

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

In re:) Case No. 02-B02474
)
K MART CORPORATION,) Chapter 11
) Hon. Susan Pierson Sonderby
Debtor.) Hearing Date: June 16, 2009
) Hearing Time: 11:00 a.m. (CT)

NOTICE OF MOTION

PLEASE TAKE NOTICE that on **Tuesday, December 15, 2009, at the hour of 11:00 a.m. (CT)** 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 **Kmart Corporation's Motion to Allow in Part and Disallow in Part Claim of Beulah Johnson**, 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.

PLEASE TAKE FURTHER NOTICE that to appear telephonically at this hearing, please contact Judge Sonderby's courtroom deputy at 312-435-5647 as well as Mark Mackowiak of the law firm below at 312-629-5187.

Dated: December 11, 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 **Kmart Corporation's Motion to Allow in Part and Disallow in Part Claim of Beulah Johnson**, was served via overnight courier delivery, to the party listed below, on the 11th day of December, 2009.

Beulah Johnson
1086 Torrey Drive
Fayetteville, NC 28301

/s/ William J. Barrett
William J. Barrett

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, mhannon@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 janice.alwin@bfkn.com
- Thomas V Askounis taskounis@askounisdarcy.com, jburt@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, dmyer@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 patrickclisham@hotmail.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, Faye.Feinstein@quarles.com
- Randall A Constantine rconstantine@mcbenefitslaw.com
- Sara E. Cook scook@mckenna-law.com, bankruptcy@mckenna-law.com;lpalma@mckenna-law.com
- Joseph R Curcio info@curcio-law.com, kmillan@curcio-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
- 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@deborahnebnerlaw.com, sbutz@deborahnebnerlaw.com;webmaster@debnertrustee.com;lizd@deborahnebnerlaw.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
- David D Ferguson dferguson@polsinelli.com, tbackus@polsinelli.com; kvervoort@polsinelli.com; docket@polsinelli.com; docketing@polsinelli.com; smagdziak@polsinelli.com
- Richard H Fimoff rfimoff@rsplaw.com, labrams@rsplaw.com
- J Mark Fisher mfisher@schiffhardin.com, edocket@schiffhardin.com; sricciardi@schiffhardin.com
- Patricia J Fokuo pfokuo@schiffhardin.com, edocket@schiffhardin.com
- Joseph D Frank jfrank@fgllp.com, ccarpenter@fgllp.com; knewman@menterlaw.com; jkleinman@fgllp.com
- David J Frankel dfrankel@sormanfrankel.com, bbehanna@sormanfrankel.com
- Wilson P. Funkhouser wfunkhouser@fvldlaw.com
- Christian J. Gabroy christian@gabroy.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
- Ronald E Gold rgold@fbtlaw.com, ahammerle@fbtlaw.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, garyfoley@hotmail.com; dyoun0153@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@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@gouldratner.com, stamssot@gouldratner.com;hmartinez@gouldratner.com
- Thomas S. Leo sleo@leoweber.com, mwargo@leoweber.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
- 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;mjawor@loeb.com
- Michael C. Moody mmoody@orourkeandmoody.com, firm@orourkeandmoody.com,morourke@orourkeandmoody.com
- Tyler A Moore tmoore@bslbv.com
- James E. Morgan james.morgan@klgates.com, teresa.gomez@klgates.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@kirkland.com
- David A. Newby dnewby@jnlegal.net, cjohnson@jnlegal.net
- Lauren Newman lnewman@tcfhlaw.com, lnewman@tcfhlaw.com;frichard@tcfhlaw.com
- Marie L Nienhuis mnienhuis@gklaw.com, pmitchell@bcblaw.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
- Eric S. Prezant eric.prezant@bryancave.com
- Dennis E. Quaid dquaid@tcfhlaw.com
- Mark L Radtke mradtke@shawgussis.com, bharrington@shawgussis.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, bharrington@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@atbankruptc
y.com;josietroester@msn.com;gus@bestclientinc.com
- James E Spiotto spiotto@chapman.com
- Mark J Stauber markjslaw@aol.com, stauberlaw@comcast.net
- Catherine L Steege csteege@jenner.com, docketing@jenner.com
- Jeffrey Strange jstrangelaw@aol.com
- Jerry L Switzer jswitzer@polsinelli.com
- Nancy A. Temple ntemple@kattentemplelaw.com
- Michael S Terrien mterrien@jenner.com
- Pia N Thompson pthompson@ksnlaw.com
- Deborah L. Thorne dthorne@btlaw.com, kbruhnke@btlaw.com
- L. Judson Todhunter JTodhunter@howardandhoward.com
- Steven B Towbin stowbin@shawgussis.com
- A Kelly Turner kturner@lordbissell.com
- David P. Vallas vallas@wildman.com, fleming@wildman.com;ecf-filings@wildman.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, cpotter@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.

