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' REPLY MEMORANDUM IN SUPPORT OF MOTION FOR CLASS CERTIFICATION

Plaintiffs Carrie Ann Lucas, Debbie Lane, and Julie Reiskin, by and through their counsel, hereby submit this Reply Memorandum in Support of Motion for Class Certification.

INTRODUCTION

Named Plaintiffs demonstrated in their Substituted Memorandum in Support of Motion for Class Certification ("Class Memorandum" or "Class Mem.") that the proposed class in this case meets the requirements of Rule 23 and, further, that class certification provides a more efficient and consistent mechanism for addressing the corporate-wide policies (and lack of required policies) at issue in this case than numerous individual actions in courts around the country. Their motion was based on evidence of Kmart's centralized policies and policy failures and extensive testimony from disabled Kmart shoppers concerning the barriers they had encountered. Defendant Kmart Corporation ("Kmart") concedes that its store operating policies

are centralized -- a concession that, in and of itself, makes class certification appropriate. In addition, information produced by Kmart in response to this Court's Order of September 20, 2001, provides extensive evidence of barriers to Kmart customers who use wheelchairs, including: (1) reports from more than 19,000 visits by "mystery shoppers" to more than 2,000 Kmart stores documenting obstructions that would likely pose barriers to shoppers in wheelchairs; (2) Kmart's own ADA compliance surveys showing widespread lack of compliance, including, for example, the fact that 39% of the stores for which Kmart provided data do not have sufficient accessible parking; and (3) surveys conducted for Kmart in July, 2001, by experts it retained for the purpose of opposing class certification which show, for example, that 35% of the time, the stores surveyed failed to maintain an accessible route through sidewalk merchandise displays, access to approximately 25% of the fitting rooms was obstructed, and 20% of customer service counters did not comply.

In its Memorandum in Opposition to Plaintiffs' Motion for Class Certification ("Class Opposition" or "Class Opp."), Kmart attempts to defeat class certification by making three principal arguments: (1) that a class should not be certified because there are no identical, architectural barriers at issue; (2) that the experiences of putative class members cannot be common because each Kmart store is different and because many putative class members had experienced both discriminatory and non-discriminatory treatment at Kmart stores; and (3) that the experiences of putative class members were isolated and temporary. Kmart also makes

extensive arguments on the merits to the effect that it is already in compliance with Title III of the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12181 et seq.[1]

Much of Kmart's Class Opposition and its supporting papers are dedicated to establishing a factual proposition that Named Plaintiffs never contested and readily concede: Kmart stores are physically different from one another. This argument misses the point: Commonality can arise from physical similarity; it can also arise, as it does here, when a class challenges centralized policies that result in common discriminatory experiences. The physical differences touted by Kmart do not reduce either the similarity of these experiences or the control Kmart exercises through its centralized policies over the physical conditions at those stores. To the extent Kmart argues that class certification requires that all of its stores be identical or that all class members always experience discrimination on every visit to every Kmart, it is arguing for a standard far beyond that of Rule 23, one imposed on no other protected class.

A number of Kmart's arguments are either made in its Statement of Facts or appear in several different sections of its Rule 23 analysis. Because its primary argument appears to be a lack of commonality, Named Plaintiffs will address these broad themes first before addressing Kmart's specific objections to numerosity, typicality, representation, Rule 23(b)(2), standing and the practicalities of trying this case as a class action. Finally, while urging the Court to postpone analysis of the merits of the case until after resolution of their motion to certify a class, Named Plaintiffs briefly address several merits questions raised by Kmart in its Class Opposition.

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

ARGUMENT

I. Named Plaintiffs' Challenges to Kmart's Centralized Policies Present Common Questions of Law and Fact Sufficient to Satisfy the Commonality Requirement.

A. Cases Challenging Centralized Policies are Routinely Certified as Class Actions.

Named Plaintiffs have demonstrated that Kmart's store operations policies are highly centralized. (See Class Mem. at 14-25.) In its Class Opposition and in oral argument before this Court, Kmart agreed. In its opposition brief, Kmart concedes that it has a single set of operating polices. (See Class Opp. at 15; see also id. at 7 (describing centralized review and modification of design criteria).) Kmart's counsel also stated before this Court, in opposing Named Plaintiffs' motion to compel:

> Plaintiffs have spoken to centralized policies as an issue going to certification. That's true, and obviously any company like a Kmart that has over 2100 stores across the country has centralized policies, centralized training, all sorts of centralized issues.

(Motion to Compel Transcript of Proceedings at 12-13 (Rep. App. Tab 14).)[2] Kmart naturally argues that its centralized policies are sufficient to ensure compliance with the ADA. (Id. at 13; see also Class Opp. at 15-16.) Named Plaintiffs disagree and have demonstrated that Kmart's centralized policies and/or policy failures cause discriminatory barriers to customers who use wheelchairs. (See Class Mem. at 17-25.) Although the resolution of the question whether

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[2] The appendix submitted with Named Plaintiffs' Class Memorandum will be referred to as "App."; the appendix submitted with this Reply Brief will be referred to as "Rep. App."

Kmart's policies are sufficient to prevent discrimination goes to the merits of this case, the question itself is common to the class and should be answered on a classwide basis.

Where named plaintiffs challenge centralized policies, class certification is appropriate. See J.B. ex rel. Hart v. Valdez, 186 F.3d 1280, 1288 (10th Cir. 1999) (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'") (quoting Adamson v. Bowen, 855 F.2d 668, 676 (10th Cir. 1988)).[3] Courts in a variety of situations have held that questions concerning policies or the lack thereof meet the commonality requirement. For example, in Lightbourn v. County of El Paso, Texas, 118 F.3d 421 (5th Cir. 1997), cert. denied 522 U.S. 1052 (1998), and National Org. on Disability v. Tartaglione, No. Civ. A. 01-1923, 2001 WL 1258089 (E.D.Pa. Oct. 22, 2001) (Rep. App. Tab 23), both of which involved challenges by classes of individuals with disabilities to inaccessible polling places, the commonality requirement was met because the defendants did not have policies in place "direct[ing] local election officials to comply with [29 U.S.C. § 794] and the ADA" by making polling places accessible. Lightbourn, 118 F.3d at 426; see also Tartaglione, 2001 WL 1258089 at *3 (allegation that defendant failed to have policies ensuring that voters with mobility impairments had access to neighborhood polling places was an allegation that defendant "engaged in a

[3] This would be so even if Kmart had put on competent evidence that its policies were decentralized. In Faulk v. Home Oil Co., 184 F.R.D. 645 (M.D. Ala. 1999), the court held that where there is "substantial evidence" of centralization, it is appropriate to find commonality and typicality, even where the defendant offers evidence of decentralization, because to resolve that factual dispute would be to address the merits. Id. at 656; see also Orlowski v. Dominick's Finer Foods, Inc., 172 F.R.D. 370, 373-74 (N.D. Ill. 1997) (same); Meiresonne v. Marriott Corp., 124 F.R.D. 619, 622-23 (N.D. Ill. 1989) (same).

common course of conduct on a classwide . . . basis"). Similarly, in a recently-certified employment class action, the court held that a class of Deaf employees satisfied commonality where they challenged the employer's policy requiring all employees to pass certain hearing standards. Bates v. United Parcel Svc., No. C99-2216 TEH, --- F. Supp. 2d ---, 2001 WL 1482023 at *4 (N.D. Cal. Nov. 1, 2001) (Rep. App. Tab 18).[4]

Further, even under Kmart's formulation that its "operations are centralized in direction only and decentralized in application of that direction," (see Class Opp. at 15), the commonality requirement is met. Classes of employees are often certified challenging a centralized policy of overdelegation of authority to local managers that fails to prevent discrimination. See, e.g., Caridad v. Metro-North Commuter R.R., 191 F.3d 283, 291-92 (2d Cir. 1999) (reversing denial of commonality based on the defendant's policy of "delegating discretionary authority to supervisors to make certain employment decisions affecting discipline and promotion"), cert. denied 529 U.S. 1107 (2000); Shipes v. Trinity Indus., 987 F.2d 311, 316 (5th Cir. 1993) (holding that "[a]llegations of similar discriminatory employment practices, such as the use of entirely subjective personnel processes that operate to discriminate, satisfy the commonality and typicality requirements of Rule 23(a)."); Cox v. American Cast Iron Pipe Co., 784 F.2d 1546, 1557 (11th Cir.) (same), cert. denied, 479 U.S. 883 (1986); Beckmann v. CBS, Inc., 192 F.R.D. 608, 613-14 (D. Minn. 2000) (same); Shores v. Publix Super Markets, Inc., No. 95-1162-CIV-T-25(E), 1996 WL 407850 at *6 (M.D. Fla. March 12, 1996) (Declaration of Shana T. Mintz in

[4] See also cases cited infra n. 8.

Opposition to Plaintiffs' Motion for Class Certification ("Mintz Decl.") Ex. 6) (same).[5] Thus, the autonomy Kmart claims to delegate to its stores, (see Class Opp. at 3, 17), far from defeating class certification, presents a question common to the class: Has Kmart permitted its managers to use subjective criteria and thereby tolerated disability discrimination?

The holdings set forth above make sense. Where plaintiffs allege that they have suffered discrimination as a result of inadequate centralized policies, they have by definition raised a common issue. Further, if the policies are found to be inadequate, it is much more efficient to remedy the policies at their source rather than to conduct piece-meal, store-by-store lawsuits that likely will result in inconsistent standards.

B. Putative Class Members Allege Common Discriminatory Experiences and Any Individual Differences are Irrelevant.

Kmart argues that class members' experiences are not common because the physical layouts of its stores are different from one another and because "Plaintiffs have not identified a single barrier that is the same in all Kmart stores, or even one that they and their witnesses have found to be present all the times they visited even one given Kmart store." (Class Opp. at 5 n.3 (emphasis in original).) In other words, it is not enough for Kmart that many class members have been blocked by clothing racks that Kmart policy permits to be only 24 inches apart, or by

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[5] This doctrine had its origin in a footnote to General Telephone Company of the Southwest v. Falcon, 457 U.S. 147, 159 n.15 (1982). Falcon held that so-called "across the board" classes that included employees and applicants could not automatically be certified based only on evidence of discrimination against the former. Id. at 158. The Supreme Court provided several examples of the type of evidence that would support certification, including "[s]ignificant proof that an employer operated under a general policy of discrimination . . . such as through entirely subjective decisionmaking processes." Id. 159 n.15.

aisle displays required by Kmart's merchandising guides, or by other obstructions that Kmart policy is inadequate to prevent. Rather, Kmart appears to require that putative class members have been blocked by the same clothes or the same displays or the same obstructions that remain in the same position all the times they visited any Kmart anywhere in the country.

This is not what Rule 23 requires. Named Plaintiffs' opening brief cited a number of cases in which classes of individuals with disabilities had been certified with no requirement of identical architectural or physical barriers, and Kmart failed to address or distinguish most of these cases.[6] Indeed, Kmart's argument that individuals with mobility impairments who have encountered systematic discrimination that does not involve an identical, physical barrier cannot be certified as a class sets the standard for certification of classes of such individuals far higher than for classes of individuals belonging to any other protected category.

Kmart's analysis goes astray by focusing on the impact of its policies, rather than on the policies themselves. Numerous courts have held that the commonality requirement is met where a common policy impacts individual class members in differing ways.[7] For example, the Ninth

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[6] See, e.g., Class Mem. at 28 n.88 & 29 n.89 and cases cited therein.

