IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

In re:	)	Case No. 02-B02474
	)	(Jointly Administered)
KMART CORPORATION, et al.,	)	Chapter 11
	)	Chief Judge Susan Pierson Sonderby
	)	Hearing Date: June 26, 2002
	)	Hearing Time: 11:00 a.m. (Central Time)
Debtors.	)	Objection Deadline: June 19, 2002

MOTION OF CARRIE ANN LUCAS, DEBBIE LANE AND JULIE REISKIN FOR RELIEF FROM STAY UNDER SECTION 362 OF THE BANKRUPTCY CODE

Carrie Ann Lucas, Debbie Lane and Julie Reiskin ("Movants") hereby move pursuant to section 362(d)(2) of title 11 of the United States Code (the "Bankruptcy Code") for an order lifting the automatic stay to permit Movants to proceed with their claims for injunctive relief under Title III of the Americans with Disabilities Act, 42 U.S.C. §§ 12181 - 12189, ("ADA"), which prohibits discrimination based on disability by places of public accommodation.

On behalf of a nationwide class of Kmart shoppers who use wheelchairs, Movants allege that Kmart stores contain barriers that discriminate against those shoppers. These claims have been pending before Judge John L. Kane in the United States District Court for the District of Colorado since October, 1999. Lucas v. Kmart Corp., Civil Action No. 99-K-1923 (D. Colo.) (the "Wheelchair Access Litigation").

This Motion is decisively different from a garden variety lift stay motion, in which the holder of a pre-petition claim running against the debtor's estate seeks relief from the stay in order to be permitted to liquidate that pre-petition claim in a forum other than the bankruptcy court. Movants do not hold pre-petition "claims" against the Debtors' estates, and are not suing for a money damages award. Rather, the core contention of the Wheelchair Access Litigation is

that the Debtors' businesses are presently being operated – on a post-petition basis – in violation of federal law. The only remedy sought in that litigation is an injunction ordering the Debtors, on a going forward basis, operate their businesses in compliance with the mandates established by Congress in the Americans with Disabilities Act.

Relief from the automatic stay is appropriate with respect to the Wheelchair Access Litigation:

- Movants seek only to ensure compliance with federal civil rights laws during and after the Debtors' bankruptcy proceedings. Modification of the stay is appropriate because Kmart's obligation to comply with those laws — including the ADA — is not extinguished by the bankruptcy.
- The principal concern to which the automatic stay is addressed – preventing pre-petition creditors from jumping the line and claiming against the estate's assets outside of the bankruptcy process – is not implicated by the Wheelchair Access Litigation, which seeks only injunctive relief, not damages.
- The concern for "breathing space" for management to focus on the reorganization effort cannot be asserted as a reason to allow the present and ongoing violation of federal civil rights laws during the course of the bankruptcy case.
- Because the Wheelchair Access Litigation does not represent a "claim" against the bankruptcy estate, the underlying lawsuit will not be discharged at the end of the bankruptcy case, and Movants will be entitled to resume the litigation upon the confirmation of a plan of reorganization. Accordingly, the only question before this Court in connection with this lift stay motion is whether the Debtors

should be permitted, in the meantime, to operate their business in violation of federal civil rights laws.

- Modifying the stay will serve the important public policy goal of access for and integration of individuals with disabilities in public accommodations.
- Modifying the stay will serve the goal of judicial economy, as Judge Kane is fully familiar with the legal and factual background of this case, whereas this Court would confront the need to master, in a non-core matter that would be subject to de novo review, the hundreds of pages of briefing and thousands of pages of evidence that have already been submitted in Colorado.

ADA STATUTORY BACKGROUND

Congress enacted the ADA 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, 532 U.S. 661, 675 (2001) (holding that the ADA provides a "broad mandate" to eliminate discrimination against people with disabilities). The principal goal of the statute is to insure that individuals with disabilities are guaranteed "equality of opportunity, full participation, independent living, and economic self-sufficiency." 42 U.S.C. § 12101(a)(8). By enacting Title III of the ADA, Congress intended to prohibit discrimination on the basis of disability in places of public accommodation such as Kmart. Id. §§ 12182-12183. Kmart, however, has discriminated in the past and continues to discriminate now against individuals with disabilities in violation of Title III, both with respect to the company's physical facilities and with respect to its policies and practices.

Movants bring this action solely in order to obtain Kmart's compliance with federal law as set forth by Congress in the ADA. The remedy they seek — indeed, the only remedy

available under Title III — is injunctive relief pursuant to section 308(a) of the ADA, 42 U.S.C. § 12188(a), ordering Kmart to bring its stores into compliance with Title III, and reasonable attorneys' fees and costs pursuant to section 505. Id. § 12205. Movants do not seek damages under that statute for themselves or the class.[1] Following is a description of the ADA provisions that specifically prohibit the discriminatory policies and practices conducted by Kmart on a daily basis.

