

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

In re:) Case No. 02-B02474
)
KMART CORPORATION,) Chapter 11
) Hon. Susan Pierson Sonderby
Debtor.) Hearing Date: March 17, 2009
) Hearing Time: 11:00 a.m.

NOTICE OF MOTION

PLEASE TAKE NOTICE that on **Tuesday, March 17, 2009, at the hour of 11:00 a.m.**, we shall appear before Judge Susan Pierson Sonderby, Courtroom 642, Everett McKinley Dirksen Building, 219 South Dearborn Street, Chicago, Illinois, or before any other judge who may be sitting in her place and stead, and shall present the **Motion of Kmart Corporation for Order Authorizing Distribution on Claim of Edward Toy as Filed, and Response of Kmart to Edward Toy's Motion to Vacate Disallowing of Claims of Certain Personal Injury**, a copy of which is attached hereto and herewith served upon you at which time and place you may appear if you so see fit.

Dated: February 10, 2009

Respectfully submitted,

/s/ William J. Barrett

William J. Barrett (6206424)

Barack Ferrazzano Kirschbaum & Nagelberg LLP

200 W. Madison Street, Suite 3900

Chicago, IL 60606

(312) 984-3100

(312) 984-3150 (fax)

william.barrett@bfkn.com

Attorney for the Kmart Corporation

CERTIFICATE OF SERVICE

I, William J. Barrett, an attorney, hereby certify that a true and correct copy of **Motion of Kmart Corporation for Order Authorizing Distribution on Claim of Edward Toy as Filed, and Response of Kmart to Edward Toy's Motion to Vacate Disallowing of Claims of Certain Personal Injury**, was served via first class U.S. Mail, postage prepaid, to the parties listed on the attached Mailing Service List, on the 10th day of February, 2009.

/s/ William J. Barrett

William J. Barrett

MAILING SERVICE LIST

Kathryn Gleason, Esq.
United States Trustee
219 S. Dearborn St., Room 873
Chicago, IL 60604

Edward Toy
P.O. Box 1274
Gardena, CA 90249

Mailing Information for Case 02-02474

Electronic Mail Notice List

The following is the list of **parties** who are currently on the list to receive e-mail notices for this case.

- Mark E. Abraham mabraham@gouldratner.com
- Andrew J Abrams aabrams@sff-law.com, khewitt@sff-law.com;ccoleman@sff-law.com
- David S Adduce dadduce@komdr.com
- Howard L. Adelman hla@ag-ltd.com
- Beth A. Alcantar beth@jnlegal.net
- Janice A Alwin jalwin@shawgussis.com
- Thomas V Askounis taskounis@askounisdarcy.com
- Jonathan A. Backman jbackman@backlawoffice.com, ebackman@backlawoffice.com
- David W Baddley baddleyd@gtlaw.com, powelly@gtlaw.com
- Ronald Barliant ronald.barliant@goldbergkohn.com
- William J. Barrett william.barrett@bfkn.com
- Leslie Allen Bayles lbayles@vedderprice.com
- David E Beker dbeker@schwartzcooper.com, rbendix@schwartzcooper.com;msmith@schwartzcooper.com;rnachman@schwartzcooper.com
- Joseph P. Berglund berglundniew@aol.com
- Brad Berish bberish@ag-ltd.com
- Mark A Berkoff mberkoff@ngelaw.com, cdennis@ngelaw.com
- Stephen T. Bobo sbobo@reedsmith.com
- Abraham Brustein abrustein@dimonteandlizak.com
- Christopher M Cahill ccahill@scgk.com
- Kurt M Carlson kcarlson@muchshelist.com, psearcy@muchshelist.com
- Timothy R Casey timothy.casey@dbr.com
- Jamie S. Cassel jsc@renozahm.com
- Alvin L Catella catella1@sbcglobal.net
- Steven B Chaiken schaiken@ag-ltd.com
- Rosanne Ciambrone rciambrone@duanemorris.com
- Patrick A Clisham pclisham@shawgussis.com
- Mindy D Cohn mcohn@kayescholer.com, pstepan@winston.com;ECF_BANK@winston.com
- Michael R Collins michael.collins@collinsandcollins.com
- Christopher Combest ccombest@quarles.com, fbf@quarles.com
- Randall A Constantine rconstantine@mcbenefitslaw.com
- Sara E. Cook scook@mckenna-law.com, bankruptcy@mckenna-law.com;lpalma@mckenna-law.com;jfine@mckenna-law.com
- Jeffrey C Dan jdan@craneheyman.com, slydon@craneheyman.com;dwelch@craneheyman.com
- Michael K Desmond mdesmond@fslegal.com
- John P Devona JPDevona@yahoo.com
- Joseph B DiRago jdirago@freebornpeters.com, tgomez@bellboyd.com
- Dennis A Dressler ddressler@dresslerpeters.com
- Thomas W Drexler drexler321@aol.com, chicagolawyers@aol.com

