13, 2003, this Court granted Plaintiffs' motion, scheduled a status conference for June 23, and invited the parties to submit -- on or before June 20 -- status reports and statements indicating their position on how this case should proceed.

On June 9, 2003, Defendant Kmart filed with this Court a letter from Divisional Vice President Janet H. Delecke (the "Delecke Letter"), which asserted that this case involved claims that were discharged upon confirmation of Kmart's plan of reorganization and should therefore be closed. Pursuant to this Court's Minute Order of June 9, 2003, Plaintiffs filed their response to the Delecke Letter on June 16, 2003. Both parties filed status reports on June 20, 2003;

Defendant's status report also contained its reply to Plaintiffs' June 16 response to the Delecke Letter.

During the Status Conference on June 23, 2003, this Court denied Kmart's request to close this case and stated that it "would allow plaintiffs to proceed under the ADA claim for injunctive relief." (Reporter's Transcript: Status Conference ("Tr.") at 8.) The Court further requested Plaintiffs to submit a brief "address[ing] the implications, if any, of Kmart's post-bankruptcy status on the class certification issue." (Id. at 9.) In addition, the Court noted that Plaintiffs had not had the chance to respond to the arguments raised in Defendant's Status Conference Report, filed June 20, 2003, and specifically invited Plaintiffs to address Defendant's argument relating to attorneys' fees. (Id. at 5, 10.)

This brief addresses the matters raised by the Court at the June 23 hearing.

I. Kmart's Bankruptcy Does Not Impair the Appropriateness or Effectiveness of Class Certification in this Case.

As this Court held in the hearing on June 23, Plaintiffs' Title III action was not discharged by confirmation of Defendant's plan of reorganization, and Plaintiffs are "allow[ed] . . . to proceed under the ADA claim for injunctive relief." (Tr. at 8.)[1] The fact that Defendant

[1] Kmart argued in its Status Conference Report that "[a]ny dispute concerning whether plaintiffs' pending action is a pre-petition claim and was discharged through bankruptcy should be decided by the Bankruptcy Court." (Status Conference Report at 6). This is not accurate. Except for actions concerning dischargeability under certain subsections of § 523 of the Bankruptcy Code -- none of which are at issue here -- this Court has concurrent jurisdiction with the bankruptcy court to determine dischargeability. Whitehouse v. LaRoche, 277 F.3d 568, 578 (1st Cir. 2002) (holding that,"[w]here an asserted exception to discharge relies upon none of the four waivable exceptions to discharge [§ 523(a)(2), (4), (6), and (15)], . . . the jurisdiction of the bankruptcy court is concurrent, hence nonexclusive"), see also Rein v. Providian Fin. Corp., (continued...)

has been through and emerged from bankruptcy should have no effect on Plaintiffs' request to pursue those ADA claims for injunctive relief using the procedural device of a class action.

A class action is an efficient and economical procedural[2] tool to litigate the claims of individuals harmed by common policies and practices, such as those at issue in the present case. "[T]he class-action device saves the resources of both the courts and the parties by permitting an issue potentially affecting every [class member] to be litigated in an economical fashion." Califano v. Yamasaki, 442 U.S. 682, 701 (1979). The Supreme Court has compared those who seek to vindicate the rights of a class to "private attorney[s] general," United States Parole Comm'n v. Geraghty, 445 U.S. 388, 403 (1980), and a leading commentator has noted that class actions "enhance the effectiveness of private attorney general litigation that otherwise might be brought only on an individual basis." 1 Herbert Newberg & Alba Conte, Newberg on Class Actions § 1.06 at 1-19 (3d ed. 1992).

The purpose of the Bankruptcy Code "is to provide a 'fresh start' to a discharged debtor. A suit for illegal conduct occurring after discharge threatens neither the letter nor the spirit of the bankruptcy laws." O'Loghlin v. County of Orange, 229 F.3d 871, 875 (9th Cir. 2000) (quotations and citations omitted). Plaintiffs' use of the class action procedural device to

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[1](...continued)
270 F.3d 895, 904 & n.15 (9th Cir. 2001) (same).