Title III recognizes that it is easier to build wheelchair access into a new facility than to retrofit existing facilities. As such, facilities built after January 26, 1993 are required to be "readily accessible to and usable by" individuals who use wheelchairs. 42 U.S.C. § 12183(a)(1). With respect to facilities built before that time but altered in certain ways since, the altered portion must be readily accessible to and usable by individuals who use wheelchairs. Id. § 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. Id. § 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. Id. § 12181(9). Pursuant to statutory mandate, the Department of Justice ("DOJ") published Standards for Accessible Design ("Standards"), which provide dimensional standards and scoping — for example, the minimum width of accessible pathways or minimum number of accessible parking spaces — required for physical compliance with Title III. See id. § 12186; 28 C.F.R. pt. 36, app. A.

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[1] Movants have sued for damages for themselves only under the Colorado Anti-Discrimination Act. C.R.S. § 24-34-602 (providing damages of $50 to $500 for each instance of discrimination by a place of public accommodation). As a condition of lifting the stay, Movants are willing to dismiss these damages claims.

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 those goods, services, or facilities. 42 U.S.C. § 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 and usable by persons with disabilities." 28 C.F.R. § 36.211.[2] 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 (2001) ("Preamble") at 675.

FACTUAL AND PROCEDURAL BACKGROUND

Movants are all individuals with disabilities who use wheelchairs for mobility and who regularly shop at Kmart stores. As described in the Wheelchair Access Litigation, Kmart is in violation of Title III in a number of systemic ways, including: (1) failure to provide and maintain access to merchandise for shoppers in wheelchairs or scooters; (2) failure to ensure that an accessible checkout aisle is open at all times; and (3) failure to provide and maintain accessible restrooms, fitting rooms and parking spaces.

Failure to provide access to merchandise. Kmart consistently violates the ADA by failing to provide a 36-inch-wide "accessible route" to "[s]helves or display units allowing self-service by customers." See Standards §§ 4.1.3(12)(b); see also id. § 4.3 (defining "accessible route").

[2] The DOJ's Title III regulations are "entitled to deference." Bragdon v. Abbott, 524 U.S. 624, 646 (1998).

Where accessible routes are required, they often are not maintained as prescribed by statute. See 28 C.F.R. § 36.211. Furthermore, Kmart must make reasonable accommodations in its rack-spacing, merchandise-display and stocking policies to ensure access for shoppers in wheelchairs. 42 U.S.C. § 12182(b)(2)(A)(ii).

Kmart has several company-wide policies that virtually ensure that these requirements are systematically not met. In addition, Kmart customers who use wheelchairs, Kmart's mystery shopper surveys, and expert reports commissioned by Kmart for the Wheelchair Access Litigation all provide extensive evidence of obstacles to wheelchair access and other ADA violations. For example, one Kmart policy violates the ADA by permitting as little as 24 inches between clothing racks,[3] 12 inches narrower than required by the Standards. Kmart's experts concluded that in almost 80% of the stores surveyed, 24-inch-wide shopping carts did not fit through all of the clothing racks.[4] That is, 80% did not even meet Kmart's 24-inch standard much less the ADA's 36-inch one.

Other Kmart policies also violate Title III of the ADA, including the requirement of "aisle stacks" or "floor stacks," that is, stacks of merchandise displayed on the floor adjacent to fixed shelving.[5] These displays block access to the merchandise behind them and often to the

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[3] See Ruffing Dep. at 29:14 - 30:9, 32:5 - 32:18, 151:20 - 152:11. (All deposition excerpts are attached as exhibits to the Declaration of Elizabeth R. Miot ("Miot Decl.".)

[4] See Rudolph Dep. at 25:21 - 25:25 (none of the surveyors were individuals who used wheelchairs); Waxweiller Dep. at 12:21 - 13:9 (shopping cart used to survey clothing racks); Ashare Dep. at 19:8 - 20:7 (same) & Ex. 32 at 4 (Survey form asking "Can a **shopping cart** be pushed between all clothing and accessory racks?") (emphasis in original)); Robertson Decl. ¶¶ 18-20 and Ex. 5 (spreadsheet analyzing survey results).