- Janice L. Duban janice.duban@dlapiper.com
- Deborah K Ebner dkebner@deborahEbnerlaw.com,
sbutz@deborahEbnerlaw.com;webmaster@debnertrustee.com
- Michael M. Eidelman meidelman@vedderprice.com, ecf-docket@vedderprice.com
- Earle I Erman , deisenberg@ermanteicher.com
- William J Factor wfactor@seyfarth.com
- Alan S Farnell alan@farnelllaw.com
- Adam S. Fayne fayne@wildmanharrold.com
- Cynthia G. Feeley feeleypc@aol.com
- Richard H Fimoff rfimoff@rsplaw.com, labrams@rsplaw.com
- J Mark Fisher mfisher@schiffhardin.com,
edocket@schiffhardin.com;srizziardi@schiffhardin.com
- Patricia J Fokuo pfokuo@schiffhardin.com, edocket@schiffhardin.com
- Joseph D Frank jfrank@fgllp.com,
ccarpenter@fgllp.com;rheilgman@fgllp.com;jkleinman@fgllp.com
- David J Frankel dfrankel@sormanfrankel.com, bbehanna@sormanfrankel.com
- Wilson P. Funkhouser wfunkhouser@fvldlaw.com
- Jeffrey L. Gansberg gansberg@live.com
- Eugene J Geekie egeekie@schiffhardin.com
- Arlene N Gelman agelman@vedderprice.com
- Mary Anne Gerstner gerstlaw2@sbcglobal.net
- Wendy J Gibson wgibson@bakerlaw.com
- Douglas C. Giese dcgiese@defrees.com
- Ilana N Glazier iglazier@jonesday.com
- Thomas W. Goedert tgoedert@nealandleroy.com
- Richard N Golding rgolding@goldinglaw.net
- David E. Gordon DGordon@GordonLegalServices.com, dgordon@whyreds.com
- Stephen A Gorman sagorman@myintellispace.com
- James B Gottlieb jgottlieb@chuhak.com
- John T. Gregg john.gregg@btlaw.com
- Allen J Guon aguon@shawgussis.com
- Deborah M Gutfeld dgutfeld@ngelaw.com
- William S Hackney whackney@salawus.com, jadams@salawus.com
- James H Hall james.h.hall.jr@gmail.com
- Steven M Hartmann shartmann@freebornpeters.com,
bkdocketing@freebornpeters.com;awiley@freebornpeters.com
- Ronald E Harvey brioneslaw@sbcglobal.net
- Mark F Hebbeln mhebbeln@foley.com
- Harold B. Hilborn hhilborn@vblhc.com
- Peter H Honigmann foleyhonigmann@sbcglobal.net
- Thaddeus J Hunt huntlaw@innoport.com
- Paula K. Jacobi pjacobi@btlaw.com, jsantana@btlaw.com;smichaels@btlaw.com
- Cindy M. Johnson cjohnson@jnlegal.net, dnewby@jnlegal.net
- Ronald W. Kalish rkalish@sgklawyers.com, lfilippini@sgklawyers.com
- David L Kane dkane@freebornpeters.com, swong-weber@mpslaw.com
- Harold L. Kaplan hkaplan@gcd.com
- Dimitri G. Karcazes dimitri.karcazes@goldbergkohn.com
- Robert B Katz rkatz@epitrustee.com
- Synde B. Keywell synde.keywell@bryancave.com, karen.dalsanto@bryancave.com