[7] Named Plaintiffs cited a number of cases in their Class Memorandum in which class members' circumstances varied more significantly than those of Kmart shoppers who use wheelchairs or scooters. See id. at 35 & n. 96. Kmart attempts to distinguish these cases by arguing that they "involv[ed] discriminatory policies in effect at a single location managed by a single group of individuals." Class Opp. at 65 n.53. With respect to most of these cases, Kmart's description is simply wrong. See Hill v. Amoco Oil Co., No. 97 C 7501, 2001 U.S. Dist. LEXIS 3082 at *2 (N.D. Ill. Mar. 15, 2001) (App. Tab 23) (addressing "Amoco owned and operated gas stations in the Chicago area"); 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, 693 (M.D. Ga. 1999) (addressing a school district's elementary, middle and high schools as well as its

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Circuit has recently upheld the certification of a class of individuals with hearing, vision, learning, developmental and mobility impairments challenging accommodations provided by a state parole board. Armstrong v. Davis, No. 00-15132, --- F.3d ---, 2001 WL 1506518 at *2 (9th Cir. Nov. 28, 2001) (Rep. App. Tab 16). In response to the defendants' argument that separate classes should be certified for each type of impairment, the Ninth Circuit held, "in a civil-rights suit, . . . commonality is satisfied where the lawsuit challenges a system-wide practice or policy that affects all of the putative class members. . . . In such circumstance, individual factual differences among the individual litigants or groups of litigants will not preclude a finding of commonality." Id. at *13 (citations omitted). The court in Daniels v. City of New York, 198 F.R.D. 409 (S.D.N.Y. 2001), certified a class of minorities who had been subjected to unreasonable searches on the basis of racial profiling. Id. at 411, 422. The defendants objected that each class member's circumstances would be highly individualized. The court responded that Rule 23(b)(2) classes -- the type Named Plaintiffs seek to certify here -- "have been certified in a legion of civil rights cases where commonality findings were based primarily on the fact that defendant's conduct is central to the claims of all class members irrespective of their individual circumstances and the disparate effects of the conduct." Id. at 416 (quoting Baby Neal ex rel. Kanter v. Casey, 43 F.3d 48, 57 (3d Cir. 1994)); see also Miller

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[7](...continued)
gifted and special education programs); Hewlett v. Premier Salons Int'l, Inc., 185 F.R.D. 211, 213 (D. Md. 1997) (addressing all Premier hair salons; Premier operated "approximately 550 salons located in all 50 states"); Kernan v. Holiday Universal, Inc., No. JH90-971, 1990 WL 289505 at *1 (D. Md. Aug. 14, 1990) (App. Tab 25) (addressing "spa facilities owned directly or indirectly by Holiday Universal, Inc. and U.S. Health, Inc." in five metropolitan areas).

v. Spring Valley Props., 202 F.R.D. 244, 249 (C.D. Ill. 2001) (certifying class of African-Americans seeking housing at one of the defendants' approximately 200 units and holding "[w]here Plaintiffs allege that the actions were taken as part of an overall discriminatory practice in violation of the Fair Housing Act, factual differences in how Defendants carried out a discriminatory policy are not sufficient to undermine typicality"); Christina A. ex rel. Jennifer A. v. Bloomberg, 197 F.R.D. 664, 667-68 (D.S.D. 2000) (certifying class of juveniles in a state training school challenging a wide range of practices; holding that "the common question here is whether the conditions of confinement at [the school] and the policies and procedures in place there amount to or result in constitutional deprivations of Plaintiffs' rights. . . . The fact that those conditions, policies and procedures affect the Plaintiffs differently does not defeat the commonality of their claims.") (citing Milonas v. Williams, 691 F.2d 931, 938 (10th Cir.1982), cert. denied 460 U.S. 1069 (1983)); Grijalva v. Shalala, Civ. No. 93-711, 1995 WL 523609 at *1-2, *7 (D. Ariz. July 18, 1995) (Rep. App. Tab 21) (certifying a nationwide class of enrollees in Medicare HMOs challenging the failure of government agency to institute certain policies; holding that "[c]ontrary to Defendant's contention that the differences between Plaintiffs dissuade class certification, the diversity provides evidence of the widespread effect of the challenged procedures."), aff'd on other grounds 152 F.3d 1115 (9th Cir. 1998), vacated and remanded on other grounds 526 U.S. 1096 (1999).[8]

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[8] Classes are routinely certified of individuals challenging the policies governing the provision of government benefits, despite varying individual circumstances of eligibility and treatment. See, e.g., Dajour B. ex rel. L.S. v. City of New York, No. 00 CIV. 2004, 2001 WL 1173504 at *7 (S.D.N.Y. Oct. 3, 2001) (Rep. App. Tab 20) (challenging insufficient services for (continued...)

C. Even Classes Challenging Physical Barriers Do Not Require Identical Physical Barriers.

Even cases in which individuals with disabilities challenge physical barriers have not required that those barriers be identical as a prerequisite for class certification. In Lightbourn and Tartaglione, classes of plaintiffs with disabilities were challenging the failure of the defendant political jurisdictions to ensure that polling places were accessible to voters with physical disabilities. The classes were certified without any suggestion -- and, indeed, it defies

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[8](...continued)
children with asthma; because only injunctive relief sought, "the precise ways that various members of the class may have been injured is less relevant than the fact that a continuing policy or practice may be causing harm to many of the class members."); Risinger ex rel. Risinger v. Concannon, 201 F.R.D. 16, 19-20 (D. Me. 2001) (certifying class of individuals not timely receiving in-home mental health services despite the fact that class members' "different diagnoses require different treatments," as plaintiffs challenged defendants' "system of screening, diagnosis, and delivery of prescribed in-home mental health services"); Karen L. ex rel. Jane L. v. Physicians Health Servs., Inc., 202 F.R.D. 94, 97-99 (D. Conn. 2001) (certifying class of individuals challenging failure of notice concerning adverse actions in Medicaid claims and failure to ensure members could get prescription drug benefits despite wide variety of situations even among named plaintiffs); Boulet v. Cellucci, 107 F. Supp. 2d 61, 81 (D. Mass. 2000) (certifying class of individuals on waiting list for Medicaid services despite "unique medical and support requirements" of each).

Decisions certifying employment discrimination classes often describe very different individual circumstances of class members challenging a centralized policy. See, e.g., Reeb v. Ohio Dep't of Rehabilitation, 203 F.R.D. 315, 318 (S.D. Ohio 2001) (certifying class of female employees despite different types of discrimination suffered); Beckmann v. CBS, Inc., 192 F.R.D. 608, 611-14 (D. Minn. 2000) (certifying class of female employees in which one named plaintiff excluded from overtime assignments, another turned down for promotions that went to males, another did not receive same training as males); Bremiller v. Cleveland Psychiatric Inst., 195 F.R.D. 1, 6-18 (N.D.Ohio 2000) (certifying class of female employees challenging sexual harassment in the workplace despite differences in experiences of named plaintiffs); Haynes v. Shoney's, Inc., No. 89-30093-RV, 1992 WL 752127 at *1, 2-6, 20 (N.D. Fla. Jun 22, 1992) (Rep. App. Tab 22) (certifying class of female employees alleging, variously, that "the defendants have discriminatorily failed to hire, failed to promote, harassed, discharged, constructively discharged, and retaliated against" them).

reason to suggest -- that every polling place in El Paso or Philadelphia was physically identical to every other. Instead, the classes were certified because of the failure of the defendant to ensure that the physical facilities were accessible. See Lightbourn, 118 F.3d at 425; Tartaglione, 2001 WL 1258089 at *3. Likewise, Kmart has failed to ensure that its stores are accessible to customers in wheelchairs, making class certification appropriate.

Identical barriers were also not required in Access Now, Inc. v. Ambulatory Surgery Center Group, Ltd., 197 F.R.D. 522 (S.D. Fla. 2000) or Access Now, Inc. v. AHM CGH, Inc., Case No. 98-3004, 2000 U.S. Dist. LEXIS 14788 (S.D. Fla. Jul. 12, 2000) (App. Tab 16). In these two cases, the named plaintiffs were seeking certification of nationwide classes of persons with disabilities challenging alleged violations of the ADA at a series of affiliated -- though not commonly owned -- health care facilities. In contrast to the present case -- which addresses only Kmart stores owned and operated by the Kmart Corporation -- the facilities at issue in AHM included "ambulatory surgical centers, specialty clinics, and medical office buildings," id. at *4, and in Ambulatory Surgery, "specialty hospitals, outpatient care, rehabilitation hospitals, professional medical offices, surgical units, psychiatric hospitals, medical office buildings, and general services hospitals." Id. at 526. In both cases, despite the wide variety in types of facilities, the court held that the class satisfied the commonality requirement of Rule 23(a)(3).[9]

[9] Kmart attempts to distinguish Ambulatory Surgery and AHM by stating that the court in each provided "little of its reasoning or the factual basis for its decisions" and that the cases appear to have been challenging "specific 'architectural features,' which were common to all of the defendants' facilities." Class Opp. at 63 (emphasis in original). This is incorrect: As set forth in text above, the courts provided the precise factual bases for their decisions, and included explicit mention that they covered a wide range of types of facilities.

Kmart's attempt to distinguish two other physical-barrier-discrimination cases cited by Named Plaintiffs also fail. Kmart asserts that in Arnold v. United Artists Theatre Circuit, Inc., 158 F.R.D. 439 (N.D. Cal. 1994), "accessible seating was the only ADA violation alleged." (Class Opp. at 62 (emphasis in original).) This is incorrect. The Arnold plaintiffs challenged the number and placement of disabled seating, barriers to accessible paths of travel, and inaccessible restrooms. Id. at 445, 447. Significantly, the second of these categories is a broad description of may of the barriers challenged by Named Plaintiffs here: Obstacles in merchandise aisles and sidewalk displays as well as inaccessible clothing racks are simply barriers to accessible paths of travel. There was, in any event, no suggestion that each theater at issue in Arnold had the same layout or design.

Finally, Kmart challenges Named Plaintiffs' reliance on Farrar-Kuhn v. Conoco Inc., Civil Action No. 99-WM-2086 (D. Colo. Aug. 22, 2000) (App. Tab 21), on the grounds that the motion for class certification was uncontested. Kmart asserts that "[a]lthough the Farrar-Kuhn court purported to undertake a full analysis of the requirements of Rule 23, pursuant to Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 614 (1997), it is evident from its order that its analysis was substantially truncated by the defendant's concessions. Thus, the decision is of little precedential value." (Class Opp. at 64.) That the motion was uncontested was stated clearly in Named Plaintiffs' Class Memorandum. (Id. at 29 n.89.) There is no indication in Judge Miller's opinion, however, that he did anything other than follow the mandate of the Supreme Court in Amchem to assess the appropriateness for certification of an uncontested class as rigorously as a contested one. This assessment resulted in the certification of a class very much

like the one now before this Court: A class of individuals who use wheelchairs challenging the policies and barriers of a chain of retailers. Kmart also asserts, without evidence, that "there is surely little, if any, real variation in the physical attributes, inventory, management, etc., of Conoco's service stations." (Class Opp. at 64.) To the contrary, Judge Miller's Order noted that "[t]he plaintiffs alleged that Conoco Corporate Stations have various architectural barriers and policies that discriminate against persons who use wheelchairs . . ." Farrar-Kuhn, slip op. at 1.

D. The Macy's East, Burdines, and May Cases Are Distinguishable.

Kmart relies heavily on Access Now, Inc. v. Burdines, Inc., No. 99-3214-CIV (S.D. Fla. Feb. 15, 2001), Access Now, Inc. v. Macy's East, Inc., No. 99-9088-CIV (S.D. Fla. Feb 15, 2001) (Mintz Decl. Exs. 1 & 2), and Access Now, Inc. v. May Dep't Stores Co., No. 00-148-CIV (S.D. Fla. Oct. 6, 2000) (First Legal Supplement to Defendant Kmart Corporation's Memorandum in Opposition to Plaintiffs' Motion for Class Certification ("First Leg. Supp.") Ex. 2). Although the court in each of these cases denied certification to a class of individuals with disabilities challenging barriers in a chain of department stores, they are distinguishable from the present case. In each of the three cases, the court relied on the fact that the "plaintiffs [had] . . . failed to show that [the defendant] maintains corporate policies that cause certain barriers to be maintained . . .." Macy's East, slip op. at 2; see also Burdines, slip op. at 3 (same); May, slip op. at 3 (stating that the complaint "only alleges specific violations -- as opposed to a uniform policy . . ."). [10] Indeed, the May plaintiffs -- seeking to certify a nationwide class -- "did not provide any

[10] This is because, in each case, no discovery had been conducted prior to the filing of motions for class certification. See Paradis Decl. ¶ 5 (Rep. App. Tab 2); Dietz Decl. ¶ 4 (Rep. (continued...)

detail concerning ADA violations outside the state of Florida . . ." Id., slip op. at 3. Lacking evidence of a common policy, the courts in these three cases based their decision on their failure to find "a uniform design flaw or structural defect in Defendant's stores nationwide." Id., slip op. at 4; see also Burdines, slip op. at 3 (same); Macy's East, slip op. at 2. These cases are thus not relevant to the analysis of the present case, in which the Named Plaintiffs have placed before the Court extensive evidence of centralized Kmart policies and policy failures that cause barriers to be maintained, as well as testimony about such barriers from 50 individuals at Kmart stores in 26 states and evidence from Kmart's mystery shoppers, in-house ADA surveys and other recently-commissioned surveys that show a consistent pattern of barriers and violations at Kmart stores around the country. See infra at 20-21, 53-55. To the extent these three cases hold that a "uniform design flaw" is a prerequisite for certification of a class of individuals with disabilities, as explained above, they are wrong and, in any event, they are irrelevant here.

Kmart also relies on objections filed by the DOJ to a proposed settlement of the May case. Kmart asserts that the DOJ "contend[ed] that the proposed class covering 382 department stores nationwide should not be approved, even for settlement purposes, because the proposed class did not satisfy Rule 23(a)." (First Leg. Supp. at 4.) This misconstrues the DOJ's objections. Gretchen Jacobs, the DOJ attorney who prepared the objections on which Kmart relies, explains that "[t]he portrait that Kmart attempts to paint of the United States' May objections is flawed in several respects." (Jacobs Decl. ¶ 4 (Rep. App. Tab 1).)

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App. Tab 3). Laurence Paradis was counsel for the plaintiffs in Macy's East and Burdines. Paradis Decl. ¶ 4. Matthew Dietz was counsel for the plaintiffs in May. Dietz Decl. ¶ 3.