[2] A ruling on class certification is a procedural ruling, collateral to the merits of the litigation. Cf. Deposit Guar. Nat'l Bank v. Roper, 445 U.S. 326, 336 (1980) (holding that denial of class certification is a procedural ruling, collateral to the merits of the litigation). It is not, and is not permitted to be, a ruling on the merits. See Cook v. Rockwell Int'l Corp., 151 F.R.D. 378, 381 (D. Colo. 1993) (citing Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 177-78 (1970)).

challenge ongoing, post-discharge, illegal conduct in an efficient and economical way, likewise, would threaten neither the letter nor the spirit of the bankruptcy laws.

Similarly, nothing that occurred during Kmart's reorganization would undermine the appropriateness of class certification in this case. Rule 23 looks essentially to whether it makes sense to resolve Plaintiffs' claims on a class-wide basis: whether class members are numerous; whether they have common legal and factual claims; whether the class representatives' claims are typical; and whether those individuals can adequately represent the class. Fed. R. Civ. P. 23(a). Kmart continues to be operated on a centralized basis -- as it was pre-bankruptcy -- making a class action the best way to address the impact of its company-wide policies on its customers who use wheelchairs and scooters. To the extent specific policies may have changed -- of which there is currently no evidence[3] -- the question whether such changes bring Kmart into compliance with the ADA is a question on the merits, one which is common to the class and best resolved on a class-wide basis.

The only specific post-bankruptcy change to which Defendant points is the fact that it now has 1,500 stores, instead of the 2,100 it had before it declared bankruptcy. (Status Conference Report at 8.) This would give it approximately 70% of the number of stores that existed pre-bankruptcy. Even if the class is only 70% the size it once was, it would still have 1.2

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[3] See, e.g., Tr. at 7 (in which this Court noted that "Kmart does not allege it has changed any of its allegedly discriminatory policies.")

million -- instead of 1.7 million[4] -- members, sufficiently large that joinder is clearly impracticable. See Fed. R. Civ. P. 23(a)(1).

Defendant also asserts generally that its financial situation has changed due to the bankruptcy, making any analysis of what is "readily achievable" pursuant to 42 U.S.C. § 12182(b)(2)(A)(iv) "extremely complicated." (Def.'s Status Conference Report at 9.) Although Plaintiffs believe that no "readily achievable" analysis will be necessary in this case,[5] the question of what is readily achievable goes to the merits of the case. And because that question requires an analysis of company-wide resources, 28 C.F.R. § 36.104, it is a question that is common to the class. See Arnold v. United Artists Theatre Circuit, Inc., 158 F.R.D. 439, 449 (N.D. Cal. 1994) (holding that where plaintiffs challenged -- under Title III -- conditions at multiple sites owned by a single corporate defendant, the legal standard depended on "various corporation-wide factors such as the availability of resources. These are additional issues of fact and law common among the subclasses."), quoted in Colorado Cross-Disability Coalition v. Taco Bell Corp., 184 F.R.D. 354, 360 (D. Colo. 1999).

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[4] See Pls.' Substituted Mem. in Supp. of Mot. for Class Certification (filed July 13, 2001) at 31.

[5] "Readily achievable" is the standard that applies to existing facilities, that is, those were built before January 26, 1993 and have not been altered since. In such facilities, barriers to access must be removed only where it is "readily achievable" to do so. 42 U.S.C. § 12182(b)(2)(A)(iv). All but 24 Kmart stores were built after January 26, 1993 or fully altered since that time. As such, these facilities are all required to comply with the Department of Justice Standards for Accessible Design. 28 C.F.R. § 36.406(a). See also Pls.' Reply Mem. in Supp. of Mot. for Class Certification (filed Dec. 3, 2001) at 40.

In sum, Plaintiffs' use of the class action procedural device to pursue injunctive relief to remedy ongoing violations of the ADA is in no way inconsistent with the goals of the Bankruptcy Code. Likewise, nothing that occurred during Kmart's bankruptcy affects Plaintiffs' ability to pursue such injunctive relief on a class-wide basis. Any substantive changes in Kmart's operations following bankruptcy present common questions of law and fact -- on the merits -- that are appropriate for resolution through a class action. A class action continues to be the best way to address systemically Kmart's company-wide policies and practices that discriminate against its customers who use wheelchairs.