[5] See Ruffing Dep. at 129:17 - 138:25 and Ex. 105 (explaining and illustrating "aisle stacks"); Miot Decl. ¶ 2 (listing Weekly Guides produced by Kmart that require "floor stacks" or "aisle stacks").

remainder of the aisle for shoppers who use wheelchairs.[6] Kmart also systematically fails to keep its merchandise aisles free of obstructions to shoppers in wheelchairs as required by federal law, including pallets, boxes, clutter and other obstacles. A database provided by Kmart of 68,301 reports from "mystery shoppers" who evaluated Kmart stores during the period February 1999 to August 2000 yielded at least 19,406 reports or 28.4% that include descriptions of obstructions that pose barriers to customers in wheelchairs. Of the 2,090 stores shopped, mystery shoppers reported relevant problems at 2,035 of them.[7] Additional deposition testimony from 45 Kmart shoppers who use wheelchairs explain how these obstacles delay, impede and generally frustrate their attempts to shop at Kmart stores.[8]

Failure to ensure that an accessible checkout aisle is open at all times. Title III of the ADA requires that each Kmart store have accessible check-out aisles in numbers relative to the total number of check-out aisles in that store, and that Kmart 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). Kmart systematically fails to do this. Movant Carrie Lucas has repeatedly encountered the situation in which no accessible check-out aisle was open and each time she inquired, she was informed that the clerk staffing the accessible aisle was on

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[6] Declaration of Carrie Ann Lucas ("Lucas Decl.") ¶ 4. Even experts hired by Kmart reported that, in approximately 21% of the stores surveyed, a customer in a wheelchair would not have been able to get to merchandise behind the displays and in 25%, a person using a wheelchair could not have gotten around the displays. Robertson Decl. ¶¶ 18-20 and Ex. 5.

[7] Declaration of Timothy P. Fox ¶¶ 2-13.

[8] See Miot Decl. Exs. 1 and 2 (chart of customer witness testimony and excerpts from customer witness depositions, arranged alphabetically).

break.[9] Many other Kmart shoppers who use wheelchairs have testified that they, too, have been unable to find an open, accessible checkout aisle, and that the alternatives offered by Kmart — for example, checking out at the customer service counter — are significantly more burdensome than checking out in the same manner as nondisabled customers.[10] In addition, the customer service counter is, itself, often inaccessible. Kmart's experts report that 20% of the customer service counters were higher than the 36 inches required by section 7.2 of the Standards.[11]

Failure to provide and maintain accessible restrooms, fitting rooms and parking spaces. The Standards require that Kmart have accessible restrooms, fitting rooms and parking spaces in specified numbers and with specified dimensions and features. See, e.g., Standards §§ 4.17 (toilet stalls), 4.35 (fitting rooms), 4.1.2(5) & 4.6 (parking spaces). These facilities must be on an accessible route, see id. §§ 4.17.1 (toilet stalls), 4.35.1 (fitting rooms), 4.6.2 (parking spaces), which must be maintained free and clear of obstructions. 28 C.F.R. § 36.211; Preamble at 675. Kmart shoppers who use wheelchairs have testified that they have been frustrated in — or even prevented from — using these facilities.[12] Surveys of Kmart stores conducted by Kmart personnel and experts show that many stores violated the appropriate ADA standards.[13]

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[9] 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.

[10] See, e.g., Fuller Dep. at 76:23 - 80:3; Logsdon Dep. at 33:25 - 41:25, 47:2 - 47:7; Haws Dep. at 13:4 - 15:1.

[11] Robertson Decl. ¶¶ 18-20 and Ex. 5.

[12] See, e.g., Allen Dep. at 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 46:10 - 47:9, 54:18 - 55:15 (fitting room), 57:25 - 58:25 (restroom); Jessee Dep. at 12:2 - 13:1, 79:2 - 79:4, 85:4 - 87:21 (fitting room); Madden Dep. at 34:8 - 37:15 (restroom); Mauro Dep. at 30:11 - 31:13 (fitting

Movant Carrie Ann Lucas filed the Wheelchair Access Litigation in October, 1999. In May, 2000, Judge Kane granted Ms. Lucas's motion to add Debbie Lane and Julie Reiskin as plaintiffs and to allege a nationwide class of Kmart shoppers who use wheelchairs. Since that time, Kmart has produced more than 88,000 pages of documents to Movants as well as a database representing approximately 68,301 additional pages of information. Kmart has deposed all three Movants and Movants have deposed five Kmart executives and three of its experts. In addition, the parties have jointly deposed at least 50 third-party witnesses, mostly consisting of Kmart shoppers who use wheelchairs or scooters.

Kmart is represented in the Wheelchair Access Litigation by Foley & Lardner, a large, 1000-lawyer national law firm that has been appointed by this Court a Key Ordinary Course Professional,[14] as well as Sherman & Howard, a 136-lawyer Denver firm.

Should the stay be modified to permit the Wheelchair Access Litigation to proceed, the case will go forward before Judge Kane, who has already presided over the first two and one-half years of litigation and who is familiar with the extensive record. Briefing of Movants' motion to certify a nationwide class — which comprised over two hundred pages of briefs and several thousand pages of supporting documents — concluded on January 4, 2002 and the motion is ripe for resolution. Following resolution of that motion, the parties will need to complete discovery. Although a significant quantity of the discovery taken to date will be relevant to the merits —

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room); 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 35:25 - 37:18 (parking).

