

United States Bankruptcy Court  
Northern District of Illinois  
Eastern Division

In re )  
)  
K-MART CORPORATION, )  
et al., )  
)  
Reorganized Debtors )

Case No. 02-02474  
Claim Nos. 17058 and 45586

NOTICE OF MOTION TO REVIVE CLAIM AND TO VACATE OMNIBUS ORDERS  
DISALLOWING CLAIM

To: Andrew Goldman  
Wilmer Cutler & Pickering  
399 Park Avenue  
New York, NY 10022

PLEASE TAKE NOTICE that the undersigned will apply to the above-named Court, at 042 on  
Dec. 17, 2008 at 11:00 o'clock a.m., or soon thereafter as counsel may be heard upon Motion for an Order to  
Revive the Claims of Kevin Meiswinkel and to vacate the Omnibus Orders Disallowing Claim.

Attached hereto and made a part hereof is a Certification and Memorandum of Law in support of this  
Motion.

The undersigned:

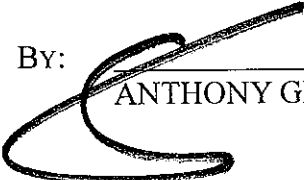
- waives oral argument and consents to disposition on the papers.  
 requests oral argument if Motion is contested.  
 requests oral argument.

A proposed form of Order is annexed.

JARVE KAPLAN GRANATO, LLC  
10 LAKE CENTER EXECUTIVE PARK  
401 ROUTE 73 NORTH, SUITE 204  
MARLTON, NJ 08053

GORDON & CENTRACCHIO  
211 WEST WACHER DRIVE  
SUITE 500  
CHICAGO, IL 60606

BY:

  
ANTHONY GRANATO

BY:

  
JOSEPH RYAN

United States Bankruptcy Court  
Northern District of Illinois  
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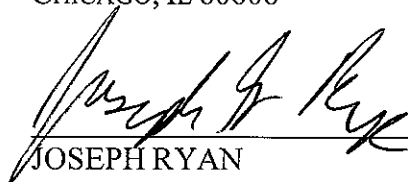
**CERTIFICATION OF SERVICE**

I, JOSEPH RYAN, ESQUIRE, hereby certify that I have served all parties with the within and foregoing MOTION TO REVIVE and CERTIFICATION OF SERVICE, by regular U.S. mail to:

Andrew Goldman  
Eric R. Markus  
Wilmer Cutler Pickering LLP  
399 Park Avenue  
New York, NY 10022  
Attorneys for Kmart Corporation

**GORDON & CENTRACCHIO**  
211 WEST WACHER DRIVE  
SUITE 500  
CHICAGO, IL 60606

BY:

  
JOSEPH RYAN

**United States Bankruptcy Court  
Northern District of Illinois  
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**In re** )  
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**K-MART CORPORATION,** )  
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**Reorganized Debtors** )

**Case No. 02-02474  
Claim Nos. 17058 and 45586**

**ORDER**

The above matter having been brought before the Court upon Motion by Anthony Granato, Esquire, attorney for Claimant, Kevin Meiswinkel, for an Order vacating that part of the 14<sup>th</sup> and 19<sup>th</sup> Omnibus Order disallowing Kevin Meiswinkel's claims and reviving the claims asserted by him against K-Mart and good cause having been shown;

**IT IS ON THIS**            day of            , 2008, **ORDERED,**

that the 14<sup>th</sup> and 19<sup>th</sup> Omnibus Orders disallowing Michael Meiswinkel's claims are hereby vacated; and  
Michael Meiswinkel's claims against K-Mart Corporation are hereby revived.