- Thomas G. King tking@kech.com
- Scott B. Kitei skitei@sidley.com
- Jeremy C Kleinman jkleinman@fgllp.com
- Peter P Knight peter.knight@lw.com, chefiling@lw.com
- Micah R Krohn mkrohn@fgllp.com, ccarpenter@fgllp.com;rheiligman@fgllp.com
- Robert J. Labate robert.labate@hklaw.com
- Robert W Lannan lannanr@gtlaw.com
- Caren A Lederer calederer@golanchristie.com
- Michael D. Lee mlee@schuylerroche.com, vvillagomez@schuylerroche.com
- Mark E Leipold mleipold@gouldtratner.com, stamssot@gouldtratner.com;hmartinez@gouldtratner.com
- Thomas S. Leo sleo@leoweber.com, mwargo@leoweber.com
- Thomas J Lester tlester@hinshawlaw.com
- Neal H Levin nhlevin@freebornpeters.com, bkdocketing@freebornpeters.com
- Douglas J. Lipke dlipke@vedderprice.com, ecfdoCKET@vedderprice.com
- Bruce E. Lithgow blithgow@bellboyd.com
- Angelo J Loumbas ajloumbas@aol.com, rpk@eckhart.com;slb@eckhart.com
- David M Madden dmadden@momlaw.com
- Howard Marks hmarks@bnf-law.com
- Philip V Martino philip.martino@dlapiper.com
- Richard J Mason rmason@mcguirewoods.com, docket@mcguirewoods.com;cgunderson@mcguirewoods.com;jbrehm@mcguirewoods.com
- Patrick C. Maxcy pmaxcy@sonnenschein.com
- Gregory A. McCormick mccormick@garfield-merel.com
- Andrew P. R. McDermott lyndale5@yahoo.com
- Andrew P. R. McDermott amcdermott@kirkland.com
- Michael J McKitrick mmckitrick@dmfirm.com
- Melissa G. Melsher mgmelsher@uhlaw.com
- George R Mesires george.mesires@bfkn.com
- Randall L. Mitchell rmitchell@adlmb.com
- Michael L Molinaro mmolinaro@loeb.com, chicdkt@loeb.com
- Michael C. Moody mmoody@orourkeandmoody.com, firm@orourkeandmoody.com,morourke@orourkeandmoody.com
- Tyler A Moore tmoore@bslbv.com
- James E. Morgan jmorgan@bellboyd.com, tgomez@bellboyd.com
- Harold L Moskowitz hlmatty@aol.com
- Gillian E Munitz gillian.munitz@bfkpn.com
- Joel R Nathan joel.nathan@usdoj.gov, leslie.steffen@usdoj.gov,marina.ravelo@usdoj.gov,ecf1.ausa@usdoj.gov
- William T Neary USTPRegion11.ES.ECF@usdoj.gov
- Bradley P Nelson nelson@sw.com, central@sw.com;howe@sw.com;connor@sw.com;callahan@sw.com;swcourts@yahoo.com
- Phillip W. Nelson pnelson@jenner.com
- David A. Newby dnewby@jnlegal.net, cjohnson@jnlegal.net
- Lauren Newman lnewman@fagelhaber.com
- Marie L Nienhuis mnienhuis@gklaw.com, pmitchell@bcblaw.net
- Monica C O'Brien gstern1@flash.net