[13] Robertson Decl. ¶¶ 2-20 and Exs. 2, 3, 5 & 6 (spreadsheets analyzing survey results).

[14] See Final Order Pursuant to 11 U.S.C. § 105(a), 327(a) and 331 Authorizing Retention of Professionals Utilized by Debtors in the Ordinary Course of Business at 4 (filed February 15, 2002).

whether on a class or individual basis — Movants will likely require approximately five to ten additional depositions of Kmart personnel as well as additional data concerning Kmart's operations, most of it available in easily-transmitted electronic form. Finally, the parties must designate and take discovery of expert witnesses.

Should the stay not be modified, the matter may be litigated before this Court. However, this Court would be required to address numerous non-core issues in order to resolve Kmart's obligations under the ADA. These matters would then be put before the district court for de novo review pursuant to 28 U.S.C. § 157(c)(1), requiring essentially two full presentations of the central issues in this case. In the alternative, Movants may elect to wait out the reorganization and proceed with the Wheelchair Access Litigation once the automatic stay terminates pursuant to section 362(c). 11 U.S.C. § 362(c). After the plan is confirmed (which may well be premised on a business plan that does not include bringing the Debtor into compliance with the ADA) and the stay terminated, the newly-reorganized company would then face the prospect of an injunction requiring it to modify its policies and alter its stores to comply with the ADA.

ARGUMENT

Movants seek to require Kmart to operate its business post-petition in accordance with federal law. As long as Kmart continues to violate the ADA during its reorganization, Congress' goals in enacting the statute are defeated. Because the Wheelchair Access Litigation does not seek to liquidate a pre-petition claim, and because the underlying right to an injunction would not be discharged at the conclusion of the bankruptcy case, none of the bankruptcy purposes underlying the automatic stay are served by the application of the stay to the Wheelchair Access Litigation.

I. KMART'S DUTY TO COMPLY WITH FEDERAL LAW IS NOT EXTINGUISHED BY THE BANKRUPTCY.

A. Kmart Has a Continuing Obligation to Comply with the ADA.

Being a debtor in bankruptcy does not give Kmart the right to violate the ADA. As Judge Easterbrook stated, addressing an order to cease on-going pollution, "[h]aving been a debtor in bankruptcy does not authorize a firm to operate a nuisance today, . . . or otherwise excuse it from complying with laws of general application." In re CMC Heartland Partners, 966 F.2d 1143, 1146 (7th Cir. 1992) (citations omitted). Although the purpose of the bankruptcy law 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. A 'fresh start' means only that; it does not mean a continuing license to violate the law." O'Loghlin v. County of Orange, 229 F.3d 871, 875 (9th Cir. 2000) (citations omitted).[15]

In O'Loghlin, the Ninth Circuit held that a pre-petition lawsuit for discrimination in employment under Title I of the ADA, 42 U.S.C. § 12111 - 12117, could continue and that the plaintiff's claims for damages were not discharged to the extent they addressed post-petition violations, even if those violations were a continuation of pre-petition conduct. Id. at 874-75. To hold otherwise "would allow a defendant to use pre-discharge violations of the ADA to

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[15] See also Larami Ltd. v. Yes! Entm't Corp., 244 B.R. 56, 60 (D.N.J. 2000) (holding that automatic stay did not apply to post-petition suits for injunctive relief and noting that if the stay provision "were read to prevent the injunctive relief sought here, bankrupt businesses which operated post-petition could violate patent rights with impunity"); Bambu Sales, Inc. v. Sultana Crackers, Inc., 683 F. Supp. 899, 917 (E.D.N.Y. 1988) (holding that the plaintiff in a trademark infringement action could pursue claims for injunctive relief against corporation in bankruptcy and stating, "[t]he Bankruptcy Act was intended to protect and rehabilitate debtors. It should not be used as a shield behind which a debtor may sustain the misappropriation of a trade name to which he is not rightfully entitled'") (quoting Steak & Brew Inc. v. Makris, 177 U.S.P.Q. 412, 414 (D. Conn. 1973)).

insulate itself from liability for post-discharge violations, so long as the pre- and post-discharge violations were part of the same course of conduct." Id. at 875.