II. Should Plaintiffs Be Entitled to Recover Attorneys' Fees as Prevailing Parties in this Litigation, Such Recovery Would Not Be Not Limited to Fees Relating to Post-Discharge Legal Work.

Defendant argued in its Status Conference Report that "Plaintiffs' pre-petition attorneys' fees qualify as a 'claim'" because they "were incurred pre-petition and relate to pre-petition conduct." (Id. at 5.) As a result, Kmart argued, Plaintiffs' right to such fees has been discharged. (Id. at 6.) This represents a misunderstanding of the fee-shifting provision of the Americans with Disabilities Act.

A. Any Attorneys' Fees Awarded to Plaintiffs Would Be Based on Kmart's Post-Petition Conduct and Would Be Ancillary to Nondischargeable Injunctive Relief.

Section 505 of the Americans with Disabilities Act states that, "[i]n any action or administrative proceeding commenced pursuant to this chapter, the court or agency, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee, including litigation expenses, and costs." 42 U.S.C. § 12205. The United States Supreme

Court has made clear that a party is not a prevailing party, entitled to fees, unless and until it achieves a "material alteration of the legal relationship of the parties," that is, through an enforceable judgment on the merits or a court-ordered consent decree. Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Resources, 532 U.S. 598, 604 (2001) (quotation and citation omitted). No such judgment or decree entered prior to Kmart's bankruptcy. More importantly, any judgment or decree in this case will be based on Kmart's on-going, post-discharge violations of the Americans with Disabilities Act. 42 U.S.C. § 12188(a)(1) (remedies are available to "any person who is being subjected to discrimination on the basis of disability") (emphasis added). That is, although evidence of Kmart's pre-petition violations will be admissible to show its discriminatory practice, see O'Loghlin, 229 F.3d at 876, any injunction must ultimately be based on the conclusion that these practices are ongoing post-discharge. As such, any entitlement to fees will be based on Kmart's post-discharge -- rather than pre-petition -- conduct.

Because the situation before the Court is rather rare,[6] Plaintiffs have been able to identify only one case precisely on point; in that case, although not discussed explicitly, the fee award ultimately included both pre- and post-bankruptcy work. The defendant in AM International, Inc. v. Datacard Corporation brought counterclaims requesting, among other things, injunctive relief under the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6901 et seq. 106 F.3d 1342, 1346 (7th. Cir. 1997). After defendant Datacard filed its counterclaims, the plaintiff filed for bankruptcy. Id. at 1346. The district court ultimately held that Datacard's counterclaims for injunctive relief had not been discharged, and that it was entitled to attorneys' fees on its RCRA and other claims. Id. On appeal, the Seventh Circuit upheld the district court's determination that Datacard's request for injunctive relief under RCRA was nondischargeable. Id. at 1348. Furthermore, the Seventh Circuit acknowledged that an award of fees was appropriate and remanded to the district court for a more complete explanation for the basis for its fee award. Id. at 1352. It did not address -- and thus did not preclude -- an award of fees for pre-petition work.

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[6] Most of the cases involving nondischargeability of actions for injunctive relief are environmental cases brought by government regulatory agencies, see, e.g., In re Torwico Elecs., Inc., 8 F.3d 146, 150-51 (3d Cir. 1993), cert. denied 511 U.S. 1046 (1994), In re CMC Heartland Partners, 966 F.2d 1143, 1146 (7th Cir. 1992), In re Chateaugay Corp., 944 F.2d 997, 1008 (2d Cir. 1991), or common law claims, In re Ben Franklin Hotel Assocs., 186 F.3d 301, 305 (3d Cir. 1999), In re Davis, 3 F.3d 113, 116-17 (5th Cir. 1993), In re King's Gate Apartments, Ltd., 206 B.R. 233, 234-35 (Bankr. W.D. Okla. 1996). These types of claims do not typically include fee-shifting provisions, so the question of dischargeability of attorneys' fees did not arise. The non-compete provision at issue in In re Udell did require payment of attorneys fees. 18 F.3d 403, 405 (7th Cir. 1994). The Seventh Circuit held that the action to enforce the non-compete was not discharged but did not address attorneys' fees. Id. at 409-10. According to counsel for one of the parties, the question of attorneys' fees was settled between the parties following the Seventh Circuit's decision. (Robertson Decl. ¶ 4.)

