

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' SUBSTITUTED MEMORANDUM IN SUPPORT OF
MOTION FOR CLASS CERTIFICATION**

Pursuant to this Court's Minute Order of July 10, 2001, Plaintiffs Carrie Ann Lucas, Debbie Lane, and Julie Reiskin ("Named Plaintiffs") hereby submit this Substituted Memorandum in Support of Motion for Class Certification. Named Plaintiffs are also filing substituted versions of Tabs 7, 8 and 14 of the Appendix to their Motion for Class Certification. References in this Substituted Memorandum to other Tabs are to the Appendix filed with the original Memorandum in Support of Motion for Class Certification.

Named Plaintiffs bring this case to correct architectural barriers and policies at Defendant's Kmart stores across the country that discriminate against a large number of Kmart shoppers who use wheelchairs or scooters. The putative class seeks an injunction ordering Kmart Corporation ("Kmart") to adopt reasonable policies to ensure access for customers who use wheelchairs or scooters and to use its centralized design and construction program to bring all of its stores into compliance with the Americans with Disabilities Act. 42 U.S.C. § 12101 *et*

seq. (“ADA”). This case epitomizes the type of action for which Rule 23 was designed, as class-wide injunctive relief will be appropriate and manageable to formulate and implement.

BACKGROUND

A. Named Plaintiffs

Carrie Ann Lucas, Debbie Lane and Julie Reiskin are all busy professional women who use wheelchairs for mobility and who shop at Kmart. Ms. Lucas is the Access and Testing Coordinator of the Colorado Cross-Disability Coalition (“CCDC”), a statewide disability rights organization. She is unable to walk due to a bone infection and bone tumor and related treatment and uses a power wheelchair for mobility.¹ Ms. Lane is the Project Coordinator at CCDC. She is unable to walk due to spastic paraparesis and uses a power wheelchair for mobility.² Ms. Reiskin is the Executive Director of CCDC. She is unable to walk due to multiple sclerosis and uses a power wheelchair for mobility.³

Named Plaintiffs seek to represent a class defined as follows:

All persons with disabilities who use wheelchairs or scooters for mobility who have been denied, or are currently being denied, full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any public accommodation that was designed or constructed by or is owned, operated, or leased by or leased to Kmart Corporation anywhere in the United States.

Named Plaintiffs have all encountered discriminatory barriers, policies, and practices at Kmart stores, including but not limited to: obstructions that block passage to and through the

¹ Lucas Dep. at 10:23 - 11:9, 22:19 - 23:5 (Appendix Tab 1).

² Lane Decl. ¶¶ 2-3 (Appendix Tab 4).

³ Reiskin Dep. at 93:17 - 93:20 (Appendix Tab 5); Reiskin Decl. ¶ 2 (Appendix Tab 6).

store, as well as access to merchandise;⁴ clothing racks placed too close together to permit wheelchair passage;⁵ absence of an open accessible check-out aisle;⁶ inaccessible fitting rooms;⁷ service counters that were too high;⁸ and inability to find or use an accessible parking space.⁹ Each of these barriers, policies, and practices has the same effect: it denies customers who use wheelchairs or scooters the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of Kmart stores.

A few examples from Named Plaintiffs' many experiences illustrate the effect of these barriers. In her deposition, Ms. Lucas described being on the way to a meeting of her ordination

⁴ See, e.g., Lucas Dep. at 122:12 - 123:11, 126:15 - 127:21, 130:14 - 132:12, 138:3 - 142:25, 244:4 - 249:13, 292:5 - 298:5, 305:2 - 305:25, 311:13 - 315:4, 359:8 - 361:16, 377:11 - 386:18, 394:10 - 395:4, 420:7 - 439:22, 444:19 - 448:11, 461:2 - 461:5, 475:5 - 476:4, 519:2 - 528:17, 539:1 - 539:15, 550:9 - 554:13, 570:1 - 571:5, 573:1 - 574:6, 586:4 - 586:11, and Ex. 11 at P0064, Ex. 16 at P0001-3, P0014-15; Lane Dep. at 236:2 - 238:22, 260:1 - 272:25, 278:2 - 292:1 and Ex. 19 at P0038-39 (Appendix Tab 3); Reiskin Dep. at 36:1 - 38:4, 40:8 - 43:19, 81:2 - 81:13. The pages cited in this brief discuss discrimination that occurred after October, 1997, that is, the date two years prior to the filing of the Complaint in this case. The excerpts from Exhibits 11, 16 and 19 are photographs taken by Named Plaintiffs of access barriers at Kmart stores.

⁵ See, e.g., Lucas Dep. at 107:2 - 107:25, 110:23 - 112:5, 132:1 - 132:8, 137:3 - 137:10, 448:14 - 448:24, 503:5 - 505:14, 549:8 - 549:18, 571:24 - 573:13 and Ex. 16 at P0006; Lane Dep. at 238:23 - 239:10; Reiskin Dep. at 36:1 - 36:10, 78:4 - 79:17, 96:20 - 98:6.

⁶ See, e.g., Lucas Dep. at 226:4 - 226:17, 236:13 - 241:10, 254:12 - 256:19, 260:7 - 262:9, 326:1 - 331:19, 363:11 - 374:17, 394:10 - 397:18, 418:14 - 419:20, 450:20 - 458:14, 555:16 - 557:17; Lane Dep. at 117:10 - 122:24 and Ex. 19 at P0039; Reiskin Dep. at 15:13 - 17:25, 34:18 - 34:24, 43:6 - 43:19.

⁷ See, e.g., Lucas Dep. at 107:20 - 108:1, 116:2 - 116:24, 442:5 - 443:19, 461:6 - 461:9, 464:5 - 471:22, 487:1 - 487:4, 505:15 - 505:18 and Ex. 16 at P0009-10; Lane Dep. at 242:10 - 242:18, 273:3 - 277:18.

⁸ See, e.g., Lucas Dep. at 440:9 - 441:17; Lane Dep. at 231:2 - 232:16.

⁹ See, e.g., Lucas Dep. at 153:6 - 153:24, 177:4 - 177:21, 258:8 - 259:25, 272:1 - 272:18, 315:7 - 315:23, 362:12 - 362:19, 402:6 - 418:4, 459:2 - 460:10, 491:1 - 491:25, 497:1 - 502:11, 564:19 - 568:22; Lane Dep. at 112:2 - 116:24.

committee -- she is approved for ordination in the United Church of Christ -- and needing to stop quickly to replace her nylons. She went into the Greeley, Colorado, Kmart and discovered that, in the aisle in which nylons were displayed, boxes of stock obstructed her access to this urgent purchase. She tried pushing the boxes out of the way but was unable to do so. Ultimately, she was not able to buy nylons at Kmart and had to stop at another store on her way to the meeting.¹⁰ Ms. Lucas also described the experience of attempting to get to a clearance rack that was located in the interior of the girls' clothing department. She got past the first two racks but was unable to proceed.¹¹ Ms. Reiskin has tried to access aisles at Kmart, only to be forced to turn around, go down an adjacent aisle, and try to access the first aisle from the opposite end. At times, the aisle floors have been so badly blocked by merchandise stacked on the floor that she could not go down specific aisles even though she needed merchandise from those aisles.¹²

On a number of occasions when Ms. Lucas went to check out after shopping at Kmart, she found that no accessible check-out aisle was open. Each time she inquired, she was informed that the clerk staffing the accessible aisle was on break.¹³ She was often made to wait while the accessible check-out aisle was opened. On at least one of these occasions, she noticed that others who had gotten in line after she had gone to check out were already leaving the store, though the accessible check-out aisle had still not been opened.¹⁴ On two occasions, Ms. Lane returned to her lift-equipped van in the Kmart parking lot only to discover that an unauthorized vehicle was parked in the striped access aisle next to her accessible parking space, blocking access to her lift.

¹⁰ Lucas Dep. at 139:10 - 142:25; Lucas Decl. ¶ 9 (Appendix Tab 2).

¹¹ Lucas Dep. at 168:4 - 170:16.

¹² Reiskin Decl. ¶¶ 9-10.

¹³ See, e.g., Lucas Dep. at 236:13 - 241:10, 254:20 - 256:19, 260:7 - 262:9, 326:1 - 329:21, 337:5 - 338:16, 350:16 - 351:22, 364:14 - 373:23, 395:17 - 397:18, 450:20 - 458:14.

¹⁴ Id. at 262:2 - 262:9.

On one occasion, she had to ask a passing customer to back her van out so she could deploy the lift, get in, and drive away.¹⁵

The three Named Plaintiffs have patronized -- among them -- nine Kmart stores in the Denver, Colorado area. In addition, Ms. Lucas has also patronized Kmart stores in Hermitage, Tennessee, Sherman and Greenville, Texas, and Wichita and Salina, Kansas; Ms. Reiskin has patronized a Kmart store in Durango, Colorado. At all of these stores, they encountered similar discriminatory barriers, policies, and practices.¹⁶

B. Putative Class Members and Other Customer Witnesses

¹⁵ Lane Dep. at 112:2 - 115:20.

¹⁶ See Lucas Dep. at 84:2 - 85:25 (Greenville, Texas), 106:15 - 117:13 (same), 173:3 - 173:14 (Hermitage, Tennessee), 540:14 - 540:21 (Sherman and Greenville, Texas and Salina and Wichita, Kansas), 548:2 - 559:23 (Greenville, Texas), 564:4 - 574:6 (Salina, Kansas), 586:4 - 586:7 (Wichita, Kansas); Reiskin Dep. at 12:23 - 17:25 (Durango, Colorado).