> Kmart creates the misleading impression that the United States opposed the May settlement agreement on the sole ground that the class proposed therein (e.g., persons with disabilities and their shopping companions who shopped at May department stores nationwide) failed to satisfy Rule 23(a) of the Federal Rules of Civil Procedure.

(Id. ¶ 3.) In fact, because the DOJ entered the case as an amicus curiae at the settlement stage, it did not take a position on the propriety of class certification. (Id. ¶ 7.) Instead, the DOJ's objections concerned procedure -- that a class that had earlier been denied certification could not, under Amchem Products, Inc. v. Windsor, 521 U.S. 591 (1997), be certified for settlement purposes -- and the substance of the settlement itself. (Jacobs Decl. ¶¶ 4-6.) Ms. Jacobs concludes by stating that

> the United States' objections to the May agreement should not be read as either a general indictment against class actions in ADA actions, or, more specifically, an argument against disability-based class actions against department store chains. . . . It is inaccurate to allege that the Department believes that classwide claims under title III of the ADA against department stores, or any other place of public accommodation subject to the ADA, should not be permitted to proceed as class actions. Rather, the appropriateness of class certification must be evaluated on a case-by-case basis.

(Id. ¶ 8.)

E. It Is Not Necessary That Every Class Member Experience Discrimination During Every Visit to Kmart in Order to Certify a Class.

Kmart also argues that Named Plaintiffs' and putative class members' discriminatory experiences at Kmart cannot be common because these same individuals have also had non-discriminatory experiences at Kmart. Kmart also references several positive comments that Named Plaintiffs' counsel received from class members concerning Kmart stores. The fact that some potential class members have had both discriminatory and non-discriminatory experiences

and that some have positive things to say about Kmart does not detract in any way from the commonality of class members' discriminatory experiences or the appropriateness of class certification.

The Tenth Circuit has approved class certification even where it was possible that the class included some members who approved of the challenged policy. See Lanner v. Wimmer, 662 F.2d 1349, 1357 (10th Cir. 1981). The best Kmart has been able to do is show instances in which the challenged conduct has not occurred; it has not produced testimony or evidence suggesting that there are Kmart shoppers with disabilities who approve of closed accessible checkout aisles, obstructed merchandise aisles, narrow clothing aisles, insufficient or blocked parking, and inaccessible or blocked restrooms or fitting rooms. Yet, as the Lanner case demonstrates, even such implausible evidence would not be sufficient to defeat class certification.[11]

Many courts have certified classes in the face of explicit evidence that fewer than all of the class members have experienced the challenged conduct. For example, in Cox v. American Cast Iron Pipe Co., 784 F.2d 1546 (11th Cir. 1986), a case alleging sex discrimination in employment, the defendant presented interrogatory responses from class members containing "assertions both of no discrimination and of no opinion about discrimination." Id. at 1557. The district court relied on these responses in part in denying class certification. The Eleventh

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[11] One potential class member, while not endorsing the challenged conduct, does appear to disapprove of the use of a class action in this circumstance. See Mintz Decl. Ex. 15. This, too, is not a barrier to class certification. See Siddiqi, 2000 U.S. Dist. LEXIS 19930 at *25.

Circuit reversed, holding that, "[a]t best, the trial judge could only conclude from these answers that some specific claims might not be held by all class members. But Rule 23 does not require that all the questions of law and fact raised by the dispute be common." Id. Similarly, in Shores v. Publix Super Markets, Inc., 1996 WL 407850 (M.D. Fla. March 12, 1996), also a sex discrimination case, the defendant submitted "hundreds of affidavits from women who believe[d] that they [had] not been discriminated against." Id. at *3. The court concluded that

> [t]he fact that a large number of potential class members are satisfied with the status quo, or are unwilling to come forward, cannot defeat class certification. . . . [P]laintiffs cannot be precluded from asserting their right to be free from discrimination merely because other employees chose not to assert those rights.

Id. (citations omitted); see also Robidoux v. Celani, 987 F.2d 931, 934 (2d Cir. 1993) (upholding certification of a class of individuals challenging delays in state assistance; court cites statistics showing only two to fifteen percent of the cases were delayed); Hill v. Amoco Oil Co., 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); Joseph v. General Motors Corp., 109 F.R.D. 635, 640 (D. Colo. 1986) (holding that the existence of "satisfied customers" in products liability case did not defeat class certification).

F. Disability Discrimination at Kmart Stores Is Pervasive and Repeated, Not Isolated or Temporary.

Kmart attempts to minimize the commonality of Named Plaintiffs' and putative class members' experiences by characterizing them as isolated,[12] temporary,[13] fleeting,[14] sporadic,[15] and episodic.[16] While this may appear simply to be argument-by-thesaurus, at least the first two adjectives are rooted in law. Where the ADA requires access, that access must be maintained. 28 C.F.R. § 36.211(a). That provision "does not prohibit isolated or temporary interruptions in service or access due to maintenance or repairs." Id. § 36.211(b). The DOJ commentary to this regulation explains further, however, that "[f]ailure of the public accommodation to ensure that accessible routes are properly maintained and free of obstructions . . . would . . . violate this part." 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. As an initial matter, then, the question whether barriers are isolated or temporary goes to the merits of the case and is inappropriate for resolution at this time. The question is, in fact, a common one shared by the class: Has Kmart properly ensured that accessible routes -- for example, shelves, clothing racks, restrooms, and fitting rooms -- are properly maintained and free of obstructions?

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[12] Class Opp. at 2, 4, 5, 19, 21, 22, 24, 30, 31, 32, 34, 41-42, 48 n.45, 55, 56, 57, and 73-74.

[13] Id. at 2, 4, 5, 19, 21, 22, 24, 25, 28, 30, 31, 32, 33, 44, 55, 56, 57, and 76.

[14] Id. at 2, 24, and 23 n.24.

[15] Id. at 33, 55, and 73-74.

[16] Id. at 22, 29 n. 30, 44, 56, 57, and 63.

Whether the question goes to the merits or to the class certification motion currently before this Court, it is clear that barriers to Kmart customers who use wheelchairs are neither isolated nor temporary. In their opening brief, Named Plaintiffs identified 81 individuals who had experienced discrimination at Kmart stores, provided testimony from 50 of them and provided evidence that Kmart had received relevant complaints from another 259 individuals. (Class Mem. at 12.) Named Plaintiffs also provided extensive evidence of centralized Kmart policies and policy failures that cause systematic discrimination against disabled customers. (Id. at 18-23.) In response to Kmart's assertion (among others) that Named Plaintiffs' and putative class members' experiences were isolated and temporary, Named Plaintiffs moved to compel forms filled out by "mystery shoppers" who were hired to shop at Kmart stores and both to respond to a series of "yes/no" questions and to provide written comments for each shopping trip. Named Plaintiffs' counsel analyzed comments from 68,301 shopping trips during the period February 1999 to August 2000. Of these comments, at least 19,406 or 28.4% include descriptions of clutter and other obstructions that pose barriers to customers in wheelchairs. (Fox Decl. ¶¶ 3-13 & Ex. 2 (Rep. App. Tab 13).)[17] For example, shoppers made comments such

[17] The period within which these data were gathered is well within the statute of limitations, as this case was filed in October, 1999. Kmart asserts that recent training concerning customers with disabilities "does not introduce any new concepts," essentially asserting that its policies and training have not changed materially since 1992. See Class Opp. at 11, 16. As such, these data are relevant to the present suit. The customer service survey system that Kmart put in place after August, 2000, did not ask questions directed to clutter or obstructions; rather its open-ended questions -- posed to shoppers who called a toll-free number -- asked generally what those shoppers did and did not like about Kmart. See Second Robertson Decl. Ex. 21. Even so, for example, in September, 2001, 6.1% of the 1000 calls analyzed by the vendor complained about "crowded aisles." See id. Ex. 22. The vendor uses this percentage and applies it to the (continued...)

as "some aisles not able to enter, for stacks of boxes, merchandise, etc. in them," (id. at 1 (6/2/00 entry)), "area is too cluttered -- it is hard to get cart through," (id. at 3 (11/8/99 entry)), and "aisles had lots of boxes, very crowded and difficult to get through," (id. at 8 (4/1/99 entry)).

These incidents were well-distributed across the Kmart chain: of the 2,090 stores shopped, mystery shoppers reported relevant problems at 2,035 of them. Id. Summary memoranda submitted by the vendor providing mystery shopper services regularly confirmed that the reports showed cluttered aisles. (See, e.g., Second Robertson Decl. Ex. 12 at K35524 (March 2000: 13% of all floors were either dirty or cluttered); Ex. 14 (May 2000: 20% of aisles and 13% of store floors were dirty or cluttered); Ex. 15 (June 2000: 15% to 20% of shoppers reported that aisles were cluttered); Ex. 16 (July 2000: 16% to 20% of shoppers reported that aisles were cluttered).) Although we do not know precisely how many individuals in wheelchairs were obstructed by each of these reported obstacles, they rebut Kmart's claims that the experiences of putative class members were isolated and temporary.

Putting aside the company-wide policies that permit or even mandate barriers to individuals with disabilities -- which barriers are, by definition, neither isolated nor temporary -- these numbers and the results of a survey commissioned by Kmart this past summer make clear that disability discrimination is neither isolated nor temporary at Kmart. While no case has

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[17](...continued)
total commenting respondents; applying this method to the 6.1% figure would project that 1,804 individuals had similar complaints that month. See id. at 3; see also Second Robertson Decl. Ex 23 (excerpts from the deposition of Tammy Pretre) at 12-13. In any event, surveys performed for Kmart this summer confirm the continued presence of these barriers. See infra Section VIII.A.

analyzed 28 C.F.R. § 36.211(b) in depth,[18] one court's analysis of an identical provision in the ADA transportation regulations suggests that a discrimination rate as low as 3% cannot be considered isolated or temporary. The plaintiffs in Cupolo v. Bay Area Rapid Transit, 5 F. Supp. 2d 1078 (N.D. Cal. 1997), individuals who used wheelchairs, were suing BART, San Francisco's rapid transit authority, alleging that BART's elevators were often out of order. BART asserted that problems with its elevators were isolated and temporary and therefore excusable under 49 C.F.R. § 37.161(c), which contains "isolated or temporary" language identical to that of 28 C.F.R. § 36.211(b). BART provided evidence that elevators were available over 97% of the time. Cupolo, at 1080-81. The court held that "the problems encountered by class members are not simply isolated or temporary interruptions due to maintenance or repairs." Id. at 1083.[19] That is, a barrier that arose 3% of the time was not isolated or temporary. The mystery shopper comments analyzed above suggest that barriers occur at Kmart stores at least 28% of the time. Results of Kmart's "expert" survey -- discussed in greater detail in Section VIII.A below -- and its own in-house ADA surveys show various ADA violations occurring at rates ranging from 6% to 46%. (See Second Robertson Decl. Exs. 1-5).

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[18] The only case that mentions 28 C.F.R. 36.211 states simply that "defendant must periodically monitor and maintain all such equipment to ensure that it continues to comply with the Title III Standards," and that "Title III regulations expressly require that accessible features and equipment be maintained in operable working condition." Independent Living Resources v. Oregon Arena Corp., 1 F. Supp. 2d 1124, 1136, 1142 n.11 (D. Or. 1998).

[19] BART also argued that any elevator problems were promptly repaired and that it provided alternative transportation when elevators were out of order. The court rejected this, holding that the regulations "do not provide that prompt repair and reasonable accommodations serve as defenses to claims of ADA violations." Id. at 1083-84.

Cases relied on by Kmart are not to the contrary, as each addresses only a single instance of discrimination. None arose in the context of a putative class action with evidence of repeated violations and centralized policies that caused the barriers or violations in question. See Anderson v. Ross Stores, Inc., No. C99-4056, 2000 WL 1585269 at * 1 (N.D. Cal. Oct. 10, 2000) (Mintz Decl. Ex. 3) (challenging a single instance in which plaintiff requested a reasonable accommodation); Tanner v. Wal-Mart Stores, Inc., Civ. No. 99-44-JD, 2000 U.S. Dist. LEXIS 1444, *16-17 (D.N.H. Feb. 8, 2000) (Mintz Decl. Ex. 8) (challenging a single incident on which the defendant failed to remove ice and snow from its parking lot); Pack v. Arkansas Valley Corr. Facility, 894 P. 2d 34, 39 (Colo. App. 1993) (same). Kmart is essentially arguing that each time an individual disabled Kmart shopper encounters a discriminatory barrier, that experience stands alone and cannot be analyzed together with all of the other experiences and policies demonstrated in Named Plaintiffs' Class Memorandum. This runs counter not only to common sense, but to the words of Kmart's lead counsel, written in describing the role of statistics in civil rights cases: "Discrimination is more likely to be a systemic condition related to widespread practices than a series of isolated events . . .." Walter B. Connolly, Jr., David W. Peterson & Michael J. Connolly, Use of Statistics in Equal Employment Opportunity Litigation § 1.01 (1980 & Supp. 2000).