By providing only injunctive relief and no damages, Title III addresses on-going violations rather than remedying past violations.[16] As long as Kmart owns and operates department stores, it will have an on-going duty under Title III of the ADA to make those stores accessible to shoppers in wheelchairs. Movants' lawsuit, while reciting pre-petition violations of Title III, is based on the fact that these violations are on-going and seeks an injunction to stop them.[17] By lifting the automatic stay and allowing this case to go forward, Kmart will be prevented from taking advantage of the bankruptcy proceeding to delay correcting discriminatory policies and practices in its stores that should not have been occurring at all.[18]

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[16] Although a plaintiff must have experienced the challenged discriminatory conditions in the past to have standing, without an intent to continue to patronize the public accommodation in question, his standing disappears. See, e.g., Shotz v. Cates, 256 F.3d 1077, 1081-82 (11th Cir. 2001) (holding that disabled plaintiffs did not have standing to challenge barriers in courthouse because past visits to courthouse did not indicate an immediate and real threat of future discrimination); Steger v. Franco, 228 F.3d 889, 892-93 (8th Cir. 2000) (holding disabled plaintiffs who offered no evidence of their intent to visit defendant's office building in the future lacked standing to seek injunctive relief requiring defendant to bring building into compliance with the ADA). Similarly, where the alleged violations have been remedied, the case may be partially or entirely moot, leaving the plaintiff with no remedy for past discrimination. See, e.g., Parr v. L & L Drive-Inn Restaurant, 96 F. Supp. 2d 1065, 1087 (D. Haw. 2000) (holding that claims alleging architectural barriers to wheelchair access were moot where barriers had been remedied).

[17] See Lucas Decl. ¶¶ 3-7.

[18] This is consistent with Congress' judgment that debtors are required to comply, on a post-petition basis, with all state laws of general applicability. See 28 U.S.C. § 959(b) ("[A] trustee, receiver or manager appointed in any cause pending in any court of the United States, including a debtor in possession, shall manage and operate the property in his possession according to the requirements of the valid laws of the State in which such property is situated"). This exception to the automatic stay ensures that state law remains effective throughout the reorganization process and that parties injured by the debtor's actions are protected. See, e.g., In re White Crane Trading Co., 170 B.R. 694, 702 (E.D. Cal. 1994) (holding

B. Movants' Right to an Injunction to Compel Compliance with the ADA will not be Discharged in Bankruptcy.

Movants' claim for an injunction requiring post-petition compliance with the ADA will not be discharged in bankruptcy. Courts have held that injunctions requiring the cessation of on-going illegal conduct are not dischargeable in bankruptcy. See, e.g., In re Chateaugay Corp., 944 F.2d 997, 1008 (2d Cir. 1991) (holding that an order requiring cessation of ongoing pollution was not a dischargeable claim); CMC, 966 F.2d at 1147 (holding that if "harmful releases are threatened or ongoing," an injunction to prevent such releases would not be discharged); cf. Ohio v. Kovacs, 469 U.S. 274, 285 (1985) (stating, in dicta, "we do not question that anyone in possession of the site — whether it is Kovacs [the debtor] or another . . . must comply with the environmental laws of the State of Ohio. Plainly, that person or firm may not maintain a nuisance, pollute the waters of the State, or refuse to remove the source of such conditions.").

These decisions are based at least in part on the fact that the injunctions in question were not "claims" as that term is defined in section 101(5) of the Bankruptcy Code. 11 U.S.C. § 101(5). Pursuant to section 101(5), in order to be a "claim" dischargeable in bankruptcy, a right must be either a right to payment or a "right to an equitable remedy for breach of performance if such breach gives rise to a right to payment." For example, because the Environmental Protection Agency "has no authority to accept a payment from a responsible party as an alternative to continued pollution[,] . . . a cleanup order that accomplishes the dual objectives of removing accumulated wastes and stopping or ameliorating ongoing pollution

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that § 959(b) prohibited trustee from conducting distress sales in violation of state law and stating, "[t]he purpose of bankruptcy is not to permit debtors or nondebtors to wrest competitive advantage by exempting themselves from the myriad of laws that regulate business"); cf. Midlantic Nat'l Bank v. New Jersey Dep't of Envtl. Prot., 474 U.S. 494, 505 (1986) (noting that § 959(b) supported its holding that a trustee could not abandon property in contravention of state environmental laws).

emanating from such wastes is not a dischargeable claim." Chateaugay, 944 F.2d at 1008; see also CMC, 966 F.2d at 1146-47; In re Udell, 18 F.3d 403, 407-08 (7th Cir. 1994) (holding that a right to an injunction to enforce a covenant not to compete was not a "claim" under section 101(5) because it did not give rise to "an alternative or other corollary right to payment of liquidated damages"). Title III of the ADA provides only an injunctive remedy, and Movants have no authority to accept payment from Kmart in lieu of accessible stores. As such, their request for an injunction to make Kmart stores accessible is not a "claim" under section 101(5), and Movants' right to an injunction to curtail those violations will not be discharged in bankruptcy.[19]