Named Plaintiffs have submitted with this motion excerpts of the depositions of 45 individuals who have encountered similar access barriers, policies, and practices. Forty-three of these witnesses are potential class members, that is, people with disabilities who use wheelchairs or scooters who have encountered wheelchair access problems at Kmart. The other two witnesses are friends or relatives of people who use wheelchairs or scooters or others who have witnessed conditions similar to those that impeded Named Plaintiffs in their shopping endeavors at Kmart. (These witnesses and potential class members will be referred to collectively as “Customer Witnesses.”) In total, Named Plaintiffs and Customer Witnesses have experienced discrimination at 77 Kmart stores in 26 states around the country.¹ In addition, Plaintiffs have disclosed to Kmart, pursuant to Rule 26(a)(1), the names of other individuals who have information concerning access issues at Kmart stores. The total number of witnesses so disclosed -- including Customer Witnesses -- is at least 83.²

Customer Witnesses have testified that they have encountered the same types of discriminatory barriers, policies, and practices that the Named Plaintiffs have encountered, for example, obstructed aisles and merchandise, clothing racks that were too close together for wheelchair passage, and accessible check-out aisles that were closed or unavailable.³ Customer Witness testimony shows that these individuals share many other common discriminatory experiences at Kmart stores around the country including, but not limited to, inaccessible fitting rooms and restrooms, service counters that are too high, inaccessible parking, and obstructions

¹ Miot Decl. ¶¶ 2-3 (Appendix Tab 14).

² See Miot Decl. ¶ 16 and Exs. 2 - 9.

³ See Chart at Tab 7 of the Appendix showing citations to Customer Witness testimony relevant to these three areas. Excerpts from the depositions of Customer Witnesses are attached in alphabetical order behind Tab 8 of the Appendix.

on the sidewalks in front of stores.⁴ Again, a few of the many examples illustrate the practical impact of these common forms of discrimination.

⁴ See, e.g., Allen Dep. at 24:17 - 24:24 (sidewalk), 66:7 - 66:22 (fitting room); Armfield Dep. at 75:15 - 76:3, 98:18 - 102:15 (fitting room); Berloff Dep. at 21:21 - 22:14 (parking); Donn Dep. at 16:2 - 17:1 (parking); Dowling Dep. at 85:16 - 88:9 (parking); Fuller Dep. at 27:15 - 28:8; 70:14 - 70:25 (sidewalk), 46:10 - 47:9, 54:18 - 55:15 (fitting room), 57:25 - 58:25 (restroom), 78:9 - 78:24 (counters); Jessee Dep. at 12:2 - 13:1, 79:2 - 79:4, 85:4 - 87:21 (fitting room); Kemper Dep. at 19:16 - 20:8; 101:4 - 101:18 (sidewalk); Knowlen Dep. at 30:18 - 31:5; 61:7 - 63:17 (sidewalk); Logsdon Dep. at 36:8 - 42:12 (counters); Madden Dep. at 34:8 - 37:15 (restroom); Mason Dep. at 26:10 - 27:13 (counters); Mauro Dep. at 30:11 - 31:13 (fitting room); McDowell Dep. at 78:13 - 79:7 (sidewalk); Ouellett Dep. at 12:11 - 12:21 (fitting room); Roland Dep. at 62:17 - 63:12 (restroom); Weeber Dep. at 29:1 - 31:4 (parking); Williams Dep. at 32:22 - 33:13 (counters), 35:25 - 37:18 (parking).

William Fuller testified that when he encountered obstructions at the Kmart in Winchester, Virginia, he would often go to the customer service counter to try to get help. Once there, he had to line up behind other customers waiting for service -- for example, making returns or asking questions -- and was often confronted by a queue line that was too narrow for him to enter. Instead, he would have to unhook part of the queue line and hope "some benevolent person" would let him in. At the customer service counter -- which was too high -- he would ask that an employee be paged to the obstructed aisle to assist him. "It was not a dignified process," he testified. When he would return to the obstructed aisle to await assistance, typically no employee would show up, requiring him to return to the customer service counter a second time.¹ Mr. Fuller also explained two separate problems created by Kmart's practice of putting merchandise displays in the aisles. He testified, "Those kind of displays often made it difficult for me to get at any items that would be behind the display that I might need."² A second problem arose when he was trying to check out and encountered a display of snack food. The back wheel of his wheelchair caught the corner of the display. Mr. Fuller testified as to what came next:

And so, of course, you know what happened. Down went the display, spewing across the floor went the potato chips, and here I am wondering what do you do. Do I now stop and try to round up these 85 packets of potato chips? Do I say to heck with it, let some poor stock guy who was being paged to meet me back in sports deal with it?

And it creates a sense of not just embarrassment. It's worse than embarrassment because it's really -- it's really a sense of helplessness. . . . [A]nd that strikes at the very issue, I think, that many people with disabilities are trying to grapple with today, which is independence, trying to be as independent as we reasonably can be.³

¹ Fuller Dep. at 76:23 - 78:24; see also id. at 78:25 - 80:3.

² Id. at 38:6 - 38:12.

³ Id. at 40:5 - 40:19; see generally id. at 38:6 - 41:12.

Ellen Davis encountered so many obstructions in the toy department of the Kmart in Brooklyn, New York that she ultimately had to station herself “in the one open spot” she and her husband could find while her husband retrieved toys and brought them to her. She had to go through the same process to select clothes for her son. This made her feel “highly frustrated” because it took away her independence. She testified that, during that shopping trip: “I started to get upset where I started to cry because I didn’t want my husband picking everything out. I wanted to pick out my kids[’] things on my own and I couldn’t do that.”⁴

The obstructions in one of the aisles in the Santa Rosa, California, Kmart caused Frances Moeller to get stuck. She testified about the resulting situation:

I remember getting down one main aisle that looked like it was a good aisle and getting stuck in the back where I couldn’t turn around to get out. I couldn’t go right or left. I was stuck. I was yelling for help. No one heard me except for a customer who came and tried to help move racks that were holding all these purses on them to try and help me get out of the department. Finally, my husband came over and also assisted to get me out of the department.⁵

Ms. Moeller also testified about one of the consequences of the inaccessible clothing racks. She was attempting to purchase women’s underwear and was prevented from doing so by the congestion of the racks. She was unable to find an employee in the department and did not make a purchase, as she “chose not to have [her] husband looking for [her] underwear.”⁶

John Armfield was shopping for shoes in the Newton, Kansas, Kmart. Because of the obstructions in the shoe aisles, he had to rely on his wife to retrieve shoes until he found a pair he

⁴ Davis Dep. at 8:23 - 9:21, 12:12 - 13:15.

⁵ Moeller Dep. at 216:24 - 218:22.

⁶ Id. at 219:19 - 220:20.

could buy. Although he purchased the shoes, he testified that he is still not sure that they are the shoes that he would have purchased had he been able to look at all of the available choices himself.⁷

Margaret Dowling testified that when a rack or merchandise was in her way at the Antioch, California, Kmart, she would have to ask an employee to retrieve items. For example, when shopping for clothes, she would tell the employee her size and preferred color. “If they don’t have it,” she testified, “they shout across the racks and say what colors they do have, and I ask them to bring me that It’s humiliating.”⁸

Mitchell Logsdon stated that the accessible check-out aisles at the Terre Haute, Indiana, Kmart were closed about 80% of times she shopped there.⁹ Although she requested that an accessible aisle be opened, Kmart personnel would not do so. Instead, she had to check out at the customer service counter. Because that counter had no lowered portion, she had to lift her purchases to shoulder height, which was quite painful. On one occasion, she attempted to purchase produce at the customer service counter but was told that she was not allowed to do so, because that location did not have a scale. When she asked to have the produce weighed at another location, that request was also denied. Ultimately, she was unable to purchase the produce she had wanted.¹⁰

The manager of a Kmart in Tulsa, Oklahoma told Victoria Haws that, in order to have an accessible check-out aisle open when she was ready to check out, she would have to make a request when she entered the store. Ms. Haws testified that she did not like this practice:

⁷ Armfield Dep. at 57:14 - 57:25.

⁸ Dowling Dep. at 73:9 - 73:18; 83:3 - 83:23.

⁹ Logsdon Dep. at 47:2 - 47:7.

¹⁰ Id. at 33:25 - 41:25.

I wasn't really pleased because that again would be me having to ask for special treatment, and which is really something I don't like to do. I want to be treated like I'm a typical person. I want to go into a store, do my shopping, and go home, and not have to go in and say, Would you please help me with this, or Could you please do this for me.¹¹

In addition, Ms. Haws would have to wait in line at the customer service counter to request Kmart to open an accessible check-out aisle,¹² effectively requiring her to wait in two lines while nondisabled shoppers only had to wait in one.

Kmart's lack of access makes people much less independent. Carol Williams, a member of the New Hampshire House of Representatives who uses a wheelchair due to multiple sclerosis, shops at a Kmart in Manchester, New Hampshire. Rep. Williams testified that she began taking a personal care attendant with her to Kmart in light of the obstacles there, although she shops alone at other stores. Rep. Williams has a limited number of hours during which her personal care attendant is available to her, and any time spent at Kmart cannot be devoted to required personal care tasks such as personal hygiene and laundry.¹³ Similarly, Stacey Berloff, a college student who shops at a Kmart in Brighton, Massachusetts, testified that, although she generally does all of her own shopping, she has to take someone -- often her mother -- with her to Kmart because of all the trouble Ms. Berloff has had with access.¹⁴ Because of the difficulties Bernadette Mauro encountered shopping in a wheelchair at the Kmart in Laurel, Maryland, she

¹¹ Haws Dep. at 13:14 - 13:20.

¹² Id. at 13:4 - 15:1.

¹³ Williams Dep. at 19:1 - 20:22, 62:21 - 64:25.