G. Cases on Which Kmart Relies Are Distinguishable.

Kmart relies on a number of cases to attempt to defeat Named Plaintiffs' arguments for commonality. All are distinguishable. For example, Kmart cites to several cases in which the plaintiffs were attempting to certify a class under Rule 23(b)(3) and/or to maintain claims for

damages for individual class members. Clopton v. Budget Rent A Car, 197 F.R.D. 502, 506-07 (N.D. Ala. 2000); Demkowitz v. Endry, 411 F. Supp. 1184, 1194-95 (S.D. Ohio 1975); Faulk, 184 F.R.D. at 662-63. Named Plaintiffs here move to certify a class under Rule 23(b)(2) and do not seek damages on behalf of the class. Because the entitlement of any one class member to damages requires a more individualized evaluation than the entitlement of a class to injunctive relief, and because Rule 23(b)(3) requires common questions to "predominate" over individual ones -- a requirement not found in Rule 23(b)(2), see Adamson v. Bowen, 855 F.2d 668, 676 (10th Cir. 1988) -- these cases are inapposite.

Kmart also relies on several cases for the proposition that class certification is inappropriate where multiple facilities are involved. For example, Kmart cites the Faulk case with the following parenthetical: "'the problem of multiple facilities creates a formidable barrier to class certification of the Plaintiffs' . . . claims . . . [which] are sufficiently different that they will require different proof to establish liability.'" (Class Opp. at 50 (ellipses in original).) In fact, the Faulk court held that Rule 23(a) commonality existed for a multiple-facility employment class with respect to hiring and promotion claims but that it did not with respect to hostile environment claims. The language Kmart purported to cite from Faulk in fact reads (with omitted text underlined): "The problem of multiple facilities creates a formidable barrier to class certification of the Plaintiffs' hostile environment claims;" and, three paragraphs later, "In sum, the Plaintiffs have established commonality and typicality with regard to Home Oil's hiring and promotion practices. They have not met the prerequisites with regard to their hostile environment claims. The individual claims of hostile environment are sufficiently different that

they will require different proof to establish liability." As noted above, the court ultimately refused to certify any class on the grounds that it did not satisfy Rule 23(b)(3), not at issue in the present case. Id., 184 F.R.D. at 659. Faulk thus supports Rule 23(a)(2) commonality here, as Named Plaintiffs' challenge to Kmart's polices is analogous to the Faulk plaintiffs' challenge to hiring and promotion policies, and does not require the individualized assessment of the class members' state of mind that would have been required by a hostile environment class.

The remainder of Kmart's multiple-facility cases all present circumstances very different from the present case. In Lott v. Westinghouse Savannah River Co., Inc., 200 F.R.D. 539 (D.S.C. 2000), for example, the plaintiffs attempted to certify a class of employees that included all job classifications from general counsel to day laborers in a series of different types of operations ranging from "nuclear operations to firefighting to medical services to construction to janitorial services," each of which had its own set of personnel procedures. Id. at 554-55. In contrast, Kmart concedes that it has a single Store Operating Policies manual, now being supplanted by a single set of "Golden Rods" policy memoranda, for all of its stores. (Class Opp. at 15.) In several other multiple-facility cases cited by Kmart, the plaintiffs simply did not provide evidence of centralized policies or support for the existence of claims other than those of named plaintiffs. In Seidel v. General Motors Acceptance Corp., 93 F.R.D. 122 (W.D. Wash. 1981), instead of rebutting defendant's evidence of decentralization by pointing to centralized policies, the plaintiffs offered only statistics showing "similar patterns and trends around the country, from which plaintiffs would have the Court infer that '[s]urely there must be a master plan.'" Id. at 124. In Stambaugh v. Kansas Dep't of Corr., 151 F.R.D. 664 (D. Kan. 1993), the

complaint described two instances of alleged failure to promote on the basis of sex. The court held that the plaintiffs had not given it "any basis to infer that beyond themselves are still more female employees who were denied upper-level promotions" on a discriminatory basis. Id. at 673 n.4; see also Bradford v. Sears, Roebuck and Co., 673 F.2d 792, 793, 795-96 (5th Cir. 1982) (reversing class certification because the defendant had submitted an unrebutted affidavit that its policies differed from facility to facility); Bostron v. Apfel, 182 F.R.D. 188, 195-96 (D. Md. 1998) (declining to certify a class of white, male Social Security employees, in part because "the record . . . [was] essentially silent concerning the locus of autonomy in making the challenged employment decisions . . .."). While relying on these inapposite cases, Kmart ignores many cases in which multiple-facility or nationwide classes have been certified.[20]

Finally, Kmart argues that the proposed class lacks commonality because it "rais[es] issues under state laws that vary across the states where class members may be found." (Class Opp. at 60 & n.50.) No such state statutes are at issue in this litigation; rather, the proposed class

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[20] See, e.g., Anderson v. Conejo, 199 F.R.D. 228, 267 (N.D. Ill. 2000) (certifying a nationwide case of women who had been subject to certain types of searches by Customs at any United States international airport); Butler v. Home Depot, Inc., No. C-94-4335 SI, 1996 WL 421436 at *1 (N.D. Cal. Jan 25, 1996) (Rep. App. Tab 19) (certifying a class of all female applicants and employees within the West Coast division of Home Depot); Shores, 1996 WL 407850 at *1, *10 (certifying class of female employees at 500 retail grocery stores in Florida, Georgia and South Carolina); Grijalva, 1995 WL 523609 at *1, *7 (certifying nationwide class involving one hundred HMOs around the country providing care to over one million Medicare beneficiaries); Roman v. Korson, 152 F.R.D. 101, 112 (W. D. Mich. 1993) (certifying class of migrant farmworkers challenging wrongfully-charged rent in certain federally-subsidized farmer-owned housing nationwide); Haynes, 1992 WL 752127 at *20 (certifying a class of store-level employees at two different commonly-owned restaurant chains); see also cases cited supra n.7.

will have a single claim under the federal Americans with Disabilities Act.[21] This distinguishes the present case from all of the cases on which Kmart relies, each of which involves an attempt to certify a multi-state class to bring state common law and/or statutory claims under circumstances in which the laws at issue differ state-to-state. See Castano v. American Tobacco Co, 84 F.3d 734, 737, 741-44 (5th Cir. 1996) (declining to certify multi-state class of tobacco users bringing state common law and statutory claims); Clay v. American Tobacco Co., 188 F.R.D. 483, 487, 495 (S.D. Ill. 1999) (same); In re Jackson Nat'l Life Ins. Co. Premium Litig., 183 F.R.D. 217, 222-23 (W.D. Mich. 1998) (declining to certify multi-state class of purchasers of life insurance bringing state law fraud claims); In re Ford Motor Co. Ignition Switch Prod. Liab. Litig., 174 F.R.D. 332, 338, 340 (D.N.J. 1997) (declining to certify a multi-state class of automobile purchasers bringing state and federal claims); Walsh v. Ford Motor Co., 130 F.R.D. 260, 271 (D.D. C. 1990) (same), app. dism., 945 F.2d 1188 (D.C. Cir. 1991).

Kmart also argues that compliance with the ADA "implicates" rights under various state and local access provisions, offering two examples of such provisions that require wider accessible parking spaces than the federal standards. (See Class Opp. at 61.) Named Plaintiffs must, apparently, clarify that they will not seek to reduce wheelchair access at any Kmart store in any state. Any Kmart store in compliance with more aggressive state or local standards would not, by definition, be in violation of the ADA. In Kmart's parking space example, the width

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[21] Although the Named Plaintiffs bring claims individually under Colorado law, they do not assert these claims or other state claims on behalf of the class. See Amended Class Action Complaint at 17. This will not impact other class members' state law claims. See infra Sections IV and V.A.

provided in the Department of Justice Standards for Accessible Design ("Standards") is a minimum, id., 28 C.F.R. pt. 36, app. A, § 4.6.3, and spaces complying with the more generous California or Florida standards would not be in violation. The fact that state statutes may address the same subject matter as a federal statute at issue in a class action should not bar certification, as classes are regularly certified under, for example, federal securities and employment statutes regardless of the fact that rights under state statutes governing those same areas might be "implicated."

II. Named Plaintiffs Have Demonstrated That Joinder is Impracticable.

As set forth in Named Plaintiffs' Class Memorandum, there are more than two million persons age 15 and older in the United States who use wheelchairs and, as a matter of simple logic, many of these potential class members are among the approximately 180 million customers each year who patronize the 2,100 Kmart stores located in all 50 states. (See Class Mem. at 30.) Therefore joinder is impracticable.

Kmart does not dispute these statistics, nor does it argue that joinder in this case would be practicable. Instead it attacks the method used by Named Plaintiffs to estimate of the number of persons in the class as "pure conjecture." But the exact size of the class is irrelevant. Because "the exact size of the class is unknown," and the undisputed statistics demonstrate that it is "common sense that it is large, the Court will take judicial notice of this fact and will assume that joinder is impracticable." 2 Robert Newberg, Newberg on Class Actions § 7.22 at 7-77 (1992 & 2001 Supp.) ("Newberg"); see also Butt v. Allegheny Pepsi-Cola Bottling Co., 116

F.R.D. 486, 488 (E.D. Va. 1987) (taking judicial notice that class was large and joinder impracticable).

In any event, Named Plaintiffs used census statistics and Kmart's own figures to estimate that the class of Kmart shoppers who use wheelchairs likely numbers around 1,700,000. This is in accord with the method approved in Colorado Cross-Disability Coalition v. Taco Bell Corp., 184 F.R.D. 354 (D. Colo. 1999), which held that the court may make "common sense assumptions" to support numerosity, including reliance on census figures. Id. at 358. Kmart attacks this analysis, relying in part on the case of Barlow v. Marion County Hosp., 88 F.R.D. 619 (M.D. Fla. 1980) (cited in Class Opp. at 47). The Barlow case, however, approved of a method much like that used by Named Plaintiffs here, holding that plaintiffs seeking to certify a class of recipients of free or low-cost medical services satisfied the numerosity requirement when they used survey data to estimate the number of individuals eligible for services and applied the defendant's figures for the rate of utilization in the general population to estimate the class size. Id. at 624, 625. Here, Named Plaintiffs used census data of Americans who use wheelchairs and Kmart's estimate that 85% of the population shops in its stores to estimate the class size. See also Miller v. Spring Valley Props., 202 F.R.D. 244, 248 (C.D. Ill. 2001) (certifying class of African-American applicants and renters in a fair housing case and approving method using total number of people who made appointments to see the defendants' apartments and census data concerning number of African Americans in population).

Kmart also argues that Named Plaintiffs have not established a link between their estimate and the claims for which they seek certification, that is, that they have not demonstrated

how many wheelchair-using Kmart shoppers have encountered discrimination at Kmart. However, it is very common, especially in a Rule 23(b)(2) class, for a class of individuals subject to the discriminatory behavior to be certified, without precise proof of the number who have actually experienced it. For example, in Faulk, the court certified a class of African-American employees where the plaintiffs identified 164 employees and 31 applicants "who potentially were affected by the alleged discriminatory policies." Id., 184 F.R.D. at 654. The defendants objected that the plaintiffs' expert had identified only nine additional management positions that should have gone to African-Americans, suggesting that only nine individuals suffered discrimination. The court disagreed, holding that, because the plaintiffs challenged the defendants' practices, all of the individuals identified were appropriate class members, and thus numerosity was satisfied. Id., at 655. [22]

Finally, Kmart challenges Named Plaintiffs' class definition on the grounds that it contains no time limit. Kmart relies only on cases in which the class sought damages and

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[22] See also Karen L., 202 F.R.D. at 99 (holding numerosity satisfied where 77,000 individuals were eligible for the services in question, despite the fact that the plaintiffs did not allege that all eligible individuals had been injured, as "it [was] reasonable to assume that many of the enrollees have and many may experience such harm in the future" and that "the suit concerns government policies that have been in place for some time."). A number of cases have held, without analysis, that a class satisfies numerosity based only on statistics going to the number of individuals potentially affected by the challenged policy, without requiring an analysis of how many were actually affected. See, e.g. Tartaglione, 2001 WL 1258089 at *5 (certifying class based on number of voters with disabilities, not number of same who had been denied access to polling places); Civic Ass'n of the Deaf of New York City, Inc. v. Giuliani, 915 F. Supp. 622, 634 (S.D.N.Y. 1996) (certifying class based on number of Deaf New Yorkers, not number of same who had been unable to use call boxes); Arnold, 158 F.R.D. at 448 (certifying class based on number of wheelchair users and semi-ambulatory persons in California and the conclusion that the "number of disabled persons affected by the alleged access violations" would be large, rather than an estimate of those actually injured by the alleged discrimination).

individualized injunctive relief. See Davoll v. Webb, 160 F.R.D. 142, 143 (D. Colo. 1995), aff'd 194 F.3d 1116 (10th Cir. 1999); Daigle v. Shell Oil Co., 133 F.R.D. 600, 602 (D. Colo. 1990). In contrast, the present case seeks only prospective, class-wide, injunctive relief, so there is little need to determine precisely the contours of the class. See Daniels, 198 F.R.D. at 416 (holding that "general class descriptions based on the harm allegedly suffered by plaintiffs [are] acceptable in class actions seeking only declaratory and injunctive relief under Rule 23(b)(2)") (citations omitted)). That said, this Court has the discretion to adopt a class definition different from that in the complaint or motion, Colorado Cross-Disability Coalition, 184 F.R.D. at 357, and Named Plaintiffs do not object to a class definition that incorporates a two-year limitation.