- Kavita M Patel kpatel@schiffhardin.com
- Nancy A Peterman petermann@gtlaw.com, carlsonk@gtlaw.com;greenbergc@gtlaw.com;ostrowe@gtlaw.com;lowena@gtlaw.com;bloomw@gtlaw.com;heyens@gtlaw.com
- Ronald Peterson rpeterson@jenner.com
- August A Pilati apilati@aapltdlaw.com, pmitchell@aapltdlaw.com;kfedinets@aapltdlaw.com;steve_horvath@ilnb.uscourts.gov
- Alex Pirogovsky apirogovsky@uhlaw.com
- Karen J Porter kjplawnet@aol.com, kjplawnet@aol.com
- Steven S. Potts otispott@comcast.net, lkoran@maxwellandpotts.com,maxwelllawchicago@yahoo.com,marchfirst_trustee@hotmail.com
- Eric S. Prezant eric.prezant@bryancave.com
- Dennis E. Quaid dquaid@tcfhlaw.com
- Mark L Radtke mradtke@shawgussis.com, dkrasa-berstell@akingump.com
- Gabriel Reilly-Bates greilly-bates@jenner.com, sfdocket@shesksylaw.com
- Christopher L. Rexroat clrexroat@uhlaw.com
- Charles S Riecke criecke@seyfarth.com
- Peter J Roberts proberts@shawgussis.com
- Kimberly J Robinson kim.robinson@bfkn.com
- Allyson B Russo arusso@vedderprice.com
- Joseph G Ryan joeryan58@hotmail.com
- Joel A Schechter joelschechter@covad.net
- Michael M Schmahl mschmahl@mcguirewoods.com, docket@mcguirewoods.com;cgunderson@mcguirewoods.com
- Mark A Schramm marsch500@gmail.com
- Charles P Schulman cschulman@sachnoff.com
- Brian L Shaw bshaw100@shawgussis.com
- Michael L Sherman shermlaw1@aol.com
- Anne M Sherry asherry@jonesday.com
- Adam P. Silverman asilverman@ag-ltd.com
- Alan H Slodki alan007@ameritech.net
- Patricia K. Smoots psmoots@mcguirewoods.com
- Donald A. Snide dasnide@varnumlaw.com
- Brian G. Snyder lawyers@drewandsnyder.com
- Konstantine T. Sparagis gsparagi@yahoo.com, mark@atbankruptcy.com;gus@atbankruptcy.com;tim@atbankruptcy.com;ameyers@atbankruptcy.com
- James E Spiotto spiotto@chapman.com
- Mark J Stauber markjlaw@aol.com, stauberlaw@comcast.net
- Catherine L Steege csteege@jenner.com, docketing@jenner.com
- Gregory K Stern gstern1@flash.net, steve_horvath@ilnb.uscourts.gov
- Jeffrey Strange jstrangelaw@aol.com
- Jerry L Switzer jswitzer@jenner.com
- Nancy A. Temple ntemple@kattentemplelaw.com
- Michael S Terrien mterrien@jenner.com
- Pia N Thompson pthompson@reedsmith.com, cwilson@reedsmith.com,mleib@reedsmith.com,smckessy@reedsmith.com,kpreuss@reedsmith.com

- Deborah L. Thorne dthorne@btlaw.com, kbruhnke@btlaw.com
- L. Judson Todhunter ljt@defrees.com
- A Kelly Turner kturner@lordbissell.com
- David P. Vallas vallas@wildmanharrold.com, fleming@wildmanharrold.com
- Katherine D Vega kvega@ngelaw.com
- Jon C Vigano jvigano@schiffhardin.com,
edocket@schiffhardin.com; dgordon@schiffhardin.com
- George N. Vurdelja gvurdelja@harrisonheld.com, fbruder@harrisonheld.com
- Donna B Wallace dbwallace@ameritech.net
- Michael B Weininger mweininger@lw-llp.com
- Kurt A. Winiecki kwiniecki@sachnoff.com
- Michael Yetnikoff myetnikoff@schiffhardin.com
- Barbara L Yong blyong@golanchristie.com
- Jonathan W. Young young@wildman.com, srodriguez@wildman.com; ecf-
filings@wildman.com
- Peter J Young pyoung@winston.com
- Richard G. Ziegler rziegler@mayerbrown.com

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

In re:

KMART CORPORATION,

Debtor.