On remand, counsel for Datacard petitioned for fees incurred between 1986 and 1994, that is, for a substantial amount of time prior to the 1993 bankruptcy filing. See AM Int'l, Inc. v. Datacard Corp., Civil Action No. 87 C 3408 (N.D. Ill.), Mem. in Supp. of Mot. for Am. J. and Request for Litigation Costs at 2, 13 (Robertson Decl. Ex. 2.) Although the district court did not analyze the question of dischargeability of the pre-bankruptcy fees, it did award an amount that included all requested fees for time spent prior to the 1993 bankruptcy filing. See id. Order dated Nov. 25, 1997 (Robertson Decl. Ex. 3).[7]

The decision to award attorneys' fees for pre-bankruptcy time in connection with a nondischargeable claim for injunctive relief is consistent with Supreme Court precedent holding that attorneys' fees are ancillary to injunctive relief, and may be awarded even where an award of monetary damages is prohibited. Confirmation of a plan of bankruptcy discharges any "right to payment" and "right to . . . an equitable remedy [that] gives rise to a right to payment." 11 U.S.C. §§ 101(5) & (12), 1141(d)(1)(A). Confirmation does not, however, discharge actions for prospective injunctive relief. See, e.g., In re CMC Heartland Partners, 966 F.2d at 1146.[8] The Eleventh Amendment -- for different reasons but with similar effect -- bars actions "'for the

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[7] The district court deducted fees incurred for work relating to the 1993 bankruptcy proceeding itself on the grounds that they were unrelated to Datacard's environmental claims, an argument Datacard did not contest. (Robertson Decl. Ex. 3, at 3.) For the reasons discussed below at pages 12-16, Plaintiffs' fees incurred in connection with Kmart's bankruptcy will be recoverable to the extent they were "'useful and of a type ordinarily necessary to advance the ... litigation' to the point where the party succeeded." Pennsylvania v. Delaware Valley Citizens' Council for Clean Air, 478 U.S. 546, 561 (1986)(quotation omitted).

[8] See also Pls.' Resp. to Def.'s June 6, 2003 Letter (filed June 16, 2003) at 3-7 (citing cases).

recovery of money from the state,'" Edelman v. Jordan, 415 U.S. 651, 663 (1974) (quoting Ford Motor Co. v. Dep't of Treasury, 323 U.S. 459, 464 (1945)), but does not bar actions for prospective injunctive relief against state officials. Bd. of Trustees of the Univ. of Ala. v. Garrett, 531 U.S. 356, 374 n.9 (2001) (citing Ex parte Young, 209 U.S. 123 (1908)).

In the latter type of case, when plaintiffs sue state actors in their official capacity and obtain prospective injunctive relief, they are also entitled to recover attorneys' fees ancillary to such relief, despite the prohibition on collecting money damages. Missouri v. Jenkins ex rel. Agyei, 491 U.S. 274 (1989). As the Jenkins Court explained, with reference to its earlier ruling in Hutto v. Finney, 437 U.S. 678 (1979):

> The State contended that any such award was subject to the Eleventh Amendment's constraints on actions for damages payable from a State's treasury. We relied, in rejecting that contention, on the distinction drawn in our earlier cases between "retroactive monetary relief" and "prospective injunctive relief." Attorney's fees, we held, belonged to the latter category, because they constituted reimbursement of "expenses incurred in litigation seeking only prospective relief," rather than "retroactive liability for prelitigation conduct." We explained: "Unlike ordinary 'retroactive' relief such as damages or restitution, an award of costs does not compensate the plaintiff for the injury that first brought him into court. Instead, the award reimburses him for a portion of the expenses he incurred in seeking prospective relief."

Id. at 278 (internal citations and quotations omitted). The Court concluded that "an award of attorney's fees ancillary to prospective relief is not subject to the strictures of the Eleventh Amendment." Id. at 279. Analogously to the holdings of Hutto and Jenkins, then, awards of attorneys' fees ancillary to nondischargeable claims for injunctive relief are not retroactive monetary claims and, as such, should be unaffected by the Bankruptcy Code.