III. Because Named Plaintiffs' Claims Do Not Have Unique Defenses, Kmart's Only Argument as to Typicality Fails.

Kmart argues that typicality is not satisfied because Named Plaintiffs' claims are subject to unique defenses. In making this argument, Kmart points to a single defense that it alleges differs among its stores, not among Named Plaintiffs and putative class members. The cases on which Kmart relies, however, involve defenses unique to a named plaintiff as an individual. See Hanon v. Dataproducts Corp., 976 F.2d 497, 508-09 (9th Cir. 1992) (holding that named plaintiff in securities class action had unique defense based on the questionability of his reliance on the integrity of the market); Queen Uno Ltd. P'ship v. Coeur D'Alene Mines Corp., 183 F.R.D. 687, 692 (D. Colo. 1998) (holding that named plaintiff in securities class action had unique defenses because it was a market maker in the stock in question). Kmart does not cite to a case that holds that typicality is defeated in a multiple-facility case by defenses that might apply to one facility

rather than another. In any event, the single defense on which Kmart relies -- the "readily achievable" defense of § 12182(b)(2)(A)(iv) -- looks to the resources of the entire company rather than just that of the individual facility, see 28 C.F.R. § 36.104, and will be applicable to only a handful of stores. See infra at 40.

The remainder of the cases cited by Kmart in opposition to typicality include three in which typicality was found to exist, see Kornberg v. Carnival Cruise Lines, Inc., 741 F.2d 1332, 1337 (11th Cir. 1984), cert. denied, 470 U.S. 1004 (1985), Neff v. VIA Metropolitan Transit Authority, 179 F.R.D. 185, 194 (W.D. Tex. 1998), and Lightbourn, 118 F.3d at 426, and three that are distinguishable from the present circumstances. See Broussard v. Meineke Discount Muffler Shops, Inc., 155 F.3d 331, 340-42 (4th Cir. 1998) (holding typicality did not exist in franchisee class action for breach of contract and fraud because named plaintiffs and class members were parties to different franchise agreements and because questions of reliance on misrepresentations, tolling of statute of limitations and damages were individualized); Butterworth v. Quick & Reilly, Inc., 171 F.R.D. 319, 321-22 (M.D. Fla. 1997) (holding typicality did not exist in securities class action where cause of action depended on reliance by each class member on different representations); Hall v. Burger King Corp., No. 89-0260, 1992 WL 372354 at *7 (S.D. Fla. Oct. 26, 1992) (Mintz Decl. Ex. 5) (holding typicality did not exist in race discrimination class action by franchisees as there was no common problem asserted by all named plaintiffs).

IV. Because Class Certification in the Present Case Will Not Have a Preclusive Effect on Class Members' State Law Claims, Kmart's Only Argument as to Representation Fails.

Kmart's only objection to Named Plaintiffs' ability adequately to represent the class is that class claims for injunctive relief under Title III of the ADA would have a preclusive effect on class members' claims for damages under state disability discrimination laws. Kmart relies on a single Texas district court decision materially different from the case at bar. (See Class Opp. at 67-71 (citing Zachery v. Texaco Exploration and Prod., Inc., 185 F.R.D. 230 (W.D. Tex. 1999)).) It is well established, however, that certification of a class seeking only injunctive or declaratory relief does not preclude individual damage actions by class members. Indeed, any contrary rule would vitiate Rule 23(b)(2). Because the preclusive effect on which Kmart relies does not exist, Kmart's argument fails.

Numerous courts have held that a class action seeking only injunctive or declaratory relief does not bar class members from bringing individual actions for damages. This issue often arises in actions challenging prison conditions. For example, in Fortner v. Thomas, 983 F.2d 1024, 1026 (11th Cir. 1993), several inmates brought suit under 42 U.S.C. § 1983 seeking monetary and injunctive relief for alleged constitutional violations. The district court dismissed the claims on the ground that they were barred because the claims had been litigated in a prior class action in which only injunctive relief had been sought. The Eleventh Circuit reversed, holding:

> It is clear that a prisoner's claim for monetary damages or other particularized relief is not barred if the class representative sought only declaratory and injunctive relief, even if the prisoner is a member of a pending class action . . . Because the class representatives in [the prior class action] sought only injunctive relief for the alleged unconstitutional conditions and practices of the Georgia

> prison system, the district court erred in dismissing the appellants' complaint which included a claim for monetary damages.

Id. at 1031. Many other courts, including the Tenth Circuit, follow the rule that a class action seeking only injunctive or declaratory relief does not bar class members from bringing individual damage claims. See, e.g., McNeil v. Guthrie, 945 F.2d 1163, 1166 n.4 (10th Cir. 1991) (holding that "class members may bring individual actions when they seek money damages.").[23]

The single case cited by Kmart is not to the contrary. First, unlike Title III of the ADA, which does not provide for damages, see § 12188, the class claim in Zachery was brought under Title VI/I of the Civil Rights Act of 1964, which does provide for damages. See id., 185 F.R.D. at 237 (citing 42 U.S.C. § 1981a(a)(1)). Second, the plaintiffs in Zachery had initially sought damages on behalf of the class but later amended their complaint and their motion for class certification to drop the damage claims. Id. at 234. Courts have recognized that once class representatives assert a claim on behalf of a class, there is a possibility that dropping the claim may prejudice class members. See, e.g., In re Nazi Era Cases Against German Defendants Litig., 198 F.R.D. 429, 439 (D.N.J. 2000) ("Court approval of a dismissal pursuant to Rule 23(e)

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[23] See also, e.g., Hiser v. Franklin, 94 F.3d 1287, 1291 (9th Cir. 1996) holding that ("'every federal court of appeals that has considered the question has held that a class action seeking only declaratory or injunctive relief does not bar subsequent individual suits for damages.'" (citation omitted)); Norris v. Slothouber, 718 F.2d 1116, 1117 (D.C. Cir. 1983) (holding that "[a] suit for damages is not precluded by reason of the plaintiff's membership in a class for which no monetary relief is sought."); Crowder v. Lash, 687 F.2d 996, 1009 (7th Cir. 1982) (Applying rule and noting that "several circuits have held that where a prisoner seeks damages for allegedly unconstitutional conditions of confinement he is not precluded by an earlier class action in which only declaratory and injunctive relief were sought."); Bogard v. Cook, 586 F.2d 399, 406-9 (5th Cir. 1978) (holding that individual claim for damages not barred by prior class action seeking equitable relief), cert. denied, 444 U.S. 883 (1979).

prevents the class action device from being used in an abusive manner . . . as it allows a court to ensure that the representative plaintiffs have not settled or dismissed their claims to the prejudice of a prospective class prior to certification . . ..."). As such, Zachery is distinguishable from the present case and the overwhelming weight of precedent demonstrates that certifying this class will not bar individual damage claims. Kmart's objection to certification on this ground should be rejected.

V. Certification Pursuant to Rule 23(b)(2) is Appropriate.

A. Named Plaintiffs' Individual Damages Claims Are Irrelevant to Certification under Rule 23(b)(2).

Class certification under Rule 23(b)(2) is generally appropriate only where the class is not asserting claims for damages or where such claims are incidental to the injunctive relief requested. See, e.g., Colorado Cross-Disability Coalition, 184 F.R.D. at 361-62. Here, because there is no damages claim asserted on behalf of the class, this issue should not arise. Kmart argues that the fact that Named Plaintiffs are seeking damages for themselves may cause class members' claims to be barred by res judicata. Kmart is mistaken.

Kmart bases its argument on Ticor Title Ins. Co. v. Brown, 511 U.S. 117 (1994). The class in Ticor originally sought both monetary and equitable relief but settled the case on terms that dropped the monetary claims. See Brown v. Ticor Title Ins. Co., 982 F.2d 386, 389 (9th Cir.

1992). The court approved the settlement and certified the class under Rules 23(b)(1) and 23(b)(2), but did not give absent class members the right to opt out. Id. Absent class members later brought an action seeking monetary damages, and the district court dismissed the claims on the ground that they were barred by res judicata as a result of the class action settlement. Id. at 390. The Ninth Circuit reversed, holding that, "because [the absent class members] had no opportunity to opt out . . . there would be a violation of minimal due process if [their] damage claims were held barred by res judicata." Id. at 392. The Supreme Court initially granted the writ of certiorari but subsequently dismissed the writ as improvidently granted. Ticor, 511 U.S. at 122. In dictum, the Court made clear that the issue presented by Ticor concerned only whether "absent class members have a constitutional due process right to opt out of any class action which asserts monetary claims on their behalf." Id. at 120-21 (emphasis added).

Nothing in Ticor implicates damage claims brought by Named Plaintiffs on their own behalf but not that of the class. The concern in Ticor -- that absent class members should have the choice not to participate in a class action if they are going to be bound by a judgment in that action -- does not apply to monetary claims brought only by Named Plaintiffs, who by definition chose to bring the lawsuit. Indeed courts routinely certify classes under Rule 23(b)(2) in actions in which the named plaintiffs seek damages only for themselves. See, e.g., Daniels, 198 F.R.D. at 416; Siddiqi, 2000 U.S. Dist. LEXIS 19930 at *28 n.4.

B. The Proposed Class 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 . . .." Kmart's attempt to show this provision inapplicable succeeds only in underscoring its applicability. Kmart cites to five "Kmart policies of general applicability that affect Plaintiffs and the putative class members . . .." (Class Opp. at 73.) While Named Plaintiffs argue that there are far more policies and policy failures that represent examples of Kmart acting and refusing to act on grounds generally applicable to the class, Kmart's acknowledgment of these five policies -- the adequacy of which Named Plaintiffs contest -- is certainly sufficient to support certification under Rule 23(b)(2). The other policies and policy failures alleged by Named Plaintiffs also support such certification.

Indeed, as one court has recently held, the plaintiffs do not need to point to a specific policy to support certification pursuant to Rule 23(b)(2). In certifying a class of Deaf employees challenging their employer's policies and policy failures, the court in Bates v. United Parcel Service, held that such a requirement:

> would lead to the unacceptable conclusion that an employer could protect itself from any class action suit simply by failing to adopt specific policies. That result seems particularly egregious in cases like this one, where plaintiffs claim that an employer's failure to adopt specific policies is the very reason that the employer is in violation of anti-discrimination laws.

Id., 2001 WL 1482023 at *7. Named Plaintiffs challenge Kmart's failure to promulgate specific policies sufficient to prevent discriminatory barriers; as was the case in Bates, this is sufficient for Rule 23(b)(2). See also, e.g., Lightbourn, 118 F.3d at 426 (holding that "Rule 23(b)(2) clearly applies" to case alleging failure to ensure accessible polling places because the defendant has "'acted or refused to act' on grounds generally applicable to the class."); Daniels, 198 F.R.D.

at 414 (holding that certification pursuant to Rule 23(b)(2) was "especially appropriate where a plaintiff seeks injunctive relief against discriminatory practices by a defendant"); Grijalva, 1995 WL 523609 at *2 (holding that defendant's failure to monitor Medicare HMOs and to implement effective appeals system "has affected the entire class," making Rule 23(b)(2) appropriate).

VI. Named Plaintiffs' Claims Are Best Tried as a Class Action.

Kmart argues throughout its brief that this case will require store-by-store analysis under varying standards. While these manageabilty issues are not technically part of the analysis of a Rule 23(b)(2) class, compare Rule 23(b)(2) with Rule 23(b)(3)(D), it may be helpful to review the factors that make this case not only manageable but ideal for class certification.

Much of the discrimination alleged by Named Plaintiffs can be remedied at Kmart's headquarters. Where Named Plaintiffs challenge policies or policy failures, those allegations can be addressed by an analysis of Kmart's company-wide policies and training. Even where Kmart asserts that store-level information is necessary, the required information is generated and/or collected by Kmart's headquarters. For example, although Kmart complains that an analysis of the spacing of clothing racks will require a store-by-store analysis, it concedes that Kmart's Store Planning department "creates a fixture floor plan for each store" and that this plan "is, in essence, a blue print of the entire interior of a Kmart store. . . . [including] the location of . . . various permanent and temporary fixtures . . .." (Declaration of Michael Francis in Opposition to Plaintiffs' Motion for Class Certification ("Francis Decl.") ¶¶ 8-9 (emphasis in original).) Should this Court determine that the ADA requires more than 24 inches to provide access to clothing racks, it can order Kmart to adjust its company-wide minimum and to design new

layouts at headquarters for distribution to its stores, fully in tune with Kmart's existing procedure.