Chapter 11

Case No. 02 B 02474

Honorable Susan Pierson Sonderby

Hearing Date: March 17, 2009

Hearing Time 11:00 a.m. (CT)

**MOTION OF KMART CORPORATION FOR ORDER AUTHORIZING
DISTRIBUTION ON CLAIM OF EDWARD TOY AS FILED, AND RESPONSE OF
KMART TO EDWARD TOY'S MOTION TO VACATE DISALLOWING OF CLAIMS
OF CERTAIN PERSONAL INJURY**

Kmart Corporation ("Kmart") files this motion for an order authorizing a distribution on the unsecured claim of Edward Toy ("Toy"). Kmart files this motion in response to Toy's "Motion to Vacate Disallowing of Claims of Certain Personal Injury." Although Toy is not entitled to the relief he seeks, because his claim is for \$25,000, and will receive on it a distribution of \$1,562.50, it is simply more cost-wise for Kmart to accept the claim than to respond to Toy's motion. As further background, Kmart states as follows:

1. Toy filed a timely unsecured claim for \$25,000, a copy of which is attached hereto as Exhibit A.

2. Toy revealed no details about his claim other than that the underlying event occurred in June 2000. The claim appears to relate to Toy's assertion, made in a state court case filed before Kmart's bankruptcy, that Kmart had Toy wait at a Kmart for the local Sheriff to appear after Kmart called the Sheriff to report that Toy had been shoplifting.

3. On June 25, 2003 Kmart filed its Motion to Disallow Claims of Certain Personal

Injury Claimants Not Complying with the Personal Injury Claims Resolution Procedures. Toy's claim was included in the motion. Toy did not respond to the motion, and consequently an order disallowing his claim was entered on July 18, 2003.

4. Toy also filed an administrative claim for \$25,000 on July 3, 2003 (see Exhibit B hereto). Although that claim reveals nothing about the claim other than Toy checked the "Personal injury/wrongful death" box on the claim form, Kmart believes that the claim relates to the same event in 2000 that was the subject of his first claim. Kmart objected to the administrative claim for the reason it was filed after the bar date. Toy did not respond to the objection, and consequently an order disallowing the claim was entered on October 2, 2003.

5. Nothing further was heard from Toy until December, 2008 when he advised Kmart's counsel that he would appear at the December 17, 2008 omnibus hearing. Toy did not appear at the hearing, but shortly thereafter filed his motion for an order "to vacate disallowing of claims of certain personal injury." The motion refers to the July 16, 2003 order that disallowed his pre-petition claim (the order was actually entered on July 18, 2003, although the hearing was held on July 16, 2003). Essentially, Toy seeks to reopen the unsecured claim.

6. Kmart believes both that Toy's claim has no merit, and that it is way too late for him to seek reinstatement of a claim that was disallowed five and one-half years ago. Because of the passage of time, and Kmart's belief during the passing years that the matter had been concluded, it would take considerable effort for Kmart to reassemble the evidence, and recontact the witnesses, that relate to Toy's claim. This sort of prejudice to Kmart would compel a finding that there was no "excusable neglect" that would allow the reinstatement of Toy's claim.

7. Nonetheless, because the claim is for \$25,000, and if allowed will receive a Class 7 distribution of \$1,562.50, the most practical and cost-wise course is to allow the claim as filed.

8. Although 28 U.S.C. §157(b) does not permit a district court to refer to a bankruptcy court the determination of a contested personal injury claim, where there is no contest the bankruptcy court can enter an order on the claim as with any other claim. Section 157(b)(2)(B) provides that core proceedings do not include “the liquidation or estimation of contingent or unliquidated personal injury tort ... claims.” Section 157(b)(5) provides that the district court shall try personal injury claims. Because Kmart is willing to accept the Toy claim as filed, the claim is liquidated, it will not be tried, and thus the limitations on the referral of personal injury claims in Section 157(b) do not apply.

WHEREFORE, Kmart moves that the Court enter an order allowing Toy’s pre-petition unsecured claim, claim no. 23114, in the amount of \$25,000, directing a Class 7 distribution on the claim, and denying Toy’s motion as moot.

/s/ William J. Barrett

William J. Barrett (ARDC No. 6206424)
BARACK FERRAZZANO KIRSCHBAUM
& NAGELBERG LLP
200 West Madison Street, Suite 3900
Chicago, IL 60606
Phone: (312) 629-5170
Facsimile: (312) 984-3150
William.barrett@bfkn.com

Counsel for Kmart Corporation