II. CAUSE EXISTS TO LIFT THE AUTOMATIC STAY.

A number of cases have modified stays based on the fact that the underlying cause of action would not be discharged in bankruptcy. See, e.g., In re Nyren, 187 B.R. 424, 426 (Bankr. D. Conn. 1995); In re Peltz, 55 B.R. 336, 338 (Bankr. M.D. Fla. 1985). Under the reasoning of these cases, the discussion above would provide sufficient grounds to lift the stay here. The Seventh Circuit cautions that, even where a cause of action is not dischargeable, the court must nonetheless consider the three factors set forth in In re Fernstrom Storage and Van Company,

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[19] Movants' ADA case may not even be covered by the stay. The Bankruptcy Code excepts from the automatic stay actions by a governmental unit to enforce its "police and regulatory power." 11 U.S.C. §362(b)(4). In Alpern v. Lieb, the Seventh Circuit recognized that in some circumstances pre-petition matters brought by private parties may also be exempted from the automatic stay pursuant to §362(b)(4). 11 F.3d 689 (7th Cir. 1993) (Posner, J.). "The private enforcer, sometimes called a 'private attorney general,' can be viewed as an agent of the 'governmental unit.'" Id. at 690. Movants are acting as "private attorneys' general" under the ADA. See, e.g. Newman v. Piggie Park Enterprises, 390 U.S. 400, 402 (1968) (holding, with respect to the remedy adopted by reference in Title III of the ADA, that a plaintiff acts "not for himself alone but also as a 'private attorney general.'"). Under the reasoning of Alpern, Movants' ADA claims are not subject to the automatic stay.

938 F.2d 731, 735 (7th Cir. 1991), in deciding whether to modify the stay. In re Udell, 18 F.3d 403, 410 (7th Cir. 1994). Movants easily satisfy these three factors.

The three-factor test adopted by the Seventh Circuit in Fernstrom requires that, in deciding whether to modify the automatic stay, bankruptcy courts consider whether

> a) Any great prejudice to either the bankrupt estate or the debtor will result from continuation of the civil suit,
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> b) the hardship to the [non-bankrupt party] by maintenance of the stay considerably outweighs the hardship of the debtor, and
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> c) the creditor has a probability of prevailing on the merits.

938 F.2d at 735 (quoting In re Pro Football Weekly, 60 B.R. 824, 826 (N. D. Ill.1986)).[20]

The debtor bears the burden of proof to show that the stay should not be modified. 11 U.S.C. § 362(g)(2); In re Syed, 238 B.R. 126, 132 (Bankr. N.D. Ill. 1999). Finally, the legislative history of the Bankruptcy Code states:

> [I]t will often be more appropriate to permit proceedings to continue in their place of origin, when no great prejudice to the bankruptcy estate would result, in order to leave the parties to their chosen forum and to relieve the bankruptcy court from many duties that may be handled elsewhere.

S.Rep. No. 95-989, at 50 (1978), reprinted in 1978 U.S.C.C.A.N. 5787, 5836, quoted in In re Santa Clara County Fair Ass'n, Inc., 180 B.R. 564, 566 (B.A.P. 9th Cir. 1995) and Pro Football Weekly, 60 B.R. at 827.

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[20] Kmart apparently agrees that this is the correct standard. See Debtors' Omnibus Objection to Motions for Relief from the Automatic Stay Pursuant to 11 U.S.C. § 362 at 5 (filed April 16, 2002).

A. Continuing the Wheelchair Access Litigation Will Not Prejudice the Bankrupt Estate or the Debtor.

Because Kmart has an on-going obligation to comply with Title III of the ADA that will not be discharged, the reorganization process will be more efficient if Kmart knows — during rather than after that process — the contours of its obligations to shoppers with disabilities. For example, the ADA requires Kmart to maintain its merchandise aisles free of obstructions to shoppers in wheelchairs. Standards §§ 4.1.3(12)(b) & 4.3; 28 C.F.R. § 36.211; Preamble at 675. Compliance with this provision will require modification of Kmart policies, for example, through improvements in merchandising, stocking and maintenance. It will be more efficient for Kmart to know what modifications are required by the ADA as it reorganizes rather than waiting for the stay to be terminated so that the Wheelchair Access Litigation may proceed. Kmart will have the opportunity to emerge from bankruptcy with policies already in place to reach compliance.

Kmart's legal team will incur minimal if any distraction from its reorganization efforts. Kmart's lead counsel in the Wheelchair Access Litigation, Foley & Lardner, has been appointed by this Court as a Key Ordinary Course Professional.[21] That firm, with the assistance of local counsel Sherman & Howard, has ably litigated the Wheelchair Access Litigation. The presence of these well-staffed and talented firms will limit the distraction to the in-house and outside attorneys handling the reorganization.