Kmart's procedure for architectural compliance is also centralized at headquarters. For example, Kmart asserts that, should this Court certify the requested class, it "would have to count the parking spaces to determine the accessible ratio at each store . . .." (Class Opp. at 2 (emphasis in original).) Documents turned over to Named Plaintiffs pursuant to their motion to compel reveal that Kmart has already undertaken this task in at least 1,441 stores -- and that approximately 39% of them are out of compliance. (See Second Robertson Decl. ¶ 17.) Because ADA compliance efforts have long been directed and coordinated by Kmart's headquarters, (see, e.g., Declaration of Bruce Glasser in Opposition to Plaintiffs' Motion for Class Certification ("Glasser Decl.") ¶¶ 4, 7, 11, 20, 27-33, 37, 47, 57-58, 62-64), that office should be well-prepared to manage any assessment or remedy required by this litigation.

Finally, with respect to architectural violations, Kmart asserts that the Court would have to evaluate the age and extent of renovations at each store to determine which standard to apply. (Class Opp. at 35-36.) Kmart's own submissions demonstrate, however, that a single standard would govern all but a few stores. The ADA requires facilities built after January 26, 1993 to comply with the Standards. § 12183(a)(1); 28 C.F.R. § 36.406(a). This standard thus applies to the 442 stores that Kmart states were built after January 26, 1993. (See Class Opp. at 35 n.37.) In addition, where part of a facility is altered, it, too, must comply with the Standards. § 12183(a)(2); 28 C.F.R. § 36.406(a). Kmart has admitted that its "High Frequency Refurb" program "involved changing the entire layout of most existing stores." (Francis Decl. ¶ 14; see

also Glasser Decl. ¶ 53.) As a result, at stores having undergone the High Frequency Refurb, the entire store must comply with the Standards. Kmart states further that 1,858 Kmart stores -- that is, all but about 24 stores -- have undergone this refurbishment program. (Glasser Decl. ¶ 54; see also Francis Decl. ¶ 17; Francis Dep. at 47:19 - 48:16 (Rep. App. Tab 24).) That is, all but about 24 of Kmart's 2,113 stores will be analyzed under a single set of standards: The DOJ's Standards for Accessible Design.

Even the application of a single standard to 2,100 stores may still leave the Court with the task of assessing compliance of certain architectural features in each store with that standard. As discussed above, some of this information may already be available from Kmart. However, under similar circumstances, this Court has seen fit to appoint a special master. In Bridge Publications, Inc. v. F.A.C.T. Net, Inc., 183 F.R.D. 254 (D. Colo. 1998), this Court faced the task of determining the validity of the copyright of 1,914 works. Id. at 256. It appointed a special master to prepare findings on the validity of each, which findings could then be challenged by either party. Id. at 264.

The alternative to class treatment here is 2,113 separate trials in various districts around the country. This procedure contains the potential to set very different standards for Kmart's centralized policies; that is, Kmart may ultimately have to issue separate policies for each store following entry of judgment against that store.

VII. Named Plaintiffs Have Standing to Bring this Action and to Represent the Class.

Kmart argues that Named Plaintiffs lack standing to bring this action both because they have not visited all of its 2,113 stores and because they do not provide evidence of an imminent

plan to visit all 2,113 stores in the near future. Neither is required. Rather, because Named Plaintiffs have standing to challenge all of the practices at issue here, they have standing both to bring this action and to act as a class representative.

A. Named Plaintiffs Are Not Required to Visit or Plan to Visit All 2,113 Kmart Stores.

Named Plaintiffs must have standing in order to represent the class. This simply means that they "must have personally sustained or be in immediate danger of sustaining 'some direct injury as a result of the challenged . . . conduct.'" Armstrong v. Davis, No. 00-15132, --- F.3d --- , 2001 WL 1506518 at *6 (9th Cir. Nov. 28, 2001) (quoting O'Shea v. Littleton, 414 U.S. 488, 494 (1974) (ellipses supplied)). It does not mean that they must have standing to bring each class member's claim as to each store in the country. Indeed, Kmart's argument represents a fundamental misunderstanding of the class action mechanism. "Class actions are representative suits on behalf of groups of persons similarly situated. [The class action] is a nontraditional litigation procedure that permits a representative with typical claims to sue or defend on behalf of, and stand in judgment for, a class 'when the question is of common or general interest to . . . persons . . . so numerous as to make it impracticable to bring them all before the court. . .'" 1 Newberg § 1.01 at 1-2 - 1-3 (quoting Equity Rule 38, 33 Sup. Ct. xxix (1912)). In other words, although it is hornbook standing law that one person cannot bring a claim on behalf of another, see, e.g., Warth v. Seldin, 422 U.S. 490, 499 (1975), class actions permit one person -- the named or representative plaintiff -- to bring claims on behalf of numerous others not party to the case. The prerequisites of Rule 23 serve to ensure that -- once a representative plaintiff has

established his own standing -- he can represent the interests of others. 1 Newberg § 2.06 at 2-29 - 31; see also 7B Charles Alan Wright et al., Federal Practice and Procedure § 1785.1 (2d ed. 1986 & Supp. 2001) ("As long as the representative parties have a direct and substantial interest, they have standing; the question whether they may be allowed to present claims on behalf of others who have similar, but not identical, interests depends not on standing, but on an assessment of typicality and adequacy of representation"). As explained below, Named Plaintiffs have standing to challenge Kmart's discriminatory barriers and policies based on the injuries they have suffered and their intent to continue to shop at Kmart; as explained above and in Named Plaintiffs' Class Memorandum, they satisfy Rule 23(a) and (b)(2) with respect to those claims. Named Plaintiffs thus have standing to challenge Kmart's policies and practices on behalf of a class of individuals who have been injured by them in all of Kmart's stores around the country.

Perhaps because of its fundamental misunderstanding of the mechanics of a class action, almost none of the cases on which Kmart relies in its standing argument arose in the context of a class action. Indeed, in one of the cases on which it relies -- which held that an individual did not have standing to challenge ADA violations at lottery retailers he had not visited -- the court specifically noted, "Plaintiff is not bringing this case as a class action. Although he unquestionably hopes that this action will aid other disabled persons, he is asking for relief as an individual." Tyler v. Kan. Lottery, 14 F. Supp. 2d 1220, 1224-25 (D. Kan. 1998); see also Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 166-67 (1972) (holding individual African-American lacked standing to challenge membership policies of all-white club because he had not

applied for membership); Citizens Concerned About Our Children v. Sch. Bd., 193 F.3d 1285, 1290 (11th Cir. 1999) (holding two individual students lacked standing to challenge discrimination at schools they did not attend).[24] Kmart relies on the rejection of the individual claims in Citizens Concerned and Tyler for the proposition that "[a] civil rights claim relating only to one facility, or even a handful of facilities operated by the same defendant, does not confer standing to seek sweeping injunctive relief with respect to all of the defendant's facilities," (Class Opp. at 41), but ignores the many civil rights class actions challenging conditions at multiple facilities. (See cases cited supra n.20.)

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[24] See also Shotz v Cates, 256 F.3d 1077, 1082 (11th Cir. 2001) (holding that individual 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 individual 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); Jairath v. Dyer, 154 F.3d 1280, 1283 (11th Cir. 1998) (holding individual HIV positive plaintiff lacked standing to seek injunctive relief against a doctor from whom he was not likely to seek treatment again); Access Now, Inc. v. S. Fla. Stadium Corp., 161 F. Supp. 2d 1357, 1365 (S.D. Fla. 2001) (holding individual plaintiff did not have standing to bring claims "about which he lacked actual knowledge, pursuant either to his personal encounter with those violations or by expert testimony, when the Complaint was filed."); Deck v. Am. Haw. Cruises, Inc., 121 F. Supp. 2d 1292, 1299 (D. Haw. 2000) (holding individual plaintiff who stated only that she intended in the future to "look into taking" additional cruises lacked standing to seek injunctive relief pursuant to the ADA against defendant cruise line); Delil v. El Torito Restaurants, Inc., No. 94-3900, 1997 WL 714866 at *3-4 (N.D. Cal. June 24, 1997) (Mintz Decl. Ex. 4) (holding individual plaintiff who resided over 100 miles away from a restaurant to which she was allegedly denied access in violation of the ADA, was unlikely to visit the restaurant again, and therefore, did not have standing to seek injunctive relief compelling its alteration); Aikens v. St. Helena Hosp. 843 F. Supp. 1329, 1333-34 (N.D. Cal. 1994) (holding that individual hearing-impaired plaintiff who was denied a sign language interpreter during an emergency hospital visit had no standing to seek injunctive relief because she failed to show either that she was likely to use the hospital in the near future or that, if she did so, the hospital would again fail to provide an interpreter).

One of the only class cases cited by Kmart underscores Named Plaintiffs' standing to challenge Kmart's conduct at all of its stores. The plaintiffs in Blum v. Yaretsky, 457 U.S. 991 (1982) (cited in Class Opp. at 40), represented a class of nursing home residents challenging decisions to transfer them without notice or hearing. Id. at 993. The named plaintiffs had been transferred to facilities offering lower levels of care, but had not been threatened with any other type of transfer, so they did not have standing to represent individuals who were threatened with such other transfers. Id. at 995, 999. This did not stop the named plaintiffs -- residents of a single nursing home -- from representing a class that encompassed "Medicaid-eligible residents of New York nursing homes," id. at 995-96, that is, facilities other than the one in which they resided.

B. Named Plaintiffs Have Standing to Challenge Kmart's Discriminatory Practices.

The Steger case -- on which Kmart relies -- demonstrates that Named Plaintiffs have standing under Title III of the ADA. One of the plaintiffs, a vision-impaired individual, had been injured by the lack of Braille signage in the first floor men's room of the defendant's building. On that basis, he sought to challenge all ADA violations anywhere in the building. The Eighth Circuit made two separate holdings: (1) that this plaintiff did not have standing to challenge violations that did not affect him as a vision-impaired person; but (2) that he did have standing to challenge all vision-related violations throughout the building, regardless of whether he had encountered them or not. Id., 228 F.3d at 893-94. Kmart, in its Class Opposition, relies on the separate opinion of Judge Loken -- concurring in part and dissenting in part -- for a

proposition that was rejected by the majority. (See Class Opp. at 42 ("proper standing must be limited even more specifically to those areas of a public accommodation that Plaintiffs have visited.").) The majority's holding on this point provides support for Named Plaintiffs' standing to challenge all mobility-related barriers at Kmart stores, even if they have not personally encountered each one.

Lewis v. Casey, 518 U.S. 343 (1996), also relied on by Kmart, is in accord with the first of Steger's holdings: That a plaintiff cannot challenge policies that do not affect him. In that case, a class of prisoners alleged that they were being denied access to the courts. The district court found actual injury on the part of only one named plaintiff: Failure to provide the services he required in light of the fact that he was illiterate. Id. at 358. On that basis, the Court held that the district court could not order relief as to prisoners whose injuries stemmed from different sources: the fact that they did not speak English or were in lockdown. Id. The sentence for which Kmart cites Lewis in fact supports Named Plaintiffs' standing here: "The remedy must . . . be limited to the inadequacy that produced the injury in fact that the plaintiff has established." Id. at 357 (quoted in Class Opp. at 42.) Named Plaintiffs challenge the inadequacies in Kmart policies and practices that "produced the injur[ies] in fact" that they have suffered, that is, those policies and practices that cause barriers to individuals with mobility impairments.[25]

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[25] Access Now, Inc. v. S. Fla. Stadium Corp., 161 F. Supp. 2d 1357 (S. D. Fla. 2001), submitted by Kmart in its Second Legal Supplement to Defendant Kmart Corporation's Memorandum in Opposition to Plaintiffs' Motion for Class Certification, is not to the contrary, as the plaintiff in that case was challenging specific physical barriers rather than policies and (continued...)

Kmart also asserts that Named Plaintiffs have not shown imminent future injury through plans either "to visit the well over 2100 Kmart stores they have never visited across the United States," or even to visit the stores they have visited in the past. (Class Opp. at 43.) As discussed above, it is not their burden to show that they have standing with respect to each store; accordingly, they are under no obligation to manifest plans to take a 2100-store tour in the near future. All three Named Plaintiffs shop at Kmart stores regularly, and all intend to continue to do so in the future. (Second Lucas Decl. ¶ 3; Second Lane Decl. ¶ 2; Second Reiskin Decl. ¶ 2 (Rep. App. Tabs 10-12).) This is sufficient to confer standing. See, e.g., Access 123, Inc. v. Markey's Lobster Pool, Inc., No. 00-382-JD, 2001 WL 920051 at *3 (D.N.H. 2001) (Rep. App. Tab 15) (holding one visit to restaurant coupled with intent to visit area restaurants in future and defendant's lack of intent to remedy barriers sufficient to confer standing); Association For Disabled Americans v. Claypool Holdings, LLC, 2001 WL 1112109 at *20-21 (S.D. Ind. Aug. 6, 2001) (Rep. App. Tab 17) (holding that desire to stay in hotel in city in which plaintiff had family and to which he had traveled regularly in the past was sufficient to confer standing); Parr v. L & L Drive-Inn Restaurant, 96 F. Supp. 2d 1065, 1079 (D. Haw. 2000) (holding that one visit to a fast food restaurant coupled with the fact that the plaintiff had "developed a taste for [the defendant's] food and [had] visited various [of the defendant's other] restaurants" was sufficient to confer standing, especially in light of the fact that "[v]isiting a fast food restaurant, as opposed

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[25](...continued)
practices. The court's holding -- that the plaintiff was limited to challenging barriers he had experienced or of which he had notice, id. at 1365 -- supports the claims of Named Plaintiffs, who seek to change policies and practices they have encountered and of which they have notice.

to a hotel or professional office, is not the sort of event that requires advance planning or the need for a reservation").[26]

Because Named Plaintiffs have standing to challenge Kmart policies and practices that affect their disability -- mobility impairment -- and because they satisfy Rule 23 with respect to their challenge to those policies and practices, they have standing to represent the class.