Case No. 02 B 02474

Honorable Susan Pierson Sonderby

Hearing Date: December 15, 2009
11:00 a.m.

KMART CORPORATION'S MOTION TO ALLOW IN PART AND DISALLOW IN PART CLAIM OF BEULAH JOHNSON

Kmart Corporation, for its Motion to Allow in Part and Disallow in Part Claim of Beulah Johnson ("Johnson"), states as follows:

1. Johnson filed a proof of claim on July 30, 2002 and an amended proof of claim on November 26, 2002. In her proof of claim, Johnson claimed (i) \$30,640 for a default judgment she obtained against Kmart on June 11, 1998 (the "Judgment Claim") and (ii) \$40,000,000 in punitive damages.

2. Kmart objected to Johnson's Claim as being without merit in its Tenth Omnibus Objection to Claims filed on June 16, 2003. Johnson responded to the objection on July 7, 2003 with a general request to be heard on the claim.

3. On May 20, 2009, Kmart filed a Motion for Order Applying Bankruptcy Rules 7008 and 7012 to Contested Matter on Claim of Beulah D. Johnson. On June 16, 2009, the Court granted Kmart's motion and entered an order that required that Johnson state her claims in the form of a pleading that complied with Fed. R. Civ. P. 8. Johnson filed her statement of claim

on November 2, 2009. A copy of Johnson's statement of claim (referred to as "Bankruptcy Claim Statement") is attached hereto as Exhibit A.

I. The Judgment Claim Should Be Allowed for \$36,196.

4. Counts I, II, and III of the Bankruptcy Claim Statement assert the Judgment Claim, which arises from a lawsuit that Johnson filed against Kmart on November 29, 1996 in the United States District Court for the Eastern District of North Carolina. In the Complaint (Exhibit B hereto), Johnson complained that, on account of her race, she had been denied a pay increase as a result of a transfer from the position of check-out operator to check-out supervisor, that she had been denied training in Kmart's assistant manager's training program, and that she had been denied a promotion to the position of assistant manager.

5. As noted above, Johnson obtained a default judgment on the lawsuit for \$30,640 (Exhibit C hereto). Kmart does not admit that it was properly served with the Complaint or with a motion for the default judgment. However, because of the relatively modest amount of the judgment Kmart will consent to an order allowing the claim, with interest at the federal judgment rate through January 22, 2002, as a general pre-bankruptcy unsecured (Class 6)¹ claim. Kmart calculates that interest of \$5,556 accrued on the claim prior to January 22, 2002 (Exhibit D hereto).² Thus the total amount owed under the judgment is \$36,196, which amount Kmart agrees should be allowed as a Class 6 claim.

6. The default judgment included an order directing Kmart to provide assistant manager training to Johnson. Kmart has no record of having received the default judgment (see

¹ Class 6 claims receive distributions of .105 on the dollar.

² Interest is calculated on the Federal Judgment Rate applicable to civil judgments, as reported on the Federal

Declaration of Angela McGinnis, Exhibit E hereto), and thus never had an opportunity to either comply with the training requirement, or to seek relief from it. Also, the docket for the case (Exhibit F hereto) reflects neither that the default judgment was served on Kmart nor that any effort was made to enforce the default judgment. At this time, Kmart cannot provide any training to Johnson because she has been on a paid medical leave of absence for the last several years. Accordingly, Johnson is not entitled to any monetary award relating to training, including the \$68,386³ listed in her prayer for relief for Count II for “principal wages” or the additional 401(k) contributions claimed in Count III of the Bankruptcy Claim Statement.

7. In her prayer for relief for Count II of the Bankruptcy Claim Statement, Johnson includes \$7,500 for attorney’s fees. Because no legal or factual basis is offered for this amount, it should be denied.

II. Count IV of Johnson’s Bankruptcy Claim Statement Should Be Disallowed.

8. Count IV of Johnson’s Bankruptcy Claim Statement is a general grievance that for 30 years of hard work Johnson should have a claim for \$30 million (or \$1 million a year).