¹⁴ Berloff Dep. at 10:16 - 11:14.

has had to ask her mother to purchase items at her local Kmart in California and either ship them to Ms. Mauro in Maryland or bring them with her when she next traveled to Maryland.¹⁵

In addition to the evidence supplied by Plaintiffs, Kmart has its own evidence of dissatisfaction on the part of its customers with disabilities. Kmart maintains a toll-free phone number that customers can call to voice complaints, which Kmart then categorizes by type of complaint. Kmart has produced lists of complaints received from August 31, 1998 to late April, 2001 that its personnel have classified as being related to “handicapped services.”¹⁶

Approximately 259 complaints either relate directly to issues raised in this litigation or, because of the summary nature of the data, relate generally to “handicapped services.” These 259 complaints cover at least 219 Kmart stores in 39 states. When combined with stores in which Customer Witnesses and Named Plaintiffs have experienced wheelchair access problems, the total is 289 stores in 42 states.¹⁷

C. The Americans with Disabilities Act

The ADA was enacted in 1990 “to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities .” 42 U.S.C. § 12101(b)(1); see also PGA Tour Inc. v. Martin, --- U.S. ---, 69 U.S.L.W. 4367, 4371 (May 29, 2001) (holding that the ADA provides a “broad mandate” to eliminate discrimination against people with disabilities). The statute recognizes that “the Nation’s proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent

¹⁵ Mauro Dep. at 24:21 - 26:7, 72:14 - 74:2.

¹⁶ Morgan Dep. at 10:11 - 11:21, 98:2 - 98:25 & Ex 124 (Appendix Tab 9); Robertson Decl. Exs. 10 & 11 (Appendix Tab 15).

¹⁷ Miot Decl. ¶ 4-5. Excluded from this number are complaints that, on their face, did not relate to issues covered by the ADA, such as store-provided wheelchairs or carts, benches, or merchandise that was out of stock. Id. ¶ 4.

living, and economic self-sufficiency for such individuals.” § 12101(a)(8).¹⁸ Title III of the ADA prohibits discrimination on the basis of disability in places of public accommodation such as Kmart stores, both with respect to their physical facilities and with respect to their policies and practices.

Facilities built after January 26, 1993, are required to be “readily accessible to and usable by” individuals who use wheelchairs. § 12183(a)(1). With respect to facilities built before that time but altered in certain ways since that date, the altered portion and -- to a certain extent -- the path of travel to the altered portion must be readily accessible to and usable by individuals who use wheelchairs. § 12183(a)(2). In facilities built prior to January 26, 1993 and not altered since, Kmart is required to remove architectural barriers where it is “readily achievable” to do so. § 12183(b)(2)(A)(iv). The question of what is readily achievable turns primarily on the nature and cost of the barrier removal and the resources of the public accommodation involved, including “the overall financial resources of any parent corporation or entity.” 28 C.F.R. § 36.104; see also § 12181(9). Pursuant to statutory mandate, the Department of Justice (“DOJ”) published Standards for Accessible Design (“Standards”). See § 12186; 28 C.F.R. pt. 36, app. A.

Title III also requires public accommodations “to make reasonable modifications in policies, practices, or procedures” where necessary to provide its goods, services, or facilities to individuals with disabilities, unless the entity can show that the modification would “fundamentally alter” the nature of its goods, services, or facilities. § 12182(b)(2)(A)(ii). The DOJ regulations implementing the ADA require that Kmart “maintain in operable working condition those features of facilities and equipment that are required to be readily accessible to

¹⁸ Unless otherwise noted, all statutory citations are to Title 42 of the United States Code.

and usable by persons with disabilities.” 28 C.F.R. § 36.211.¹⁹ The DOJ has interpreted this provision to require that public accommodations “ensure that accessible routes are properly maintained and free of obstructions.” Preamble to Regulation on Nondiscrimination on The Basis of Disability by Public Accommodations and in Commercial Facilities, 28 C.F.R. pt. 36, app. B (2000) (“Preamble”) at 638.

D. Defendant Kmart Corporation

Kmart Corporation sells general merchandise at discount prices in more than 2,100 Kmart stores (including Kmart, Big Kmart and Super Kmart stores) that it owns and operates throughout the United States.²⁰ Kmart claims that 85 percent of the population of the United States shops at its stores each year.²¹ Kmart’s mission is to be “the discount store of choice for low- and middle-income households.”²² The combination of Kmart’s ubiquity and its low prices makes it an attractive option for consumers with disabilities, many of whom live on fixed incomes or otherwise have less disposable income than nondisabled individuals.²³

Kmart’s headquarters is located in Troy, Michigan. Day-to-day operations of individual Kmart stores are controlled to a great extent by policies and procedures established at Kmart headquarters. For example, Kmart policies and practices are set out in the following documents:

¹⁹ The DOJ’s Title III regulations are “entitled to deference.” Bragdon v. Abbott, 524 U.S. 624, 646 (1998).

²⁰ Kmart Corporation 2000 Annual Report (“2000 Annual Report,” Robertson Decl. Ex. 1) at 16.

²¹ Id. at 4.

²² 1999 Kmart Fact Book (Robertson Decl. Ex. 2) at 2.

²³ See Table 9, “Low-Income Status of Persons 15 to 64 Years Old, By Type Of Disability: 1991-92,” Americans with Disabilities: 1991-92, Data From the Survey of Income and Program Participation, John McNeil, U.S. Department of Commerce, Bureau of the Census at 33 (Robertson Decl. Ex. 16).

- **Store Operating Policies Manual:** This manual contains more than 500 pages of step-by-step instructions on how to operate a Kmart store, from the sale of batteries to the organization of the filing system in the back office. Rather than reproducing the entire Store Operating Policies manual, Named Plaintiffs have attached the table of contents from each section of the manual to provide a sense of the breadth of topics controlled by Kmart's company policies.²⁴
- **Golden Rods:** Kmart is gradually replacing its Store Operating Policies manual with a new set of policies called "Golden Rods," which already number over 1,100 pages. Both the Store Operating Policies manual and the Golden Rods are currently operative.²⁵ A letter to all Kmart store managers accompanying the Golden Rods states that "it is expected that you Review, Communicate, and Execute each of the 'Golden Rod' bulletins immediately upon receipt."²⁶
- **Visual Merchandising Standards Manual:** This manual, provided to all Kmart stores, governs the display of clothing at those stores.²⁷
- **Merchandising brochures:** These brochures, varying in length from several pages to several hundred pages, direct the layout of merchandise in Kmart stores.²⁸ Merchandising brochures contain, among other instructions, "plot plans" that describe the arrangement of fixtures on which basic merchandise is to be displayed. Although the plot plan for each store may be different, it is created at Kmart headquarters and sent to the stores with the expectation that each store will follow its plot plan.²⁹ Store managers may not diverge from the centrally-dictated fixture layouts without permission from headquarters. The Store Operating

²⁴ Robertson Decl. ¶¶ 5-6 and Ex. 4.

²⁵ Robertson Decl. ¶ 7-8 and Ex. 5 (listing titles of Golden Rods received from Kmart prior to June 6, 2001); Frame Dep. at 15:20 - 16:2 (Appendix Tab 10). Robert Frame is Kmart's Rule 30(b)(6) designee on operations. Id. at 6:21 - 7:4.

²⁶ Frame Dep. Ex. 33.

²⁷ See Robertson Decl. Ex. 7 (excerpts from the Visual Merchandising Standards manual); Ruffing Dep. at 42:1 - 42:24 (Appendix Tab 11). Gary Ruffing is Kmart's Rule 30(b)(6) designee on merchandising and display. Morgan Dep. at 6:8 - 6:14.

²⁸ Kmart has produced more than 600 merchandising brochures for the year 2000 and 2001 to date. A list of these brochures with their dates and lengths is attached as Exhibit 1 to the Miot Declaration. See also Miot Decl. ¶ 6. An example of a merchandising brochure is the "Girls & Boys Denim Reset" attached as Exhibit 88 to the deposition of Gary Ruffing.

²⁹ See Ruffing Dep. at 49:16 - 49:18, 53:1 - 56:23, 143:24 - 144:6 and Ex. 88 at K03633.

Policies manual instructs store managers that, with respect to “Fixture/Equipment Relocations and Purchases,” they are not to “purchase new or used equipment without the approval of [headquarters],” or to “change physical layout of fixtures without approval of [headquarters] and Regional Manager.”³⁰

- **Weekly Guides:** Kmart headquarters issues a Weekly Guide each week that is sent to all stores and that provides instructions for the week in question on such matters as company-wide advertising, promotions and events, what merchandise is to be displayed where, what merchandise is to be on sale, what signs are to be used with which promotions, which merchandise is to be inventoried, and other matters. An example of the Weekly Guide for August 20, 2000, is included at Exhibit 103 to the Ruffing Deposition.³¹

- **Training Materials:** Kmart headquarters publishes the training materials that are used to train all Kmart employees at all stores in the country. They include overviews, such as “Orientation and Customer Service for Team Members,” that are distributed to all Kmart employees when they start work at Kmart, and position-specific materials, such as “Check-out Service Team Member Training Checklist.”³²

In addition, design and construction of new Kmart stores and refurbishment of existing stores is directed by Kmart headquarters.³³

E. Barriers to Wheelchair and Scooter Access at Kmart Stores

Many of the barriers encountered by Named Plaintiffs and Customer Witnesses at Kmart stores result from centralized policies and training (or the lack thereof) established at Kmart headquarters. The discussion below provides several illustrations of this centralized control. In

³⁰ Robertson Decl. Ex. 4 at K21399. Mr. Frame testified that when the Store Operating Policies require a store manager to obtain approval from Kmart headquarters or a district or regional manager, “then approval should be asked for.” Frame Dep. at 22:13 - 22:23.

³¹ See Ruffing Dep. at 101:21 - 138:12 and Exs. 102 & 103.