VIII. Kmart's Arguments to the Merits are Unavailing.

In its Class Opposition, Kmart made a number of assertions concerning the compliance of Kmart stores with the ADA and other merit-related questions. Although resolution of these issues is inappropriate at this stage, see Cook v. Rockwell Int'l Corp., 151 F.R.D. 378, 381 (D. Colo. 1993), Named Plaintiffs address them briefly below.

A. Kmart's "ADA Experts," to the Extent They Provide Relevant Information, Support Named Plaintiffs' Motion for Class Certification.

Kmart retained the firms of Ican, Inc. ("Ican") and Tucker, Spearman & Associates ("Tucker") to perform surveys of 50 Kmart stores that Kmart asserts were randomly selected. (Class Opp. at 21 & n.20.) Ican's founder, Heidi L. Van Arnem, and Tucker's president, Joyce E. Tucker, submitted the signed Joint Report of Heidi L. Van Arnem & Joyce E. Tucker ("Joint

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[26] These contrast with the cases cited by Kmart, in which the plaintiffs had not provided evidence that they had plans to patronize the defendants' facilities in the future. See cases cited supra n. 24.

Report"),[27] on which Kmart relies for its assertion that the stores surveyed "were generally accessible to wheelchair and scooter users" and that any barriers they found "were temporary and isolated." (Class Opp. at 21.)[28] As explained below, this report (1) was drafted by Kmart's attorneys, (2) relies on data gathered by entities that were paid $200,000 for a little over one month's work, at least one of which has been sponsored by Kmart in the past, and neither of which had prior experience assessing facilities for compliance with the ADA, (3) is methodologically flawed and largely does not address the barriers at issue in this case, and (4) contains conclusions that are contradicted by the data on which they purport to rely.

Kmart's attorneys played a major role in the Ican/Tucker survey. Surveyors received no formal training; the only "training" consisted of a pre-survey tour of one store by Kmart's lead counsel, Walter Connolly, Ican's Vice President of Inspiration, Kenny Rudolph, surveyors Heather Ashare and Patti Waxweiller, and Laurie Muhn, the star of the videotape discussed below. (Rudolph Dep. at 46:4 - 46:24; see also Ashare Dep. at 9:1 - 9:7; Waxweiller Dep. at 9:9 - 9:13 (Rep. App. Tabs 4-6).) Kmart's attorneys drafted the survey form. (Rudolph Dep. at 55:10 - 55:20 & Ex. 24.) After each survey, one member of the team would type up a summary

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[27] Sadly, not long after the submission of her declaration and Joint Report, Ms. Van Arnem fell critically ill. She passed away on November 11, 2001. As such, Named Plaintiffs did not have the opportunity to depose her. Named Plaintiffs do not challenge Kmart's reliance on her declaration or the Joint Report in this context and accepted a deposition of Kenny Rudolph in her place. Based both on Ms. Van Arnem's unavailability and on the deficiencies in the Joint Report, Named Plaintiffs reserve the right to move to strike should Kmart attempt to use the report in an adjudication of the merits.

[28] Kmart also relies on the Joint Report and the Ican/Tucker surveys for the proposition that Kmart stores vary physically. Class Opp. at 21. As explained above, Named Plaintiffs do not contest this.

which would be forwarded not to Ms. Van Arnem, but to Mr. Connolly. (Ashare Dep. at 27:1 - 27:12, 36:21 - 37:16.) Ultimately, Foley & Lardner drafted the Joint Report itself. (Rudolph Dep. at 60:10 - 60:21 & Ex. 26.)

Although Kmart labels Ican and Tucker "ADA Experts," (see Class Opp. at 21), Ican had not previously assessed a physical facility for compliance with the ADA, (Rudolph Dep. at 24:15 - 24:23), and the Tucker firm's background is entirely in employment rather than public accommodations compliance. (See Declaration of Joyce E. Tucker in Opposition to Plaintiffs' Motion for Class Certification ¶¶ 4-31; Joint Report ¶¶ 10-16.) Furthermore, Ican regards Kmart as its "business partner." (Rudolph Dep. at 15:17 - 15:18.) Kmart began sponsoring Ican in the summer of 2000, when it paid $10,000 to be an official sponsor of an Ican event, and Kmart's logo remains on Ican's brochure. (Id. at 61:12 - 63:18 and Ex. 27.) Mr. Rudolph saw the survey project -- one of the biggest Ican has had -- as "part of an ongoing and growing relationship between Ican and Kmart." (Id. at 26:14 - 27:5, 33:3 - 33:4.) This bias is best summed up in the email that Mr. Rudolph used to forward the draft Joint Report from Foley & Lardner to Ms. Van Arnem, in which he enthused, "Let's keep the Kmart partnership (and revenue stream!) growing!" (Id. Ex. 26.) Kmart paid Ican $100,000 for the survey, which appears to have occurred between early July of this year and the submission of Kmart's opposition on August 9, 2001. (See Rudolph Dep. at 26:1 - 26:24, 30:16 - 31:15, 47:17 - 48:9 & Ex. 23.) This is in addition to another $100,000 that was paid to Tucker for its role in the project. (See Second Robertson Decl. Ex. 18.)

Methodologically, the survey was flawed. First, individual store managers knew in advance that their stores would be surveyed, and knew the survey was being conducted while surveyors were in their stores (see Ashare Dep. at 14:9 - 14:14, 16:3 - 16:10; Rudolph Dep. Ex. 25), leaving them free to clean up or rearrange the stores to attempt to ensure good results.

Second, although Ican originally prepared a proposal that called for teams of two surveyors, one of whom would be "a person with a disability that requires the use of a wheelchair," (Rudolph Dep. 30:16 - 30:25; Ex. 21 at 2), in the end, none of the surveyors were individuals who used wheelchairs. (Id. at 25:21 - 25:25.) This led to bizarre survey methods, for example, non-disabled surveyors used shopping carts to test wheelchair access around aisle displays, to merchandise behind such displays, and to clothing racks. (See Waxweiller Dep. at 12:21 - 13:9; Ashare Dep. at 19:8 - 20:7 & Ex. 32 at 4 ("Can a **shopping cart** be pushed between all clothing and accessory racks?") (emphasis in original)).[29] Thus, because Kmart shopping carts have a standardized width of 24 inches[30] -- much narrower than most wheelchairs (see

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[29] On re-direct examination by Kmart's attorney, both surveyors asserted that they had also measured the distances between clothing racks with a tape measure. See Ashare Dep. at 37:22 - 38:5; Waxweiller Dep. at 23:9 - 24:3. Ms. Ashare stated that if these measurements were recorded, they would have been recorded in her notes. Ashare Dep. at 37:22 - 38:5. The surveyors' notes provide such measurements in only eight stores, only one of which indicates a measure of 36 inches and several of which are less than 24". See Second Miot Decl. ¶ 4 (Rep. App. Tab 8). Ms. Waxweiller said she measured between racks, but did not always record these measurements and ultimately used the standard on the form: what percentage she could get a shopping cart through. Waxweiller Dep. at 14:11 - 15:3.

[30] Ms. Ashare testified that Kmart shopping carts a standardized width, although she could not recall what that width was. Ashare Dep. at 25:22 - 26:13. Named Plaintiffs had this standardized width measured: At six Denver-area Kmarts, shopping carts measured, at their widest point, 24 inches. Bell Decl. ¶¶ 2-3 (Rep. App. Tab 9).

Class Mem. at 20) -- the Ican/Tucker survey neither asked nor proved anything relevant about the accessibility of clothing racks or merchandise behind displays.

Nor did the Ican/Tucker survey measure many of the discriminatory barriers at issue in this case. For example:

- Guidelines for the survey describe certain barriers as "temporary-operational," including, for example, "an accessible cash register that is closed, or a stocking cart in the middle of an aisle with no worker nearby," (Ashare Dep. Ex. 30),[31] and the survey form, accordingly, has no place to record these types of obstructions. (Id. Ex. 32.) But Named Plaintiffs and putative class members frequently are denied access by these types of obstructions. (See App. Revised Tabs 7 & 8.)

- The survey form does not attempt to record the accessibility of the main aisles, although Named Plaintiffs and putative class members often encounter barriers in these aisles. (See id.)

- The only survey question concerning non-main aisles relates only to "promotional displays," ignoring other types of obstructions. (Ashare Dep. Ex. 32 at 4.) Again, Named Plaintiffs and putative class members often encounter other types of barriers in these aisles. (See App. Revised Tabs 7 & 8.)

Although there is no provision for such barriers in the survey form, surveyors' handwritten notes provide a glimpse of the "temporary" barriers they were apparently instructed to ignore. For example, one surveyor noted, "Temporary obstructions throughout store (abandoned shopping carts, merchandise, ladders)." (Second Miot Decl. Ex. 2 at I/T0226.) Another noted, "Temporary issues within health & beauty dept. & home electronics prevented access to all aisles. - boxes, ladders. Numerous (temporary) obstructions (ladders, boxes, carts full of merchandise) etc. prevented access to aisles in pantry, sporting goods, do it yourself,

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[31] Ms. Ashare testified that these guidelines were communicated to other surveyors and "guided the survey process." Ashare Dep. at 13:6 - 13:15.

departments. Lawn chairs in furniture department were in the middle of aisles preventing . . . ." (Id. Ex. 3 at I/T0345 (the remainder of this note was cut off in the copy provided to Named Plaintiffs).) Another responded "yes" to the survey questions whether a person using a wheelchair could get around and have access to merchandise behind promotional displays, but added, "A number of temp. obstructions (e.g., inventory, carts, etc.) existed." (Id., Ex. 7 at IT296; see also id. ¶ 5 and Exs. 2-4, 6-8, 10-12, 14-15.) These "temporary" barriers are precisely those that Named Plaintiffs argue violate the ADA.

Finally, the Joint Report makes several assertions that are simply false. It asserts that "[a]ll main aisles were accessible." (Joint Report ¶ 24.) There was, however, no provision in the survey form for the Ican/Tucker surveyors to state whether the main aisles were or were not accessible. The part of the survey form to be filled out by the store manager contains the question whether "seasonal, sale or other promotional displays ever encroach main walkways." (See Ashare Dep. Ex. 32 at 2.) It is thus possible that the assertion concerning the accessibility of main aisles is based on the self-reporting of Kmart management. Yet this is contradicted by the Ican/Tucker surveyors: Even in the absence of a relevant question, several surveyors noted obstructions in the main aisles. (See Second Miot Decl. ¶ 7 and Exs. 6, 14-16.) The Joint Report also states,"There were no obstructions observed that would prevent a person in a wheelchair from accessing merchandise on shelves or racks located behind the displays." Id. ¶¶ 32. Yet in 21% of the stores that had such displays, the Ican/Tucker surveyors answered "no" to the question "Can a person in a wheelchair get to merchandise in back of the displays?" (See Second Robertson Decl. Ex. 4.)

Many of the other survey questions and accompanying notes -- far from supporting the assertion that Kmart stores "were generally accessible to wheelchair and scooter users" -- reveal the presence of significant barriers. Kmart's experts never entered the information in the survey forms into a spreadsheet or otherwise analyzed it quantitatively. (See Rudolph Dep. at 57:25 - 58:3.) Named Plaintiffs did so and noted the following: 35% of the stores at which merchandise was displayed outside did not maintain a 36-inch path through that merchandise, approximately 30% of both the men's and women's accessible fitting rooms did not have a bench, and approximately one-quarter of each had obstructions in the area surrounding the entrance to the fitting rooms. (See Second Robertson ¶¶ 19-20 and Ex. 4.) Two-thirds of the stores surveyed had promotional displays in the non-main aisles, a condition that often results in a barrier to customers using wheelchairs or scooters, and even the non-disabled Ican/Tucker surveyors -- using shopping carts that are narrower than wheelchairs -- stated that, in 24% of the stores with such displays, customers in wheelchairs could not get around the displays and in 21%, such customers could not get to merchandise in back of the displays. (Id.) Thirty percent of the parking lots were out of compliance. (Id. ¶¶ 21-23 and Ex. 5.) These figures reflect only the information entered in the survey form. A review of the surveyors' notes and summaries reveals more detail concerning barriers and obstructions at the Kmart stores they surveyed. (See Second Miot Decl. ¶¶ 5-7 and references cited therein.)