Dated:

\_\_\_\_\_  
United States District Judge

**United States Bankruptcy Court  
Northern District of Illinois  
Eastern Division**

**In re** )  
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**et al.,** )  
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**Reorganized Debtors** )

**Case No. 02-02474  
Claim Nos. 17058 and 45586**

**CREDITOR PERSONAL INJURY CLAIMANT KEVIN MEISWINKEL'S MOTION TO  
REVIVE CLAIM AND TO VACATE OMNIBUS ORDERS DISALLOWING CLAIM**

Kevin Meiswinkel, a personal injury creditor claimant, by his attorney, Anthony Granato, Esquire, moves this Court to Vacate that part of the 14<sup>th</sup> and 19<sup>th</sup> Omnibus Order in the above matter disallowing Kevin Meiswinkel's claims and to Order the claims asserted by him against K-Mart Corporation are revived, and in support of this motion states:

1. This Court has jurisdiction over this matter pursuant to 28 U.S.C. 157 and 1334.
2. This matter arises out of a claim for personal injuries sustained by Kevin Meiswinkel when he fell while shopping in a K-Mart store in Vineland, New Jersey on October 7, 2007 which injuries ultimately necessitated an anterior cervical fusion and resulted in continued symptomology.
3. Subsequent to the fall, K-Mart filed for bankruptcy.
4. Since the filing of the bankruptcy, the creditor Kevin Meiswinkel through Counsel had numerous dealings with K-Mart's representative, who, while in active negotiations, failed to notify counsel of any Omnibus Motions which they now claim disallow the claim.
5. More particularly, a timely Proof of Claim was filed on June 7, 2002. (Exhibit "A")
6. An amended Proof of Claim was filed on September 26, 2002. (Exhibit "B")
7. On April 29, 2003, K-Mart appointed a mediator, George Googasian, and referred this matter for non-binding Mediation as a claim in excess of \$50,000.00.

8. On May 1, 2003, K-Mart's selection of a Mediator was rejected and Kevin Meiswinkel through Counsel suggested alternative proposed mediators in New Jersey who are all retired New Jersey State Superior Court Judges. (Exhibit "C")
9. Prior to October 8, 2003, Kevin Meiswinkel through Counsel spoke with the K-Mart's representative, Keivu Knox, who agreed that the Honorable Barry Weinberg of Cherry Hill, New Jersey was an acceptable mediator. Mr. Knox advised that he would contact Judge Weinberg regarding his service as a mediator. (Exhibit "D")
10. Since October 8, 2003, our office has contacted Mr. Knox by telephone on numerous occasions to ascertain the status of this matter and the reason for the delay. Our telephone calls were not returned. (Exhibit "E")
11. On March 16, 2005, Kevin Meiswinkel through Counsel wrote to Mr. Knox asking when we can get this matter scheduled for mediation. Mr. Knox failed to respond. (Exhibit "F")
12. In December of 2006, Kevin Meiswinkel through Counsel discussed this matter with Mr. Knox who now advised for the first time that Kevin Meiswinkel's file was closed pursuant to an Omnibus motion a copy of which was never served on this office. (Exhibit "G")
13. Thereafter, Kevin Meiswinkel through Counsel discussed this matter with William Barrett, Esq., counsel for K-Mart, who advised that Mr. Meiswinkel's claim was still opened. (See Exhibit "G")
14. On January 18, 2007, Kevin Meiswinkel through Counsel received a letter from K-Mart advising that Mr. Meiswinkel's claim would be considered for settlement. (Exhibit "H")
15. Per K-Mart's request, a copy of all medical records was again forwarded to them. (Exhibit "I")
16. On April 30, 2007, K-Mart advised that Mr. Meiswinkel's claim was disallowed and forwarded copies of the 14<sup>th</sup> Omnibus Order dated February 9, 2004 and the 19th Omnibus Motion with a hearing date of March 15, 2004. (Exhibit "J")

17. The instant claim was timely filed and counsel was not timely notified of any omnibus motions.

18. Counsel is appearing in this matter Pro Hac Vice pursuant to an Order dated July 15, 2008. (Exhibit "K")

Wherefore, the creditor claimant Kevin Meiswinkel respectfully demands that his personal injury claims against the debtor be revived and that the matter proceed to mediation.