9. Count IV is inadequate on its face. It contains no specifics other than an alleged act of discrimination in 1975 for which she previously complained to the EEOC yet, after receiving a right to sue letter, declined to take further action.⁴ Any claim related to that alleged incident of discrimination is time barred under 42 U.S.C. §2000e-5(f)(1)(action must be brought within 90 days of right to sue letter), or is now precluded under *res judicata* principles because

Reserve Board’s website at www.federalreserve.gov/releases/H15/Monthly/H15_FF_O.txt

³ Johnson offers no detail for how she arrived at the \$68,386. If she can provide a reconstruction of the hours she worked between June 11, 1998 and January 1, 2002, Kmart will consider, as a means to resolve a small claim, allowing Johnson an additional Class 6 claim for the marginal pay she would have earned as an assistant manager.

⁴ In her “Response to Order Granting Kmart Corporation’s Motion for Order Applying Bankruptcy Rules 7008 and

Johnson could have asserted the claim in her 1996 lawsuit against Kmart. See *Cole v. Board of Trustees University of Illinois*, 496 F.3d 770, 772 (7th Cir. 2007).

10. Because of this defect in her claim, Johnson's claim is not entitled to Bankruptcy Rule 3001's presumption of *prima facie* validity. When a debtor objects to a claim as being legally deficient, the claimant must overcome the objection and cannot compel the debtor to refute broad allegations of fact that have no link to a legal right. See *In re Cluff*, 313 B.R. 323, 227 (Bkrcty. D. Utah 2004).

11. While a claimant, in setting forth her claim, is not required to plead legal theories, there must appear some relationship between the facts pleaded and a legal right, otherwise the claim should be dismissed. See *Bell Atlantic Corp. v. Twombly*, 127 S.Ct. 1955 (2007) (to survive a motion to dismiss, it must appear plausible from the allegations in the complaint that the claimant will be entitled to legal relief).

12. There is no cause of action under North Carolina, Florida,⁵ or federal law for the type of wrongs alleged by Johnson. Even if Johnson can prove that she found her work laborious, or that she thought that her employer did not value her work, there is no legal basis for a recovery. Count IV should be therefore disallowed with prejudice.

III. Count V of Johnson's Bankruptcy Claim Statement Should Be Disallowed.

13. In Count V of her Bankruptcy Claim Statement, Johnson requests \$25 million in punitive damages for Kmart's delay in paying the amount awarded and the training required under the default judgment.

7012 ...", filed on September 15, 2009, docket no. 32096, ¶4, Johnson states, referring to the 1975 incident, that "I went to EEOC for investigation, it was found favorable to me. I did not suit..."

⁵ Johnson worked for Kmart in Florida and North Carolina.

14. Essentially, Johnson asks this Court to sanction Kmart for not complying with the default judgment entered by the U.S. District Court for the Eastern District of North Carolina. Setting aside whether this is proper or possible, Johnson cannot demonstrate that Kmart ever received notice of the default judgment before Johnson filed her claim in this bankruptcy case. The docket for the North Carolina case does not show that the judgment was served on Kmart or that any proceedings were brought in the court to enforce the judgment. Kmart's legal department has no record of the case. See Declaration of Angela McGinnis, Exhibit E hereto.

15. Johnson is fortunate that Kmart will allow a claim for the amount of the default judgment without delving into whether Kmart was ever properly served with the complaint. But when it comes to any sanction whatsoever for what Johnson alleges was a delay in satisfying the non-monetary provisions of the default judgment, Kmart demands that Johnson be put to proving that Kmart received notice of the judgment. The proper way to have done so would have been to file with the North Carolina court some record that the judgment had been sent to Kmart. It is now more than 11 years later, and any proof of service created or filed (or uttered if verbal) at this time would be of dubious credibility.

16. What Johnson cannot explain is why in the several years between when she obtained the judgment and Kmart's bankruptcy filing she took no action to enforce the judgment or to formally advise Kmart of the judgment. She certainly knew how to file papers with the court. Had she commenced collection action, someone at Kmart would likely have discovered the existence of the lawsuit and Kmart would then either have sought to vacate the judgment or satisfy it.

17. Because Johnson is in no position to complain of any delay in the handling of the default judgment she obtained against Kmart, she has no right to an award of sanctions, and Count V of the Bankruptcy Claim Statement should thus be disallowed.

Conclusion

For the reasons set forth herein, Kmart moves that the Court (i) allow Johnson's Judgment Claim (Counts I, II, and III of the Bankruptcy Claim Statement) as a Class 6 claim in the amount of \$36,196 and (ii) disallow Johnson's other claims in their entirety.

Dated: December 14, 2009 at Chicago, Illinois.

/s/ William J. Barrett
William J. Barrett (6206424)
Barack Ferrazzano Kirschbaum
& Nagelberg LLP
200 West Madison Street, Suite 3900
Chicago, IL 60606
Telephone: 312-984-3100
Facsimile: 312-984-3150
William.Barrett@bfkn.com

Attorney for Kmart Corporation