In sum, any entitlement to attorneys' fees under the Americans with Disabilities Act would be based on entry of judgment ordering injunctive relief in favor of Plaintiffs which would, in turn, be based on post-petition conduct, and any such award would be ancillary to the injunctive relief. As such, no part of Plaintiffs' attorneys' fees were discharged by confirmation of Defendant's plan of reorganization.

B. Even If Plaintiffs' Fees for Work Done in Connection with Defendant's Pre-petition Conduct Have Been Discharged, These Fees Are Still Recoverable Because the Work was Necessary to Address Defendant's Post-Petition Violations of the ADA.

Even if, contrary to the authority above, this Court should consider fees attributable to pre-petition time to have been discharged in bankruptcy, they may nonetheless be recoverable because they were necessary to address Defendant's post-petition violations of the ADA.

Prevailing parties in fee-shifting litigation are not only entitled to recover attorneys' fees for work done on the case in which they prevailed, but may also be entitled to recover for work done in a related but separate case, even where there is no legal entitlement to fees in the separate case. The prevailing party is entitled to recover fees from the separate proceeding if those fees were incurred for work that was "'useful and of a type ordinarily necessary to advance the . . . litigation' to the point where the party succeeded." Pennsylvania v. Delaware Valley Citizens' Council for Clean Air, 478 U.S. 546, 561 (1986) (quoting Webb v. Bd. of Educ., 471 U.S. 234, 243 (1985)).

Recently, the Ninth Circuit awarded fees -- under the ADA fee-shifting provision that will govern Plaintiffs' fee petition in the present case -- for work performed in a completely separate federal court case involving a different defendant but identical issues, despite the fact that the plaintiffs' attorneys ultimately lost the separate case, barring recovery of fees under section 505. 42 U.S.C. § 12205. The plaintiffs in Armstrong v. Davis brought suit under the ADA challenging disability discrimination in the California state prison system. 318 F.3d 965, 968 (9th Cir. 2003). The plaintiffs prevailed in Armstrong, making them eligible for fees under

section 505 of the ADA, as well as under the analogous provision of the Rehabilitation Act of 1973. 29 U.S.C. § 794a(b). During the course of the Armstrong litigation, the Supreme Court granted certiorari in Yeskey v. Penn. Dep't of Corr., 118 F.3d 168 (3d Cir. 1997), on the question whether the ADA applied to prisons, a question central to the Armstrong litigation. Counsel for the plaintiffs in Armstrong took over the representation of the Yeskey plaintiffs before the Supreme Court, and were successful in establishing that the ADA does indeed apply to state prisons. Penn. Dep't of Corr. v. Yeskey, 524 U.S. 206, 213 (1998), see Armstrong, 318 F.3d at 968-69. The Armstrong plaintiffs' counsel continued to represent the Yeskey plaintiffs on remand, ultimately losing the case on summary judgment. Yeskey v. Pennsylvania, 76 F. Supp. 2d 575 (M.D. Pa. 1999). As such, those attorneys were not entitled to recover fees in the Yeskey litigation. Armstrong, 318 F.3d at 972. Nevertheless, the Armstrong court held that "[b]ecause the work in Yeskey was important to the preservation of the Armstrong Plaintiffs' rights, and because their counsel performed the work in order to protect their interests, they would be entitled as the prevailing party in the Armstrong litigation to an award of attorney's fees for that work from the Armstrong Defendants." Armstrong, 318 F.3d at 972.

Similarly, in Gulfstream III Associates v. Gulfstream Aerospace Corp., 995 F.2d 414 (3d Cir. 1993), the court held that the prevailing plaintiffs could be compensated for work devoted to a separate but consolidated case -- Rosefielde v. Falcon Jet Corp., 701 F. Supp. 1053 (D.N.J. 1988) -- against a different defendant that raised the same legal issue. The plaintiff had settled with the Falcon Jet defendant but had not recovered fees. After the plaintiff prevailed against Gulfstream Aerospace, it sought its fees for both the Falcon Jet and the Gulfstream Aerospace

litigation. The district court disallowed Falcon Jet fees, on the grounds that there was no "judicial precedent allowing attorneys fees to be recovered for services rendered in a previous action to which the defendant was not a party." Gulfstream III Assocs., Inc. v. Gulfstream Aerospace Corp., 789 F. Supp. 1288, 1294 (D.N.J. 1992), quoted in Gulfstream III, 995 F.3d at 419.