³² See, e.g., Kaselitz Dep. at 8:9 - 8:22, 14:19 - 14:21, 24:2 - 24:24, 51:3 - 51:20; Exs. 57 & 73 (Appendix Tab 12). Roberta Kaselitz is Kmart’s Rule 30(b)(6) designee on training. *Id.* at 58:9 - 58:22 and Ex. 24.

³³ See *infra* pp. 23-25.

addition, the existence of -- and ability to remedy -- architectural barriers are controlled by Kmart's centralized design and construction department.

1. Centralized Policies and Training

Kmart's corporate policy requires that merchandise be displayed in a fashion that obstructs wheelchair access. For example, most of the Weekly Guides for the second half of the year 2000 dictate that Kmart stores display merchandise in "floor stacks" or "aisle stacks."³⁴ "Floor stacks" and "aisle stacks" are stacks of merchandise displayed in aisles adjacent to fixed shelving.³⁵ Mr. Ruffing identified the photograph at Exhibit 105 to his deposition as an example of an "aisle stack" and testified that if a store had the required merchandise, he would expect to see the required aisle and floor stacks.³⁶ These types of displays have obstructed access to merchandise for Named Plaintiffs and Customer Witnesses.³⁷ As Named Plaintiff Carrie Lucas explains, she took the photograph that Mr. Ruffing identified as Exhibit 105 along with nine other photographs of floor stacks in the same store on the same day. The floor stacks depicted in the photographs prevented her from accessing the merchandise on the shelves behind the stacks.³⁸ Thus, Kmart headquarters is dictating to all of its stores that they display merchandise in a way that obstructs access for customers in wheelchairs and scooters.

³⁴ See Miot Decl. ¶ 7 (listing Weekly Guides produced by Kmart that relate to dates since June 11, 2000 and that require "floor stacks" or "aisle stacks").

³⁵ Ruffing Dep. at 129:17 - 131:15 and Ex. 103 at K17617.

³⁶ Ruffing Dep. at 131:1 - 131:15, 138:17 - 138:25 and Ex. 105.

³⁷ See, e.g., Lucas Dep. at 126:15 - 126:25, 295:3 - 295:13, 384:8 - 385:1, 444:19 - 448:11; Reiskin Decl. ¶ 11; Armfield Dep. at 53:5 - 53:24, 172:8 - 174:6; Bach Dep. at 11:4 - 11:20; Bateman Dep. at 65:9 - 65:14, 67:13 - 67:23, 71:21 - 72:7; Berloff Dep. at 9:23 - 10:6, 13:3 - 15:23; Deck Dep. at 18:3 - 18:11; Fuller Dep. at 38:1 - 39:12, 50:25 - 53:6; Haws Dep. at 19:20 - 20:8, 62:12 - 63:6; Laube Dep. at 26:21 - 28:21, 29:17 - 30:7, 40:8 - 40:11, 59:4 - 61:19, 98:10 - 99:1; Mason Dep. at 23:23 - 24:17; Ryan Dep. at 15:22 - 16:7, 20:6 - 20:16, 34:6 - 35:10; Vangeri Dep. at 43:5 - 48:21, 89:6 - 90:2.

³⁸ Lucas Decl. ¶ 10 and Ex. 1.

Kmart's corporate stocking policy also results in obstructed aisles. Kmart's Store Operating Policies manual and training manuals -- all prepared at Kmart's headquarters -- require, as part of the shelf-stocking process (which Kmart calls "replenishment"), that Kmart employees leave pallets and boxes in aisles, often blocking wheelchair and scooter access to aisles and/or merchandise.³⁹ This policy, called "drop slide fill," requires the replenishment crew to drop pallets of merchandise throughout the salesfloor, take boxes from the pallets and slide them down the various merchandise aisles, and then go from aisle to aisle, filling the shelves from the boxes.⁴⁰ In theory, until recently, Kmart policy required that all pallets be off the salesfloor by 9:00 a.m. and that there be no unattended merchandise on the salesfloor after 11:00 a.m.⁴¹ As Kmart stores generally open at 7:00 or 8:00 in the morning,⁴² this policy virtually guarantees obstructions in the aisles during several business hours. More importantly, Kmart's Rule 30(b)(6) designee on operations testified that Kmart in fact stocks merchandise throughout the day,⁴³ and Named Plaintiffs and Customer Witnesses confirm that boxes of merchandise often remain in the aisles throughout the day, blocking passage by, and/or access to merchandise by, customers in wheelchairs and scooters.⁴⁴

³⁹ See Robertson Decl. Ex. 4 at K21878-82.

⁴⁰ See Frame Dep. at 60:10 - 60:18; Robertson Decl. Ex. 4 at K21879.

⁴¹ Id. at K21878-82; Frame Dep. at 60:19 - 61:5. Early this year, that policy was changed to require pallets to be removed from the floor by 8:00 a.m. and filling of shelves to be completed by 10:00 a.m. Id. at 239:15 - 240:20.

⁴² See id. at 240:21 - 241:5.

⁴³ Id. at 61:6 - 61:14, 241:11 - 245:10.

⁴⁴ See, e.g., Lucas Dep. at 140:5 - 142:2; Douglass Dep. at 83:2 - 83:11; Haws Dep. at 20:9 - 21:12; Jessee Dep. at 92:6 - 93:25; Kemper Dep. at 10:20 - 11:12, 12:6 - 13:9; Madden Dep. at 20:23 - 22:8; Rifkin Dep. at 19:15 - 22:14, 48:18 - 50:4.

Named Plaintiffs and Customer Witnesses report that they are frequently obstructed by clothing racks that are too close together to permit passage by persons using wheelchairs or scooters. As a result, they are often unable to access clothing that is displayed anywhere other than the outer perimeter of that area.⁴⁵ This barrier, too, results from centralized Kmart policies, including the company-wide policy establishing a minimum distance between clothing racks of 24 inches.⁴⁶ Most wheelchairs are wider than 24 inches: Named Plaintiffs' wheelchairs are all 26 inches wide,⁴⁷ and the regulations implementing the ADA recognize that a typical adult-sized wheelchair is approximately 26 inches wide. Standards, Fig. A3. Although Gary Ruffing, Kmart's Rule 30(b)(6) designee on merchandising, claimed that very few aisles in very few stores were actually only 24 inches wide,⁴⁸ it is clear from the experiences of Named Plaintiffs and Customer Witnesses that impassable clothing aisles are a common and consistent barrier, and it is clear from the Visual Merchandising Standards manual and Mr. Ruffing's deposition testimony that this type of barrier is anticipated and condoned by centralized Kmart policy. Indeed, when Rep. Carol Williams, a Customer Witness, complained to her local Kmart about the inaccessibility of aisles, the manager replied that "that has to come from corporate office. Even the floor plan is laid out by the corporate office, we cannot change that on our own."⁴⁹

Barriers to merchandise -- including boxes and displays in aisles and congestion in the placement of clothing racks -- are prohibited by the ADA. The Standards require a 36-inch-wide accessible route adjacent to "[s]helves or display units allowing self-service by customers in

⁴⁵ See supra pp. 4, 9-10, note 5 and references cited in Tab 7 of the Appendix.

⁴⁶ See Ruffing Dep. at 29:14 - 30:9, 32:5 - 32:18, 151:20 - 152:11 and Robertson Decl. Ex. 7 (Visual Merchandising Standards manual) at K34825.

⁴⁷ See Lucas Dep. at 13:25 - 14:6; Lane Decl ¶ 2; Reiskin Decl. ¶ 2.

⁴⁸ Ruffing Dep. at 29:14 - 29:23.

⁴⁹ Williams Dep. at 26:4 - 26:14.

mercantile occupancies.” §§ 4.1.3(12)(b) & 4.3. Where accessible routes are required, they must be maintained. 28 C.F.R. § 36.211. Finally, Kmart is required to make reasonable modifications in the policies described above to make its goods, services, facilities, privileges, advantages, and accommodations available to individuals with disabilities, if such modifications will not fundamentally alter Kmart’s goods and services. § 12182(b)(2)(A)(ii).

Kmart’s failure to implement policies and to train its staff to implement existing policies also results in barriers to access. For example, Named Plaintiffs and Customer Witnesses have often found that accessible check-out aisles at Kmart stores are all closed. This is a violation of the regulations implementing Title III of the ADA, which require that stores have accessible check-out aisles in numbers relative to the total number of check-out aisles in the store, and that they ensure that “an adequate number of accessible check-out aisles is kept open during store hours,” or that “an equivalent level of convenient service is provided to individuals with disabilities as is provided to others.” Standards § 7.3; 28 C.F.R. § 36.302(d). As both Named Plaintiff and Customer Witness testimony shows, Kmart’s failure to maintain an open, accessible check-out aisle often introduces a substantial delay and otherwise denies them full and equal enjoyment of Kmart’s services.⁵⁰ Although Kmart’s policy purportedly requires that at least one accessible check-out aisle always be open,⁵¹ there is no mention of this policy in the materials used to train either the employees who staff the check-out aisle or those who supervise them.⁵²

⁵⁰ See supra pp. 4-5, 10-11, note 6 and references cited in Tab 7 of the Appendix.

⁵¹ See Frame Dep. at 91:4 - 91:24.

⁵² See Kaselitz Dep. Ex. 57 at K00134-35, Exs. 73, 78; Robertson Decl. Exs. 12-14. Although Kmart produced a videotape to be shown in its stores early this year that made reference to this issue, Kmart’s Rule 30(b)(6) designee on training testified that Kmart made no specific mention in its training materials of customers in wheelchairs and did not have specific training to the effect that a customer in a wheelchair should be helped any differently from any other customer. Kaselitz Dep. at 79:14 - 80:3.