The fact that Kmart will incur legal fees to defend the Wheelchair Access Litigation is of no moment. As one court commented in modifying the automatic stay to permit a sexual harassment claim to continue:

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[21] See Final Order Pursuant to 11 U.S.C. § 105(a), 327(a) and 331 Authorizing Retention of Professionals Utilized by Debtors in the Ordinary Course of Business at 4 (filed February 15, 2002).

> Debtor has continued to operate efficiently and effectively during its Chapter 11 although it has incurred substantial attorneys' fees and administrative costs administering the estate to date. The fees necessary to defend the Action are de minimis in comparison. Consequently, defense of the suit will not affect Debtor's ability to successfully reorganize in the future.

In re Am. West Airlines, 148 B.R. 920, 923 (Bankr. D. Ariz. 1993); see also In re Santa Clara County Fair Ass'n, Inc., 180 B.R. 564, 566-67 (B.A.P. 9th Cir. 1995) (holding that "[o]rdinarily, litigation costs to a bankruptcy estate do not compel a court to deny stay relief"); In re Peterson, 116 B.R. 247, 250 (D. Colo. 1990) (holding that "the prospect of litigation expenses does not constitute irreparable injury sufficient to justify continuation of the stay").[22] And because the claims in the Wheelchair Access Litigation will not be discharged, they will have to be litigated either in this Court — requiring two full proceedings pursuant to 28 U.S.C. 157(c)(1) — or later before Judge Kane after the stay is terminated. Kmart will have to incur the fees necessary to defend the Wheelchair Access Litigation in one forum or another; it will incur far less burdensome fees should the case be permitted to proceed in a single forum that is already familiar with the case.

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[22] As this Court stated in the decision affirmed by the Seventh Circuit in Fernstrom,

> Debtors in these cases often argue that modification of the stay is prejudicial to them because of their duty to cooperate in the defense of the action or because of insufficiency in coverage or a deductible. The fact that the debtor may be required to participate in the defense is not determinative of prejudice, however, especially when the debtor's insurance is obligated to provide counsel.

In re Fernstrom Storage and Van Co., 100 B.R. 1017, 1023 (Bankr. N.D. Ill. 1989), aff'd 938 F.2d 731 (7th Cir. 1991). Although defense counsel in the Wheelchair Access Litigation is provided by Kmart and not its insurance company, such counsel is already in place and fully proficient in the facts and law at issue in that litigation. Thus, this Court's statement that "[t]he fact that the debtor may be required to participate in the defense is not determinative of prejudice," applies with equal force here.

The policy modifications requested by Movants in the Wheelchair Access Litigation may even provide significant benefits to Kmart. Indeed, following the announcement of the present bankruptcy, a number of articles quoted non-disabled customers explaining their dislike for Kmart or preference for other discount chains based on conditions at the heart of the Wheelchair Access Litigation: the cluttered, crowded look and feel of many Kmart stores.[23] Compliance with the ADA's mandate to provide unobstructed access to merchandise may well have the happy by-product of making Kmart's stores more attractive to all shoppers and thus ultimately benefiting the reorganized company. As such, continuing the Wheelchair Access Litigation will not prejudice, and may in fact benefit, the Debtors here.

B. The Hardship to Movants (And the Potential Class) Considerably Outweighs the Hardship to Kmart.

The primary hardship to Movants is the continuation of the discriminatory conditions at the Kmart stores they patronize. Although the Wheelchair Access Litigation has not yet been certified as a class action, the evidence of corporate-wide policies and widespread discriminatory experiences suggests that this hardship is shared by many Kmart shoppers who use wheelchairs. The emphasis placed by Congress on the elimination of discriminatory barriers to individuals with disabilities, see 42 U.S.C. § 12101, underscores this hardship. The importance of enforcing civil rights legislation has been held by a number of courts to mitigate in favor of lifting the automatic stay. In America West, the bankruptcy judge modified the automatic stay to permit a sexual harassment claim to go forward based in part on the facts that "Movant has allegedly already suffered due to the alleged conduct and will continue to suffer unless she is able to have her day in court," and that "the enactment of Title VII indicates the strong public policy against

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[23] See, e.g. Robertson Decl. Exs. 7-10 (examples of articles commenting on Kmart stores).

sexual harassment, . . . [which] supports resolving alleged sexual harassment claims without undue delay for the benefit of all the parties." 148 B.R. at 923-24.[24]