Kmart also relies on a videotape showing a single, non-disabled Ican employee, Laurie Muhn, in a single store on a single day for the assertion that Tucker and Ican "noted that a number of the statements in declarations submitted by Plaintiffs did not accurately reflect the

state of the stores in question." (Class Opp. at 21-22 (citing Muhn Decl. ¶¶ 14-70 & Ex. 2).) Putting aside the predictable differences between Ms. Muhn's experience and that of real Kmart shoppers with real disabilities, (see Second Lucas Decl. at ¶¶ 4-41 and Exs. 1-11), and despite the use of the plurals "declarations" and "stores," this assertion is based on a direct comparison of apples to oranges: Kmart documents demonstrate that the single store in the single declaration in question -- store number 7589 in Utica, Michigan addressed in the Declaration of Duane Cook -- was undergoing a significant remodeling at the time Ms. Muhn's videotape was being recorded, providing different conditions from those encountered by Mr. Cook. (See Second Robertson Decl. ¶¶ 26-27 and Exs. 19-20.) Indeed, Ms. Muhn concedes as much during the videotape. (See Second Miot Decl., Ex. 1 at 3-4, 10 (transcript of Muhn videotape).) That Ms. Muhn and her videographer did not encounter the same barriers Mr. Cook repeatedly encountered when he shopped at the Utica store, (see Declaration of Duane Cook at ¶¶ 5-15[32]), does not rebut Mr. Cook's experiences or the appropriateness of class certification. See supra Section I.E.

B. Kmart's Stores Are Not "Virtually Entirely Accessible and ADA Compliant."

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[32] The Declaration of Duane Cook can be found in Tab 8 of the original version of the Appendix to Plaintiffs' Memorandum in Support of Motion for Class Certification. It is interesting to note that, after making an enormous effort to ensure that Named Plaintiffs relied only on testimony from witnesses who had been deposed rather than on the declarations Named Plaintiffs had originally submitted, see Defendant's Motion to Defer Deadline for Opposition to Plaintiffs' Motion for Class Certification at 12 (filed June 26, 2001), Kmart elected to attack the declaration of a witness who had not been deposed and whose testimony, at Kmart's request, Named Plaintiffs did not rely on in their Class Memorandum.

Kmart repeatedly argues that its stores are already in compliance with the ADA. This is the heart of the merits of this lawsuit, and particularly inappropriate for resolution at this stage. See Bates, 2001 WL 1482023 at *2-3 (holding that the defendant's arguments that it was in compliance with the ADA were inappropriate to consider on motion for class certification). Kmart' s own evidence, however, demonstrates that these assertions are wrong. As pointed out above, the Ican/Tucker surveys and Kmart's mystery shopper reports showed significant levels of non-compliance. See supra at 20-21, 53-54. Kmart's own 2000 ADA Surveys also show -- in two easily quantifiable examples -- that approximately 39% of the parking lots surveyed and approximately 46% of the fitting rooms surveyed were out of compliance. (See Second Robertson Decl. ¶¶ 5-18 and Ex. 2-3.)

C. Kmart's Attempts to Explain Away the Barriers at Its Stores Are Unavailing.

In its Class Opposition, Kmart addresses each of the categories of barrier complained of by Named Plaintiffs and attempts to either justify it or explain it away. These attempts all fail.

Aisle stacks. Named Plaintiffs have demonstrated that Kmart's policies mandate placing merchandise displays in aisles, a condition that commonly obstructs customers in wheelchairs from accessing the merchandise behind the displays. (See Class Mem. at 18-19.) Kmart's response is that it "expressly advises that these stacks are to be placed and angled so as not to impede access to any merchandise and used only where there is sufficient space." (Class Opp. at 26.) Kmart's only support for this express advice, however, is the declaration of a Regional Vice President stating that "[a]isle and floor stacks are to be placed to still allow access and clearance

for customers and shopping carts in and out of the aisle and to all merchandise." (Declaration of Robert D. Frame in Opposition to Plaintiff's Motion for Class Certification ("Frame Decl.") ¶ 63.) Kmart provides no evidence that it instructs its stores to ensure that merchandise behind these displays is accessible, much less that such instruction is effective. As pointed out above, even Kmart's experts found a significant level of blockage by merchandise displays. (See supra at 53-54; Second Robertson Decl. Ex. 4.)

Rack Spacing. Named Plaintiffs have provided evidence that Kmart permits as little as 24 inches between clothing racks. (See Class Mem. at 20.) Kmart argues that "the ADA has very limited, if any, applicability to the spacing of movable clothing racks . . .." (Class Opp. at 26.) The authorities on which Kmart relies addressed the interpretation of a single section of the Standards -- § 4.1.3(12)(b) -- and concluded it does not apply to moveable fixtures, so that such fixtures need only be accessible if it is "readily achievable" to do so under § 12182(b)(2)(A)(iv). Named Plaintiffs disagree with this interpretation. Among other things, § 4.1.3(12)(b) does not contain the limitation to "fixed or built-in" units that § 4.1.3(12)(a) does, indicating that it is not so limited. In any event, neither of Kmart's authorities addressed the separate question whether Kmart is required, pursuant to § 12182(b)(2)(A)(ii), to modify its policy, practice or procedure of setting the racks too close in order to make its goods available to customers with disabilities.

Kmart also asserts that Named Plaintiffs have not shown that this 24-inch minimum "has a uniform effect upon the accessibility of Kmart stores." (Class Opp. at 27.) The fact that a discriminatory policy is, at times, disregarded does not legitimize it. If a company permitted, but did not require, its managers to fire employees based on the fact that they were African-

American, the fact that some African-Americans remained employed by the company would not make the policy legal. Named Plaintiffs properly challenge a Kmart policy that explicitly permits discrimination to occur.

Obstructed Aisles. Kmart asserts that obstructed aisles encountered by Customer Witnesses are "temporary and fleeting." (Class Opp at 24.) As explained above, this is not a defense unless the interruption in access is "due to maintenance or repairs," see 28 C.F.R. 36.211(b), and is, in any event, unavailing in the face of Kmart's utter failure to "ensure that accessible routes are properly maintained and free of obstructions." (See Preamble at 638.) This assertion is also belied by over 19,000 mystery shopper records reporting obstructions, many of them in merchandise aisles. (See Fox Decl. Ex. 2.)

Accessible Checkouts. With respect to Named Plaintiffs' evidence that Kmart often fails to keep an accessible checkout aisle open, Kmart appears to argue it is not obligated to ensure that such aisles are open, but rather that disabled shoppers should be content to wait for an employee to open an accessible aisle, or to checkout from the opposite end of the checkout lane, with all of the inconvenience this entails. (See Class Opp. at 29-30; see also Donn Dep. at 9:24 - 11:10 (testifying that he was forced to go around to opposite end of checkout aisle and lost his place in line); 14:23 - 16:1 (testifying that he was instructed to use regular checkout aisle when accessible checkout aisle was closed); Madden Dep. at 26:12 - 27:19 (testifying that customers became obstinate at having to back up to let him go around checkout); Bach Dep. at 20:6 - 21:4 (testifying that she was forced to go around or have 15-year old daughter check out for her); Willenburg Dep. at 26:14 - 27:22 (testifying that cashier told her "she couldn't justify opening

up a handicap register for just one handicap person . . ..") (All deposition excerpts are included in Revised Tab 8 to Class. Mem.)

This is stark contrast to the intense focus Kmart places on ensuring that its non-disabled customers check out quickly. (See, e.g., Declaration of Roberta Kaselitz in Opposition to Plaintiff's Motion for Class Certification Ex. 4 (Kmart's Customer Service Map, requiring "Quick & Accurate Checkouts . . . Keep checkouts moving"); Second Robertson Decl. Ex. 24 at 1 (Kmart's Bulletin FTE #8: "3 In a Line Checkout Commitment," stating that, "[t]he service provided to our customers at our checkouts and service desk must be fast and friendly. ***Our goal is to never have more than three customers in a line at our checkouts or service desk.***") (emphasis in original).) This contrast constitutes discrimination in the "full and equal enjoyment" of Kmart's goods and services in violation of § 12182(a). While some measure of delay may be acceptable on a single occasion, see Anderson v. Ross Stores, 2000 WL 1585269 at * 10 -- and is likely experienced even by non-disabled patrons from time to time -- it is not acceptable as standard operating procedure in response to multiple violations where speed is a stated corporate goal. See also Cupolo, 5 F. Supp. 2d at 1083-84 (holding that prompt repair and reasonable accommodations are not defenses to violations of the ADA).

Fitting Rooms, Restrooms and Counter Heights. Kmart's response to Named Plaintiffs' evidence of inaccessible fitting rooms and restrooms and unusably high service counters is simply to assert that this evidence is insufficient. Kmart goes so far as to assert that Named Plaintiffs have provided no evidence that Kmart's restrooms are inaccessible. (See Class Opp. at 23 n. 24.) This is incorrect. (See Class Mem. at 7 n. 20.) Indeed, with respect to each of these

features, Named Plaintiffs provided evidence of repeated violations, which evidence is substantiated by Kmart's own experts. (See supra at 53-54; Second Robertson Decl. Ex. 4 (Ican/Tucker surveys also show: 20% of the customer service counters were higher than required with no flip-up shelf; 27% of men's fitting rooms and 24% of women's had obstructions in the area surrounding the entrance; 30% of both lacked required benches; 33% of men's restrooms and 38% of women's had doors that were or "seem[ed]" too heavy).)

Parking. In response to the repeated barriers Named Plaintiffs and putative class members have encountered parking at Kmart stores, Kmart relies on Thompson v. Colorado, 29 F. Supp. 2d 1226, (D. Colo. 1997), vacated on other grounds, 258 F.3d 1241 (10th Cir. 2001), a case addressing the legality, under Title II of the ADA, of a state's imposition of a fee for a disabled parking placard. The section cited by Kmart, in fact, supports Named Plaintiffs: "[A]ccessible parking for disabled persons is a compliance measure required by the ADA." Id. at 1231 (cited in Class Opp. at 32). Named Plaintiffs simply ask that -- in light of Kmart's obligation to maintain accessible parking for disabled persons -- Kmart put in place policies designed to prevent and cure abuse of its accessible parking spaces by non-disabled individuals. Kmart has stated that it will not do this, though it now disavows the testimony through which it did so as the personal feelings of Robert Frame, without pointing to any policy affirmatively undertaking such monitoring. (See Class Opp. at 33.) Having presented Mr. Frame as their 30(b)(6) designee on store operations including "enforcement of parking signage," (Frame Decl. ¶ 5), Kmart cannot disavow his testimony on the subject as a personal statement.

Kmart also states that "supervision of the parking lot is often the responsibility of Kmart's landlord." (Class Opp. at 34.) While this may be of import in assigning responsibility between Kmart and the landlord, both are liable to Named Plaintiffs to make the parking lots accessible. Title III applies to both owners and lessees of places of public accommodation, § 12182(a), and the DOJ regulations make clear that neither side can shirk this responsibility through lease language. See U.S. Dept. of Justice, Title III of the Americans with Disabilities Act: Technical Assistance Manual, III-1.2000 (1992) (Mintz Decl. Ex. 10 at 7-8). In any event, Kmart concedes that under two of its three types of leases, it has at least some measure of responsibility for the store's exterior, (Frame Decl. ¶ 54,) and even where Kmart claims it has shared or no responsibility -- semi-gross and gross leases -- it has asserted the authority to alter the striping of the parking lot and deduct the cost from its rent. (Glasser Decl. Ex. 2 at K01697 - K01700.)

Staff Assistance. Kmart suggests throughout its Class Opposition that when barriers do arise, Kmart staff are available to overcome them. Staff assistance is rarely, however, a substitute for independent access. In keeping with the goal of "assur[ing] equality of opportunity, full participation, independent living and economic self-sufficiency" for people with disabilities, § 12101(a)(8), Title III of the ADA and its implementing regulations are designed to permit people who use wheelchairs independent physical access to goods and services wherever possible. Goods and services may be made available through "alternative methods" -- for example, retrieval of merchandise -- only in facilities built prior to January 26, 1993 where providing physical access for people with disabilities is not "readily achievable." See

§ 12182(b)(2)(A)(v). Thus, in all post-1993 facilities, § 12183(a)(1), any part of a pre-1993 facility that has been remodeled, § 12183(a)(2), and any unaltered pre-1993 facilities where doing so is "readily achievable," § 12182(b)(2)(A)(iv), independent access for people who use wheelchairs must be provided. Since, as demonstrated above, few if any Kmart stores will be analyzed under the "readily achievable" standard, the availability of assistance will not be a useful defense for Kmart.

Conclusion

For the reasons set forth above and in the Class Memorandum, 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 December 3, 2001, copies of Plaintiffs' Reply Memorandum in Support of Motion For Class Certification as well as the appendix thereto were served by hand on:

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