Obstructions in accessible parking spaces and the access aisles adjacent to such parking spaces at Kmart stores are also due to the lack of policy and/or lack of training and enforcement. Kmart's Store Operating Policies state generally that its parking lots are to be "free of debris; no potholes, cracks or depressions, stray carts."⁵³ It was not until early this year, however, that a new Golden Rod was issued that instructed Kmart employees to "[k]eep accessible parking spaces and walkways clear and uncluttered, free of carts, debris, delivery trucks and other unauthorized vehicles."⁵⁴ Despite this new policy, Kmart's Rule 30(b)(6) designee on store operations stated that Kmart would not monitor the use of its accessible parking spaces and access aisles by unauthorized vehicles or install signs to prevent blockage of parking access aisles.⁵⁵

2. Architectural Barriers.

Named Plaintiffs and Customer Witnesses have encountered inaccessible fitting rooms and restrooms, service counters that are too high, and insufficient accessible parking.⁵⁶ These barriers are also under the control of Kmart headquarters.

Kmart has a highly centralized design and construction program. Kmart headquarters publishes "Outline Specifications" and a "Design Requirements Manual" for new Kmart stores. The Outline Specifications for building a Kmart store are 843 pages long; the Design Requirements are 71 pages long.⁵⁷ Kmart expects the architects and engineers it hires to follow

⁵³ Robertson Decl. Ex. 4 at K21659.

⁵⁴ Id., Ex. 6 at K37038.

⁵⁵ Frame Dep. at 110:6 - 116:12.

⁵⁶ See supra nn. 7, 8, 9 and 20.

⁵⁷ Robertson Decl. ¶¶ 11 & 12; see also id. Exs. 8 & 9; Glasser Dep. at 131:1 - 132:21 (Appendix Tab 13). Bruce Glasser is Kmart's Rule 30(b)(6) designee on design, construction, and ADA compliance. Glasser Dep. at 6:5 - 6:12 and Ex. 24.

these guidelines and requires approval by the Construction Department for any deviations.⁵⁸ While the developer or architect is required to modify Kmart's typical drawings and specifications to meet local building code requirements and environmental conditions, Kmart's Construction Department must then approve the final product.⁵⁹ In 1995, Kmart began converting its traditional stores to a new "high-frequency format;" in 1997, this design was renamed "Big Kmart." The layout of this "Big Kmart prototype" is set forth in the 1998 Kmart Fact Book.⁶⁰ An employee in Kmart's construction department at its corporate headquarters oversaw all of the construction that took place during the high-frequency refurbishment program.⁶¹

Kmart Corporation also coordinated its ADA compliance efforts through corporate headquarters. For example, with respect to new construction, Kmart updated its "standard criteria documents . . . to include the requirements of Title III." Compliance was checked by a "checking team" in the Design and Construction department at Kmart headquarters. Reference to the ADA was included in all standard contracting documents through which Kmart hired architects to build Kmart stores.⁶²

With respect to existing facilities (those built prior to the effective date of the ADA), Kmart headquarters published an "ADA Action Plan," which its Rule 30(b)(6) designee on ADA compliance described as "Kmart Corporation's guidelines for compliance with the Americans with Disabilities Act of 1990."⁶³ Kmart headquarters ordered and directed ADA surveys of

⁵⁸ Glasser Dep. at 132:22 - 133:4.

⁵⁹ Id. at 134:14 - 134:18, 168:6 - 168:11 and Ex. 160 at K23794.

⁶⁰ 1998 Kmart Fact Book (Robertson Decl. Ex. 3) at 6-7.

⁶¹ Glasser Dep. at 93:13 - 93:23.

⁶² Id. at 70:8 - 73:7.

⁶³ Id. at 14:1 - 14:4 and Ex. 111.

existing facilities in 1992, 1997, 1998 and 2000.⁶⁴ When ADA upgrade work was to be done at any given Kmart store, blueprints for the work were generated at Kmart headquarters.⁶⁵

Apparently even simple fixes are beyond the authority of the local manager. Customer Witness William Fuller testified that he requested the manager of the Winchester, Virginia, Kmart to reverse the swing of the hinges on the door to the mens' fitting room to make it wheelchair-accessible. The manager agreed that "he would discuss it with the powers [that] be" but to Mr. Fuller's knowledge, nothing was ever done. Mr. Fuller testified that he

had this sense that even though they wanted to make changes, that they didn't have the authority or that they needed to seek authority from somebody else.

Their powers to impact particularly physical things, the nature of the physical plant, appeared to [him] to be real limited.⁶⁶

In addition, despite Kmart's claimed efforts at compliance, there is evidence that headquarters personnel decided not to implement the ADA Action Plan during the refurbishment of stores.⁶⁷

F. Relief Sought

Named Plaintiffs seek an injunction compelling Kmart to bring its stores into compliance with Title III of the ADA. Because of the centralized nature of Kmart's operation, such an injunction would focus on the policies, procedures, practices, and training administered by Kmart's headquarters. For example, Named Plaintiffs request that the injunction require Kmart to modify its company policies to require sufficient space between clothing racks to permit wheelchair access, to prohibit displays of merchandise that obstruct access to aisles or other

⁶⁴ Id. at 83:11 - 83:22, 105:11 - 105:24 and Exs. 138, 147, 156 & 158.

⁶⁵ Id. at 97:5 - 97:7.

⁶⁶ Fuller Dep. at 54:21 - 55:15.

⁶⁷ See Ex. 146 to Glasser Dep.

merchandise and otherwise to ensure that aisles and merchandise are unobstructed, to modify its training procedures to ensure that access is maintained and accessible check-out aisles are open, and to require staff to monitor and report unauthorized use of accessible parking spaces. An injunction could also address architectural issues on a centralized basis, as that is how Kmart handles all construction matters, including those related to compliance with the ADA. The analysis of any store-specific information -- relating either to architectural or policy matters -- will be simplified by the fact that Kmart gathers and analyzes a wide variety of such information at the headquarters level to direct the implementation of architectural changes and other policies at the store level. There is, thus, a framework in place for both the determination of liability and the implementation of injunctive relief in this case.

A company-wide injunction to bring policies, training and infrastructure into compliance with the ADA would provide access for a far larger number of shoppers in a far more efficient fashion than forcing individual shoppers to bring store-by-store actions. If Plaintiffs are successful in this litigation, individuals who use wheelchairs from all parts of the country will have reliable, convenient and independent access to a consistent source of affordable merchandise.

ARGUMENT

Plaintiffs Are Entitled to Class Certification

I. Introduction

To maintain a class action, Named Plaintiffs must satisfy the four prerequisites of Rule 23(a) of the Federal Rules of Civil Procedure, as well as one of the three subsections of Rule 23(b). Colorado Cross-Disability Coalition v. Taco Bell Corp., 184 F.R.D. 354, 356 (D. Colo. 1999); Cook v. Rockwell Int'l Corp., 151 F.R.D. 378, 381 (D. Colo. 1993) (“Cook I”). Rule 23(a) states:

One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Named Plaintiffs satisfy all of these prerequisites: there are at least 20,000 and perhaps as many as 1.7 million members of the putative class; the barriers experienced by Kmart customers in wheelchairs are very similar and the questions whether these barriers and Kmart policies and practices constitute violations of the ADA are legal questions common to the class; Named Plaintiffs' experiences and claims are typical of those of the class; and Named Plaintiffs and their counsel have been held by the United States District Court for the District of Colorado to be able adequately to represent a class of persons with mobility impairments bringing suit under Title III of the ADA. See Farrar-Kuhn v. Conoco Inc., Civil Action No. 99-WM-2086 (D. Colo. Aug. 22, 2000) (Appendix Tab 21), slip op. at 6 (approving Carrie Lucas as representative plaintiff and Amy Robertson, Timothy Fox and Kevin Williams as class counsel); Taco Bell, 184 F.R.D. at 361 (approving Julie Reiskin and Debbie Lane as representative plaintiffs and Amy Robertson, Timothy Fox and Kevin Williams as class counsel).

Named Plaintiffs seek certification pursuant to Rule 23(b)(2) because Kmart has "acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole."

The Tenth Circuit has held that "if there is error to be made, let it be made in favor and not against the maintenance of the class action." Esplin v. Hirschi, 402 F.2d 94, 99 (10th Cir. 1968), cert. denied, 394 U.S. 928 (1969); see also Taco Bell, 184 F.R.D. at 356 (citing Esplin). It is inappropriate to pass on the merits of the claims at the class certification stage. Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 177-178 (1974); Adamson v. Bowen, 855 F.2d 668, 676 (10th Cir. 1988); Cook I, 151 F.R.D. at 381. Named Plaintiffs will analyze each of the

requirements of Rule 23(a) and Rule 23(b)(2) separately below. As an overview, however, numerous courts have certified classes of individuals with disabilities who use wheelchairs challenging architectural and transportation barriers and failures to make reasonable modifications in policies and procedures.⁶⁸ In still other cases, courts have certified classes of

⁶⁸ See, e.g. Farrar-Kuhn, slip op. at 7; Access Now, Inc. v. AHM CGH, Inc., Case Number: 98-3004 CIV, 2000 U.S. Dist. LEXIS 14788 at *17 (S.D. Fla. Jul. 12, 2000) (Appendix Tab 16); Access Now, Inc. v. Ambulatory Surgery Ctr. Group, Ltd., 197 F.R.D. 522, 530 (S.D. Fla. 2000); Taco Bell, 184 F.R.D. at 363; Colorado Cross-Disability Coalition v. Fey Concert Co., Civ. Act. No. 97-Z-1586 (D. Colo. Sept. 16, 1998) (transcript of hearing attached hereto at Appendix Tab 20) at 24-25; Berlowitz v. Nob Hill Masonic Management, Inc., No. C-96-01241 MHP, 1996 U.S. Dist. LEXIS 22599 at *12 (N.D. Cal. Dec. 6, 1996) (Appendix Tab 18); Bacal v. Southeastern Pa. Transp. Auth., Civil Action No. 94-6497, 1995 U.S. Dist. LEXIS 6609 at *30 (E.D. Pa. May 15, 1995) (Appendix Tab 17); Arnold v. United Artists Theatre Circuit, Inc., 158 F.R.D. 439, 452 (N.D. Cal.), modified, 158 F.R.D. 439, 460 (1994); Leiken v. Squaw Valley Ski Corp., Nos. CIV. S-93-505 LKK and CIV. S-93-1622 LKK, 1994 U.S. Dist. LEXIS 21281 at *37-38 (E.D. Cal. June 28, 1994) (Appendix Tab 26).