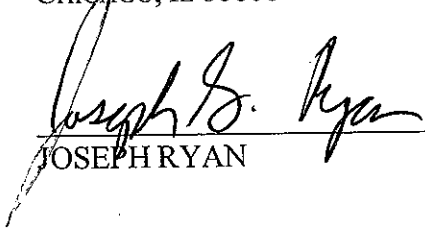
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**CREDITOR PERSONAL INJURY CLAIMANT KEVIN MEISWINKEL'S  
MEMORANDUM OF LAW IN SUPPRT OF MOTION TO REVIVE CLAIM AND TO  
VACATE OMNIBUS ORDERS DISALLOWING CLAIM**

Kevin Meiswinkel, a personal injury creditor claimant, by his attorney, Anthony Granato, Esquire, moves this Court to Vacate that part of the 14<sup>th</sup> and 19<sup>th</sup> Omnibus Order in the above matter disallowing Kevin Meiswinkel's claims and to Order the claims asserted by him against K-Mart Corporation are revived, and in support of this motion states:

**POINT ONE**

**DUE PROCESS REQUIRED K-MART TO PROCEED BY WAY OF AN ADVERSARY  
PROCEEDING IN ITS ATTEMPT TO DISALLOW MEISWINKEL'S CLAIM; KMART  
FAILED TO DO SO AND ACCORDING THE CLAIM MUST BE REVIVED**

In 2004, K-Mart proceeded by way of omnibus motions to disallow, Claimant, Mr. Meiswinkle's, claim. K-Mart did not proceed by way of an adversary proceeding. In fact, K-Mart failed to notify claimant of the proceeding until three years later; in April of 2007.

Federal Rules of Bankruptcy Procedure provide as follows:

**Rule 7001. Scope of Rules of Part VII**

An adversary proceeding is governed by the rules of this Part VII. It is a proceeding (1) to recover money or property, except a proceeding to compel the debtor to deliver property to the trustee, or a proceeding under § 554(b) or § 725 of the Code, Rule 2017, or Rule 6002, (2) **to determine the validity, priority, or extent of a lien or other interest in property**, other than a proceeding under Rule 4003(d), (3) to obtain approval pursuant to § 363(h) for the sale of both the interest of the estate and of a co-owner in property, (4) to object to or revoke a discharge, (5) to revoke an order of confirmation of a chapter 11, chapter 12, or chapter 13 plan, (6) to determine the dischargeability of a debt, (7) to obtain an injunction or other equitable relief, (8) to subordinate any allowed claim or interest, except when subordination is provided in a chapter 9, 11, 12, or 13 plan, (9) to obtain a

declaratory judgment relating to any of the foregoing, or (10) to determine a claim or cause of action removed pursuant to 28 U.S.C. § 1452. (emphasis added)

Moreover, the adversary proceeding rule is mandatory, and is grounded in constitutional due process principles. In re Mansaray-Ruffin, 200 U.S.App. LEXIS 13351, 2008 WL 2498048 (2008) In that case, the United States Court of Appeals, Third Circuit, held that although a confirmed plan (which confirmed a lien as unsecured) is usually given finality, the petitioner's failure to proceed by way of adversary proceeding proved fatal to his claim. More particularly, the Court held:

**We hold that the adversary proceeding Rule at issue here is mandatory and establishes a right to specific process that must be afforded. Its mandatory nature is grounded in principles of due process that trump "finality." See In re Linkous, 990 F.2d 160, 162 (4th Cir. 1993) ("[W]e cannot defer to [a Chapter 13 confirmation] order on res judicata grounds if it would result in a denial of due process in violation of the Fifth Amendment of the United States Constitution."). (emphasis added)**

**Id at 21** The Court further noted that:

**....the (Supreme) Court famously explained almost sixty years ago that "[m]any controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case." Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950) (emphasis added); see also *id.* at 314 ("An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." (emphasis added)); *id.* at 314-15 ("[I]f with due regard for the practicalities and peculiarities of the case these conditions are reasonably met the constitutional requirements are satisfied." (emphasis added)).**

See also Jones v. Chemetron Corp., 212 F.3d 199, 209-10 (3d Cir. 2000) , where it was found that despite 11 U.S.C. § 1141, the analog to § 1327 in the Chapter 11 context, "[u]nder fundamental notions of procedural due process, a claimant who has no appropriate notice of a bankruptcy reorganization cannot have his claim extinguished in a settlement thereto."