The Third Circuit reversed, holding that fees and expenses from separate litigation are compensable

> if the plaintiff can prove that the fees and expenses incurred in the other litigation resulted in work product that was actually utilized in the instant litigation, that the time spent on other litigation was "inextricably linked" to the issues raised in the present litigation, and that plaintiff has not previously been compensated for those fees and expenses.

Gulfstream III, 995 F.3d at 420. Plaintiffs' counsel's pre-bankruptcy time in the present case will easily meet this test. Taking the last two factors first, the pre- and post-bankruptcy issues are most certainly "inextricably linked" as they concern the same legal issues at the same company in a subset of the same stores, and Plaintiffs' counsel will not previously have been compensated for that time. As for the first factor, the Third Circuit specifically noted that the Gulfstream III trial court had relied on the Falcon Jet record, and that if it had not done so, the plaintiff "would have had to duplicate at least some of that work, and the time spent and expenses incurred would have been appropriate for inclusion in this case. We see no reasonable basis for encouraging duplicative work." Id.

The analysis set forth in Armstrong and Gulf Stream III demonstrates that Plaintiffs will be entitled to recover attorneys' fees for pre-petition work if they prevail in this case because

such work will be "useful and of a type ordinarily necessary" to this litigation. This is true even if this Court determines that Plaintiffs' pre-bankruptcy attorneys' fees were discharged. The adverse summary judgment decision in Yeskey meant that the plaintiffs in that case were not prevailing parties and had, therefore, no legal entitlement to recover attorneys' fees. See 42 U.S.C. § 12205, Buckhannon, 532 U.S. at 604. Nevertheless, because time devoted to Yeskey was necessary to the success of Armstrong, the time was compensable in Armstrong. Should this Court determine in this case that, due to discharge, there is no legal entitlement to fees for pre-petition time, that time should nonetheless be recoverable if it was spent on matters necessary to the success of the surviving, post-petition, action for injunctive relief. The voluminous factual record[9] that Plaintiffs' counsel developed pre-bankruptcy will be almost certainly of use to this Court in evaluating Kmart's ongoing, post-bankruptcy conduct,[10] and Plaintiffs' counsel's extensive legal research on ADA and class certification issues (partially reflected in their more than 100 pages of briefing on the motion for class certification) will be fully applicable to the litigation of Kmart's post-bankruptcy conduct. To deny fees for that

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[9] The parties have taken approximately 70 depositions and exchanged -- on paper and electronically -- over 140,000 pages of documents. In support of their motion for class certification, Plaintiffs submitted their own extensive deposition testimony and that of 45 other Kmart shoppers with disabilities describing discrimination they had encountered at Kmart stores around the country. They also provided testimony from Defendants' own employees detailing company-wide policies that had discriminatory effects, and from Defendants' own experts, documenting those discriminatory effects. Finally, Plaintiffs submitted a 2,773-page print-out documenting 19,406 records in which Kmart's mystery shoppers noted discriminatory conditions at Kmart stores.

[10] See, e.g., O'Loghlin, 229 F.3d at 876 (holding that pre-bankruptcy evidence is admissible to show a course of conduct).

important factual and legal research, should Plaintiffs ultimately prevail on their ADA cause of action, would encourage the type of duplication the Third Circuit in Gulf Stream III sought to avoid. For these reasons, Plaintiffs are entitled to their fees for pre-petition work regardless of the impact of Defendant's bankruptcy on such fees.

Conclusion

For the reasons discussed above, Plaintiffs respectfully request that this Court:

1. Determine that Kmart's bankruptcy had no impact on Plaintiffs' motion for class certification and proceed to address that motion, either through oral argument or on the briefs; and

2. Determine that, should Plaintiffs prevail on their request for injunctive relief under Title III of the Americans with Disabilities Act, they will be entitled to "a reasonable attorney's fee, including litigation expenses, and costs" pursuant to section 505 of that statute, 42 U.S.C. § 12205, regardless of when those fees were incurred.

Respectfully submitted,

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Certificate of Service

I hereby certify that on July 14, 2003, copies of Plaintiffs' Supplemental Pleading Regarding Bankruptcy, Class Certification and Attorneys' Fees were served by first class mail, postage prepaid, on:

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