individuals with disabilities (either different from or inclusive of mobility impairments) to permit them to challenge discriminatory conditions and policies.⁶⁹

II. The Proposed Class Meets the Requirements of Rule 23(a).

A. The Proposed Class Is So Numerous That Joinder Is Impracticable.

Rule 23(a)(1) requires that a class be so numerous that joinder of all members is impracticable. There are several factors that are relevant to this question, including the class size and the geographic diversity of class members. See Farrar-Kuhn, slip op. at 3; Taco Bell, 184 F.R.D. at 357; 1 Robert Newberg, Newberg on Class Actions, § 3.06 at 3-27 -35 (3d ed. 1992)

⁶⁹ See, e.g., Lightbourn v. County of El Paso, Texas, 118 F.3d 421, 426 (5th Cir. 1997), cert. denied, 522 U.S. 1052 (1998); Siddiqi v. Regents of the Univ. of Calif., No. C 99-0790 SI, 2000 U.S. Dist. LEXIS 19930 at *26-27 (N.D. Cal. Sept. 6, 2000) (Appendix Tab 29); Boulet v. Cellucci, 107 F. Supp. 2d 61, 81 (D. Mass. 2000); Duprey v. Connecticut Dep't of Motor Vehicles, 191 F.R.D. 329, 339-40 (D. Conn. 2000); Neff v. VIA Metro. Transit Auth., 179 F.R.D. 185, 196 (W.D. Tex. 1998); Anderson v. Dep't of Pub. Welfare, 1 F. Supp. 2d 456, 462 (E.D. Pa. 1998); Kathleen S. v. Dep't of Pub. Welfare, Civ. Act. No. 97-6610, 1998 U.S. Dist. LEXIS 2027 at *8-9 (E.D. Pa. Feb. 25, 1998) (Appendix Tab 24); Clark v. California, No. C96-1486 FMS, 1997 U.S. Dist. LEXIS 16444 at *2 (N.D. Cal. Feb. 26, 1997) (Appendix Tab 19); Guckenberger v. Boston Univ., 957 F. Supp. 306, 326-27 (D. Mass. 1997); Thrope v. Ohio, 173 F.R.D. 483, 491 (S.D. Ohio 1997); Montez v. Romer, No. 92-N-0870 (D. Colo. Jan. 15, 1996) slip op. at 2 (Appendix Tab 28) (adopting Recommendation of United States Magistrate Judge Concerning Class Action Certification, dated May 31, 1995 (attached at Appendix Tab 27)); Civic Ass'n of the Deaf of New York City, Inc. v. Giuliani, 915 F. Supp. 622, 634 (S.D.N.Y. 1996); Henrietta D. v. Giuliani, No. 95-CV-0641, 1996 U.S. Dist. LEXIS 22373 at *47 (E.D.N.Y. Oct. 25, 1996) (Appendix Tab 22); McKay v. County Election Comm'rs For Pulaski County, Arkansas, 158 F.R.D. 620, 626 (E.D. Ark. 1994). The Farrar-Kuhn, Fey Concert, and Nefflain cases were all cases either approving settlement classes or granting a joint motion for class certification. The Supreme Court has held that, even in that context, the court must conduct a thorough analysis to reassure itself that the proposed class satisfies Rule 23. Amchem Products, Inc. v. Windsor, 521 U.S. 591, 619-20 (1997). Each of the courts in the listed cases referenced Amchem and conducted such an analysis. Farrar-Kuhn, slip op. at 2; Fey Concert, transcript at 3-4; Neff, 179 F.R.D. at 192.

(and cases cited therein) (hereinafter “Newberg”). Each of these factors shows that joinder is impracticable in the case at hand.

The class is large. In determining class size, the exact number of potential members need not be shown. See, e.g., Joseph v. General Motors Corp., 109 F.R.D. 635, 639 (D. Colo. 1986). Rather, the court may make “common sense assumptions” to support a finding that joinder would be impracticable. Taco Bell, 184 F.R.D. at 358; 1 Newberg § 3.03 at 3-17 & n.58 (and cases cited therein). “Census figures are frequently relied on by courts in determining the size of proposed classes.” Taco Bell, 184 F.R.D. at 358.

In the present case, Kmart owns and operates approximately 2,100 stores around the United States, and approximately 180 million customers patronize these stores each year.⁷⁰ Census figures demonstrate there are more than two million persons age 15 and older in the United States who use wheelchairs.⁷¹ Thus if only one out of 100 persons who use wheelchairs in these states patronized a Kmart store, the class would consist of over 20,000 persons. If, as Kmart claims, “85 percent of the U.S. population shop[s] at Kmart every year,”⁷² that suggests that the class would consist of approximately 1.7 million members or 85 percent of the two million Americans who use wheelchairs.

⁷⁰ See 2000 Annual Report at 16; 1999 Kmart Fact Book at 5.

⁷¹ See “Americans with Disabilities: 1997 - Table 2,” Robertson Decl. Ex. 15.

⁷² 2000 Annual Report at 4.

The class is geographically diverse. “The fact that a class is dispersed over several counties weighs in favor of a finding of numerosity.” Taco Bell, 184 F.R.D. at 358 (citation omitted); see also Ambulatory Surgery, 197 F.R.D. at 525 (fact that class members in nationwide ADA class action were “spread across the United States” supported finding that joinder was impracticable). In the case at hand, there are Kmart stores in 50 states¹ and there are class members in 50 states. Indeed, Named Plaintiffs have submitted deposition testimony from putative class members who have had access problems at Kmart stores in 26 states; if complaints to Kmart are included, the total is 42 states.²

For these reasons, the class is so numerous that joinder is impracticable and thus satisfies Rule 23(a)(1).

B. There Are Questions of Law and Fact Common to the Proposed Class.

Rule 23(a)(2) requires that there be questions of law or fact that are common to the class. Unlike the test under Rule 23(b)(3) -- not at issue in this case -- common issues need not predominate over individual ones. Adamson, 855 F.2d at 676. “Commonality requires only a single issue common to the class.” J.B. v. Valdez, 186 F.3d 1280, 1288 (10th Cir. 1999) (citations omitted). “The claims of the class members need not be identical for there to be commonality; either common questions of law or fact will suffice.” Schwartz v. Celestial Seasonings, Inc., 178 F.R.D. 545, 551 (D. Colo. 1998) (citing Milonas v. Williams, 691 F.2d 931, 938 (10th Cir. 1982), cert. denied, 460 U.S. 1069 (1983)). “[T]here may be varying fact situations among individual members of the class . . . as long as the claims of the plaintiffs and other class members are based on the same legal or remedial theory.” Joseph, 109 F.R.D. at 639-40 (citation omitted). Indeed, if identical claims were required, “it would be rare, if even

¹ 1998 Kmart Fact Book at 12.

² Miot Decl. ¶¶ 3, 5.

possible, to obtain class certification.” Cook v. Rockwell Int’l Corp., 181 F.R.D. 473, 480 (D. Colo. 1998). As demonstrated by the attached deposition excerpts, members of the putative class in this case share a number of common factual experiences and legal issues that satisfy the commonality requirement of Rule 23(a)(2).

Common discriminatory barriers. Members of the proposed class experience common forms of discrimination at Kmart stores around the country, including (though not limited to): encountering boxes, pallets, and merchandise displays that impede their access; being unable to access clothing because fixtures are placed too close together to permit passage in a wheelchair; finding no open, accessible check-out aisle at which to purchase merchandise; having difficulty using service counters that are too high; being unable to use fitting rooms or restrooms; and being unable to park in an accessible parking space.³

A number of cases have held that where people who use wheelchairs encounter the same types of barriers at a number of commonly-owned or affiliated public accommodations, class certification is appropriate. See, e.g., Farrar-Kuhn, slip op. at 4-5; Ambulatory Surgery, 197 F.R.D. at 526-27; AHM, 2000 U.S. Dist. LEXIS 14788 at *8-12; Taco Bell, 184 F.R.D. at 359-60; Arnold, 158 F.R.D. at 449; Leiken, 1994 U.S. Dist. LEXIS 21281 at *14. In Farrar-Kuhn, the plaintiffs sought certification of a class -- defined almost precisely as the putative class here is defined -- of people who use wheelchairs or scooters who had been denied the full and equal enjoyment of goods and services at service stations and convenience stores owned by Conoco Inc. Plaintiffs in that case challenged a variety of barriers to wheelchair access at approximately 200 Conoco stores in eleven states. Slip op. at 1-2. Judge Miller held that the class satisfied Rule 23(a)(2) because common questions of fact and law existed, including:

- (1) the class members complain of the same architectural barriers and policies;
- (2) the plaintiffs urge that by these architectural barriers and policies, the defendant discriminated against all members of the class; and (3) the determination of

³ See supra pp. 2-12 and Tabs 7 & 8 of the Appendix.

whether these barriers and policies violate the ADA is the same whether there is one plaintiff or a class of plaintiffs.

Slip op. at 5; see also Arnold, 158 F.R.D. at 449 (holding that “[f]rom the fact that the same categories of design features are being challenged in each [of 70 theaters], it follows that the legality of those features are legal issues common to the claims of the members of all of the subclasses”) (emphasis added); Taco Bell 184 F.R.D. at 359-60 (Plaintiffs challenged the “queue lines” at all Taco Bell restaurants in Colorado).