K-Mart was obligated to proceed by way of an adversary proceeding which would necessarily include Notice. Their failure to do so violated Mr. Meiswinkel's due process rights. Mr. Meiswinkel did not receive any notice of K-Mart's 2004 motions to disallow his claim until April of 2007. Accordingly, his claim should be revived.

## POINT TWO

### **PURSUANT TO THE DOCTRINE OF PROMISSORY ESTOPPEL, K-MART SHOULD BE ESTOPPED FROM DISALLOWING THE CLAIM**

Following the disallowance of Mr. Meiswinkel's claim in 2004, K-Mart continued to engage in settlement discussions with the claimant through at least January 18, 2007. As a result, Mr. Meiswinkel relied on those discussions to his detriment; He reasonable assumed that his claim was viable when, in fact, it had been disallowed in 2004. The resultant hardship is clear as Mr. Meiswinkel sustained a serious injury and should his claim be disallowed, he will not recover any monies and will not be made whole. Had he been timely notified of the motions, he would have taken the necessary steps to avoid having his claim disallowed.

"Promissory Estoppel" is the principle that a promise made without consideration may nonetheless be enforced to prevent injustice if the promisor should have reasonably expected the promisee to rely on the promise and if the promisee did actually rely on the promise to his or her detriment. Malaker Corp. Stockholders Protection Comm v. First Jersey Natl Bank, 163 N.J. Super 463, 395 A.2d 222 (App. Div. 1978)

A promissory **estoppel** claim will be justified if the plaintiff satisfies its burden of demonstrating the existence of, or for purposes of summary judgment, a dispute as to a material fact with regard to, four separate elements which include: (1) a clear and definite promise by the promisor; (2) the promise must be made with the expectation that the promisee will rely thereon; (3) the promisee must in fact reasonably rely on the promise, and (4) detriment of a definite and substantial nature must be incurred in **reliance** on the promise. The essential justification for the promissory **estoppel** doctrine is to avoid the substantial hardship or injustice which would result if such a promise were not enforced. Phillips v. Borough of Keyport, 107 F.3d 164, 182 (3d Cir.) (en banc), cert. denied, 522 U.S. 932, 118 S. Ct. 336, 139 L.Ed.2d 261 (1997) (quoting Miller v. Miller, 97 N.J. 154, 163, 478 A.2d 351, 355 (1984)). See also Scibek v. Longette, 339 N.J. Super. 72, 84, 770 A.2d 1242, 1250 (App. Div. 2001); The Tax Authority, Inc. v. Jackson Hewitt, Inc., 377 N.J. Super. 493, 512, 873 A.2d 616 (App. Div.), certif. granted, 185 N.J. 39, 878 A.2d 855 (2005). The reliance must also be in good faith. Phillips, 107 F.3d at 182. "[T]he

essence of [the] doctrine is to prevent a party from disavowing its previous conduct where the conduct amounts to a concealment or misrepresentation of material fact, unknown to the party claiming estoppel, and where the conduct was motivated by the intention or expectation that it would be acted upon by the adverse party who does in fact rely thereon in good faith in prejudicially changing its position." Charter Oak Fire Ins. Co. v. State Farm Mutual Auto. Ins. Co., 344 N.J. Super. 408, 416-17, 782 A.2d 452, 458 (App. Div. 2001)

K-Mart knew or should have known that the claim was disallowed in 2004. Claimant reasonably relied on K-Mart's continued participation in settlement discussions with the claimant through 2007 to his detriment. Had he been timely notified of the motion, he would have objected. Accordingly, K-Mart should be estopped from claiming that Mr. Meiswinkel's claim was disallowed.

In Conclusion the creditors respectfully request that:

- A. This Court vacate that part of the 14<sup>th</sup> and 19<sup>th</sup> Omnibus Orders that disallowed Michael Meiswinkel's claims;
- B. This Court Order that the claims of Mr. Meiswinkel against K-Mart be revived; and
- C. This Court grant plaintiff any and all relief that may be just and proper.

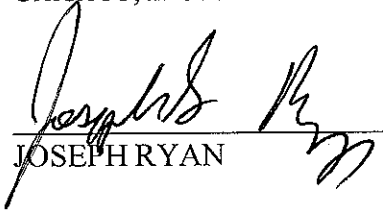
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