It would also be a hardship to Movants to continue the stay of litigation that has proceeded for two and one-half years through extensive discovery and briefing. The Seventh Circuit held, in Fernstrom, that "[w]here the stayed non-bankruptcy litigation has reached an advanced stage, courts have shown a willingness to lift the stay to allow the litigation to proceed. . . . The attention paid to the stage to which the non-bankruptcy litigation has progressed is based on the sound principle that the further along the litigation, the more unfair it is to force the plaintiff suing the debtor-defendant 'to duplicate all of its efforts in the bankruptcy court.'" 938 F.2d at 737 (quoting In re Murray Indus., 121 B.R. 635, 637 (Bankr. M.D. Fla. 1990)). The requirement that Movants duplicate their efforts before this Court and likely, as to the many non-core issues, before the district court is also a source of hardship to Movants. As one court has commented, "[t]he duplicative litigation is burdensome both to Movants and the courts involved. Judicial economy dictates a prompt resolution in a single forum and with the same judge who was originally assigned to the case." In re Rexene Prods. Co., 141 B.R. 574, 577 (Bankr. D. Del. 1992). See also In re Santa Clara County Fair Ass'n, Inc., 180 B.R. at 566 (holding that "Courts may consider the factor of judicial economy when deciding lift stay issues.")

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[24] See also, e.g., In re Santa Clara County Fair Ass'n, Inc., 180 B.R. at 566-67 (affirming district court decision to lift stay that was based in part on the fact that "public policy favored the resolution of civil rights actions and outweighed any competing policy served by the automatic stay under the circumstances"); In re Interco Inc., 153 B.R. 858, 861 (Bankr. E.D. Mo. 1993) (modifying automatic stay in part based on "significant health and welfare concerns in that Movant suffers from AIDS"); In re Larkham, 31 B.R. 273, 276 (Bankr. D. Vt. 1983) (holding that modifying the stay to permit an employment discrimination case to proceed "insures the expeditious consideration of [the movant's] civil rights suit, an important priority of Congress"); Paden v. Union for Experimenting Colls. and Univs., 7 B.R. 289, 291 (Bankr. N.D. Ill. 1980) (holding that modifying the automatic stay in employment discrimination cases "ensures the expeditious consideration of Title VII suits, an important priority of Congress.").

Finally, it would be a hardship on Movants to litigate their ADA case in Illinois. Movants are all busy professional women with significant job and family commitments and limited income. Carrie Lucas is a single mother of an 11-year-old daughter who has both cognitive and mobility impairments. She is a law clerk at the Colorado Cross-Disability Coalition ("CCDC"), and is a second-year law student at the University of Denver College of Law.[25] Debbie Lane is the Community Organizer at CCDC and is also a single mother of a 4-year-old son with disabilities.[26] Julie Reiskin is CCDC's executive director and step-mother to two teen-age sons.[27] All three Movants would have great difficulty making and affording the arrangements necessary to proceed in the Northern District of Illinois. See Rexene Prods., 141 B.R. at 577 (considering, in ordering modification of automatic stay, that "[t]here would be an added logistical burden to Movants if forced to litigate in Delaware. The attorneys, witnesses, documents and parties are all located in Texas. The added expense of transporting the lawsuit to Delaware is unnecessary.")

In contrast to these significant hardships to Movants, members of the potential class, and the important public policy embodied in the ADA, the only conceivable hardship to Kmart is the need to defend itself through counsel in the Wheelchair Access Litigation at a slightly earlier date than it would have to should Movants be required to wait out the stay. This is not sufficient to overcome the hardship to Movants. See, e.g., America West, 148 B.R. at 923 (holding that the fact that "Debtor must merely hire local counsel and allow its employees to participate in discovery and to testify," was insufficient hardship to defeat a motion to modify the stay).

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[25] Lucas Decl. ¶¶ 8-10.

[26] Declaration of Debbie Lane ¶¶ 2-4.

[27] Declaration of Julie Reiskin ¶¶ 2-4.

C. Movants Will Likely Prevail on the Merits.

The third factor to be considered in connection with the present motion is whether Movants have "a probability of prevailing on the merits." Fernstrom, 938 F.2d at 735. It was sufficient to the Seventh Circuit in that case that the movant's case was "not frivolous." Id. at 737; see also In re Levitz Furniture, Inc., 267 B.R. 516, 523 (Bankr. D. Del. 2000) (same); Rexene Prods., 141 B.R. at 578 (holding that "[t]he required showing is very slight."). Kmart's own policies and data show that it is in violation of the ADA at many of its stores. For example, based solely on facts admitted by Kmart, there are insufficient numbers of accessible parking spaces at 39% of Kmart stores, non-compliant fitting-rooms in 30%, and inaccessible customer service counters in 20%. Kmart's data concerning cluttered aisles and inaccessible clothing racks suggest that Movants will prevail on these issues as well. Movants far exceed the standard for merit required by this third prong of the Fernstrom test.

CONCLUSION

For the foregoing reasons, Movants request that this Court modify the automatic stay to permit the Wheelchair Access Litigation to proceed in the United States District Court for the District of Colorado. In the alternative, Movants request that the stay be modified in part to permit the case to proceed through a determination of liability and formulation of remedy, but that implementation of that remedy be stayed until confirmation of a plan of reorganization.

Respectfully submitted,

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