Like the plaintiffs in Farrar-Kuhn, Arnold and Taco Bell, Named Plaintiffs here challenge the same categories of design features at all Kmart stores. Although each Kmart store may be arranged differently, both Kmart policy -- for example, requiring floor stacks and permitting racks as close as 24 inches apart -- and Named Plaintiff and Customer Witness testimony show that the discriminatory design features and their effects on shoppers who use wheelchairs or scooters are extremely consistent. The fact that a narrow clothing aisle may occur in the northwest corner of one store but the southeast corner of another or occur between “four-way racks” of tee-shirts in one store but between “round racks” of jackets in another does not diminish the commonality of the experience (inability to access merchandise in a wheelchair), the commonality of the policy (Kmart’s company-wide policy of permitting distances as narrow as 24 inches between clothing displays), or the commonality of the legal question (whether the ADA requires Kmart to maintain sufficient distance between its clothing racks to permit people in wheelchairs to pass). The same analysis applies to the other design features challenged in this litigation.

Common application of corporate policy and practices. Where a class challenges discriminatory policies and practices, commonality is established. 1 Newberg § 3.10 at 3-52 - 53. see also J.B., 186 F.3d at 1288 (holding that the fact “that the claims of individual class members may differ factually should not preclude certification under Rule 23(b)(2) of a claim seeking the application of a common policy” (citations omitted)). In the present case, Named Plaintiffs

challenge a number of centralized Kmart policies, for example, the requirement of displaying merchandise in the aisles, the restocking policy that results in obstructed aisles, and the standard that permits as little as 24 inches between racks. They also challenge common Kmart practices, for example, failing to open accessible check-out aisles, failing adequately to monitor aisles, fitting rooms, restrooms and accessible parking for obstructions, and failing to incorporate, in Kmart corporate training materials, sufficient steps to ensure that employees maintain wheelchair access.

In Bacal, a class of plaintiffs with disabilities challenged the practices of a paratransit system, including that “requests for service made a day in advance are routinely not met; requested rides are not scheduled at the requested times; . . . [and] vehicles are routinely late, early or never arrive for scheduled picks-ups.” Id., 1995 U.S. Dist. LEXIS 6609 at *4. Despite the multiplicity of individual circumstances this undoubtedly represented, the court held that class members were all challenging “the same alleged illegal conduct of the defendants, namely, a number of allegedly routine practices which violate the ADA and affect all . . . paratransit riders.” Id. at *11.⁴ Likewise, Named Plaintiffs here challenge routine Kmart practices that violate the

⁴ See also Hill v. Amoco Oil Co., No. 97 C 7501, 2001 U.S. Dist. LEXIS 3082 at *17-18 (N.D. Ill. Mar. 15, 2001) (Appendix Tab 23) (holding that a class of African-Americans alleging a practice of requiring them, but not white customers, to prepay for gasoline satisfied commonality); Siddiqi, 2000 U.S. Dist. LEXIS 19930 at *16-22 (holding that common questions existed among a class of Deaf and hard of hearing students challenging a university’s policies and practices in the provision of sign language interpreters and other accommodations); Thomas County Branch of the Nat’l Ass’n for the Advancement of Colored People v. City of Thomasville Sch. Dist., 187 F.R.D. 690, 697 (M.D. Ga. 1999) (holding that common questions existed among African American students in school district’s elementary, middle and high schools as well as its gifted and special education programs who alleged a variety of policies and practices that discriminated against them); Hewlett v. Premier Salons Int’l, Inc., 185 F.R.D. 211, 217 (D. Md. 1997) (holding that common questions existed among class of African-American customers of hair salons who alleged a corporate policy of denying services to such customers); Guckenberger, 957 F. Supp. at 325 (holding that common questions existed where a class of students with learning disabilities alleged that a university’s policies and procedures for accommodations violated the ADA and other antidiscrimination statutes); Kernan v. Holiday Universal, Inc., No. JH90-971, 1990 WL 289505 at *3 (D. Md. Aug. 14, 1990)(Appendix Tab 25) (holding that

ADA and that affect all Kmart customers who use wheelchairs or scooters. Furthermore, where, as here, plaintiffs with disabilities allege violations of the ADA at affiliated facilities, it is significant that Kmart controls the design and construction of Kmart stores and formulated and attempted to execute an ADA compliance plan, all at the headquarters level. See Ambulatory Surgery, 197 F.R.D. at 526 (relying, in holding that a class of persons with disabilities satisfied the commonality requirement, on the fact that the defendants “availed themselves of a common program of construction, design, and building code/ADA review.”).

Failure to enact or enforce a policy where one is legally required also provides a common question warranting class certification. The DOJ has interpreted its regulations to require that public accommodations such as Kmart “ensure that accessible routes are properly maintained and free of obstructions.” Preamble at 638. Kmart is specifically required to “ensure that an adequate number of accessible check-out aisles is kept open during store hours, or . . . otherwise modify its policies and practices, in order to ensure that an equivalent level of convenient service is provided to individuals with disabilities as is provided to others.” 28 C.F.R. § 36.302(d). The lack of clearly enunciated policies and training ensuring access -- for example, the absence from check-out training materials of reference to the requirement of keeping an accessible check-out aisle open -- is an issue common to the class.

In Martens v. Smith Barney, Inc., 181 F.R.D. 243 (S.D.N.Y. 1998), a group of female employees sought class certification, challenging “a pattern of discriminatory treatment of women that results in entry barriers, sexual harassment, and glass ceilings, and that traces to a central failure by Smith Barney’s management and human resources department to prevent and remedy widespread discrimination.” Id. at 259. Although entry barriers, sexual harassment and glass ceilings involve a wide variety of individual circumstances, the court held that “[c]lass

common questions existed among a class of African-American plaintiffs alleging a policy of discriminatory denial of spa membership).

certification [was] appropriate if the claims entail[ed] common issues and the injuries trace[d] to the central employer's failings." Id.⁵

Common legal issues. Members of the putative class share common legal questions including, among others: whether the discriminatory policies, practices and barriers at Kmart stores violate the ADA; whether Kmart is required to bring those of its stores built after January 26, 1993 into full compliance with the ADA, 42 U.S.C. § 12183(a)(1); whether it is readily achievable for Kmart to remove architectural barriers in those stores built before that time and not altered in the meantime, § 12182(b)(2)(A)(iv); where discrimination results from Kmart policies (such as displaying merchandise in floor stacks, placing unattended boxes in aisles as part of the stocking process, or permitting clothing racks as close as 24 inches apart) or practices (such as failing to keep merchandise aisles unobstructed or failing to keep an accessible check-out aisle open) whether modifying such policies or practices would fundamentally alter Kmart's goods or services, § 12182(b)(2)(A)(ii); and whether Kmart has failed in its obligation to maintain access. 28 C.F.R. § 36.211.

Finally, defenses asserted by Kmart will require company-wide analysis. As the Arnold court noted:

[W]here, as here, plaintiffs challenge conditions at several sites, all owned by a single corporate defendant, the legal standard applied under the ADA to evaluate the adequacy of the accommodations at each of the respective theaters is one that hinges, in part, on various corporation-wide factors such as the availability of

⁵ See also Lightbourn, 118 F.3d at 426 (holding that common questions existed where a class of persons with disabilities alleged that county violated the ADA and 29 U.S.C. § 794 by failing to direct local election officials to enforce those statutes); Buycks-Roberson v. Citibank Fed. Sav. Bank, 162 F.R.D. 322, 330-32 (N.D. Ill. 1995) (holding that common questions existed where policy that delegated discretion to loan officers permitted systematic discrimination against African-American clients); Gomez v. Ill. State Bd. of Educ., 117 F.R.D. 394, 399-400 (N.D. Ill. 1987) (holding that commonality existed where the plaintiffs alleged "that the defendants have violated federal law because of their failure to promulgate uniform guidelines" with respect to the putative class of students).

resources. These are additional issues of fact and law common among the subclasses.

Arnold, 158 F.R.D. at 449 (citations omitted) (quoted in Taco Bell, 184 F.R.D. at 360). Kmart has asserted the defense that some of the remedial measures demanded by the plaintiffs will not be “readily achievable,” see Amended Answer to Amended Class Action Complaint at 13, a standard that looks to the resources of the parent company. 28 C.F.R. § 36.104.

C. Named Plaintiffs’ Claims Are Typical of the Claims of the Class.

Rule 23(a)(3) requires that the claims of the Named Plaintiffs be typical of those of the class. The Supreme Court has held that “[t]he commonality and typicality requirements of Rule 23(a) tend to merge.” General Tel. Co. of Southwest v. Falcon, 457 U.S. 147, 157 n.13 (1982). Furthermore, “differing fact situations of class members do not defeat typicality under Rule 23(a)(3) so long as the claims of the class representative and class members are based on the same legal or remedial theory.” Adamson, 855 F.2d at 676. This is so even if not all wheelchair-using Kmart shoppers have encountered discrimination at Kmart.

The mere fact that some class members may not wish to become members of the class or pursue claims against [the defendant] does not indicate that their interests are antagonistic to those of the named plaintiffs or the remainder of the class, so that class action treatment would be inappropriate. Rather, the so-called “satisfied customers” would be indifferent as to the claims and potential recovery of the class.

Joseph, 109 F.R.D. at 640 (citation omitted).⁶

⁶ The existence of “satisfied customers” in the class would not defeat other provisions of Rule 23(a) either. See, e.g., Hill, 2001 U.S. Dist. LEXIS 3082 at *18 (holding that the fact that a civil rights class may include individuals who did not actually suffer discrimination does not defeat commonality); Siddiqi, 2000 U.S. Dist. LEXIS 19930 at *25-26 (holding that the fact that some class members may oppose the class does not defeat class certification as “any equitable relief will not ‘adversely affect’ the rights [of such] class members . . . where the aim of the relief is to alleviate the violation, not cause new violations to the rights of deaf and hard of hearing students.”).

The court in Taco Bell concluded that the typicality prong was satisfied for reasons directly applicable to this case:

The plaintiffs here suffer from disabilities which, although not identical, require the use of a wheelchair or scooter for mobility. Thus, the effect of the disability is shared by all class members. Further, the representative plaintiffs contest the legality of architectural barriers under the same statutes as the class.

184 F.R.D. at 360. Similarly, in Ambulatory Surgery, the court held that the proposed representatives of a nationwide class of persons with disabilities challenging barriers at various types of affiliated health care facilities had claims typical of the class because they had the same interests and suffer[ed] the same injuries as the class members in that they are allegedly denied access to the same facilities as the class members and discriminated against as the result of the continued existence of physical barriers to access. Furthermore, the representative Plaintiffs, like the class members, seek injunctive relief requiring Defendants to modify each of their facilities, as well as build new facilities, in compliance with the ADA and the regulations promulgated thereunder.

197 F.R.D. at 528. Named Plaintiffs all use wheelchairs for mobility and have encountered discriminatory barriers and policies at Kmart stores. The effect of these barriers and policies is the same for these individuals as for the class: it impairs their ability to shop at Kmart, that is, to have “full and equal enjoyment of [Kmart’s] goods, services, facilities, privileges, advantages, or accommodations.” § 12182(a). Named Plaintiffs and the proposed class challenge these barriers under the same statutes and remedial theories as the class: they assert that the ADA requires Kmart to remove its barriers and make reasonable modifications to its policies and practices to permit them full and equal enjoyment of Kmart’s goods and services. See § 12182(a), (b)(2)(A)(ii), (iii) & 12183(a). Named Plaintiffs’ claims satisfy the typicality requirement of Rule 23(a)(3).

D. Named Plaintiffs Will Fairly and Adequately Protect the Interests of the Class.

The final requirement of Rule 23(a), adequate representation, requires that the representative plaintiffs have common interests with the class members and that the representative plaintiffs will vigorously prosecute the interests of the class through qualified counsel. Cook I, 151 F.R.D. at 386. Adequate representation is usually presumed in the absence of contrary evidence. Id. (quoting 2 Newberg § 7.24 at 7-80 to -81).

Defendant does not dispute the adequacy of representation provided by class counsel,¹ and “[t]his in itself goes a long way to negating [any] argument that the class will be inadequately represented.” Schwartz, 178 F.R.D. at 553.

To satisfy the adequate representation requirement, “a class representative must be part of the class and ‘possess the same interest and suffer the same injury as the class members.’” Amchem, 521 U.S. at 625-26 (citations omitted). Named Plaintiffs in this case, Carrie Lucas, Debbie Lane, and Julie Reiskin, easily meet this standard.

All three Named Plaintiffs are part of the class and have suffered the same injury as class members as all three have disabilities that require them to use wheelchairs for mobility and all have experienced discrimination at Kmart Stores as a result of Defendant’s architectural barriers and discriminatory practices and policies.² All three Named Plaintiffs have lengthy histories of dedication to the rights of persons with disabilities, demonstrating that they possess the same interest as class members.

Ms. Lucas is a graduate of The Iliff School of Theology. She currently is the Access and Testing Coordinator at CCDC and is a member of Disability Ministries, the national committee

¹ See Letter from S. Mintz to A. Robertson (Robertson Decl. Ex. 17).

² See supra pp. 2-5.

for persons with disabilities of the United Church of Christ. She was a delegate to the National Disability Party Convention. Ms. Lucas's daughter also uses a wheelchair. Ms. Lucas has been admitted for enrollment beginning in the fall of this year at the University of Denver College of Law, where she has received a full scholarship -- the Chancellor's Scholarship -- based on her commitment to public service.³

Ms. Lane began working for the rights of persons with disabilities more than ten years ago. She has been involved with numerous organizations concerned with the rights of persons with disabilities, including the Epilepsy Foundation of Missouri and the Missouri Parents' Act, an organization assisting families of persons with disabilities. She works at CCDC in the position of Project Coordinator.⁴

Ms. Reiskin was a member of Connecticut Coalition of Citizens with Disabilities from 1987 until 1994, and a member of CCDC from 1994 to the present. While in Connecticut, Ms. Reiskin also worked with AIDS Project Hartford and supervised a residential treatment program at a school for children with emotional and learning disorders. From December 1996 to the present, Ms. Reiskin has served as the Executive Director of CCDC.⁵

All three Named Plaintiffs have previously been held by this Court to be adequate representatives in class actions brought under Title III of the ADA. See Farrar-Kuhn, slip op. at 6 (finding that Ms. Lucas was an adequate class representative); Taco Bell, 184 F.R.D. at 361 (finding that Ms. Reiskin and Ms. Lane were adequate class representatives). For these reasons, the proposed class meets the adequacy of representation requirement of Rule 23(a)(4).

E. The Proposed Class is Sufficiently Defined to be Administratively Feasible.

³ Lucas Decl. ¶¶ 2-8.

⁴ Lane Decl. ¶¶ 3-4.

⁵ Reiskin Decl. ¶¶ 3-7.

Although not included in Rule 23, most courts require that, to be certified, a class must be sufficiently defined so as to be “administratively feasible for the court to determine whether a particular individual is a member.” Taco Bell, 158 F.R.D. at 357 (quoting Davoll v. Webb, 160 F.R.D. 142, 143 (D. Colo. 1995), aff’d 194 F.3d 1116 (10th Cir. 1999)); see also Cook I, 151 F.R.D. at 382; Joseph, 109 F.R.D. at 638. “[T]he class does not have to be so ascertainable that every potential member can be identified at the commencement of the action. If the general outlines of the membership of the class are determinable at the outset of the litigation, a class will be deemed to exist.” Cook I, 151 F.R.D. at 382 (citations omitted). The class proposed here is defined to include “all individuals with disabilities who use wheelchairs or scooters for mobility” who have suffered discrimination at a Kmart store anywhere in the United States. This definition is administratively feasible, especially in light of the fact that the class demands only classwide injunctive relief. That is, in ordering Kmart to make its stores more accessible to people who use wheelchairs or scooters, this Court will not be required to determine whether any given individual is a class member as it might in a case demanding damages or individualized injunctive relief (for example, back-pay or on-the-job accommodations). Further, because each class member requires a wheelchair or scooter for mobility, each such person is by definition substantially impaired in the major life activity of walking, and thus there will be no need to conduct an individualized inquiry as to whether a class member has a “disability” under the ADA. See Preamble at 620 (“[A] person who is paraplegic is substantially limited in the major life activity of walking” and is thus disabled under the ADA.).

The cases cited above,⁶ also suggest that classes defined to include individuals who use wheelchairs and/or scooters who have suffered discrimination at public accommodations are sufficiently well defined.

⁶ See supra notes 77-78.

III. The Proposed Class Is Proper Under Rule 23(b)(2).

Once a class has satisfied all four of the prerequisites of Rule 23(a), it must satisfy one of the subsections of Rule 23(b). The class proposed herein satisfies Rule 23(b)(2).

A class is proper under Rule 23(b)(2) if the party opposing the class “acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole . . .” and the representatives are seeking “final injunctive relief or corresponding declaratory relief.” “Civil rights cases against parties charged with unlawful, class-based discrimination are prime examples” of Rule 23(b)(2) classes. Amchem, 521 U.S. at 614 (quoting Adv. Comm. Notes, 28 U.S.C. App., p. 697). A case that seeks “exclusively injunctive relief, alleging class-based discrimination for noncompliance with federal statutory provisions (the ADA) . . . fits squarely within the ambit of cases for which Rule 23(b)(2) was created.” AHM, 2000 U.S. Dist. LEXIS 14788 at *16; see also Taco Bell, 184 F.R.D. at 361 (holding that “[a] class action in which all members of the class complain of the identical architectural barrier necessarily involves acts that are generally applicable to the class”) (citations omitted); Arnold, 158 F.R.D. at 452 (holding that class alleging violation of Title III of the ADA at 70 commonly-owned movie theaters was a “paradigm of the type of action for which the (b)(2) form was created”).

In the case at bar, “generally applicable regulations under the ADA govern [Defendant’s] various operations [and] those generally applicable requirements . . . lead to conditions which are generally applicable to the plaintiffs as a group.” Ambulatory Surgery, 197 F.R.D. at 529. For example, Defendant’s discriminatory policies and practices apply to, and affect, class members in the same way: blocked aisles and narrow passages between clothes racks prevent class members from independently viewing and selecting merchandise; closed accessible check-out lanes prevent class members from independently purchasing merchandise; and inaccessible fitting rooms, restrooms and parking spaces prevent class members from utilizing these areas. Certification

under Rule 23(b)(2) is proper because Kmart has acted in a manner applicable to the entire class, making appropriate final declaratory and injunctive relief. It is also proper because the class seeks only injunctive and declaratory relief.

CONCLUSION

For the reasons set forth above, Named Plaintiffs respectfully request that this Court certify a class defined as follows:

All persons with disabilities who use wheelchairs or scooters for mobility who have been denied, or are currently being denied, full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any public accommodation that was designed or constructed by or is owned, operated, or leased by or leased to Kmart Corporation anywhere in the United States.

Named Plaintiffs further request that they be certified as the representatives of this class and that the attorneys listed below be certified as class counsel.

Respectfully Submitted,

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Certificate of Service

I hereby certify that on July 13, 2001, copies of Plaintiffs' Substituted Memorandum in Support of Motion For Class Certification as well as substituted Tabs 7, 8 and 14 of the Appendix thereto were served by first class mail, postage prepaid, on:

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