

## **EXHIBIT B**

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION

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In re:	:	Case No. 02-02474
	:	[Jointly Administered]
KMART CORPORATION, etal	:	Chapter 11
	:	Chief Judge Susan Pierson Sonderby
Debtors	:	

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**MEMORANDUM IN SUPPORT OF CLAIMANTS MOTION TO QUASH KMART'S MOTION FOR [i] ORDER GRANTING PARTIAL SUMMARY JUDGMENT ON CLAIM OF DAVID KERSH, CLAIM NO. 48076 AND [ii] ORDER PARTIALLY ALLOWING CLAIM OF DAVID KERSH AS A CLASS 7 CLAIM.**

**BACKGROUND**

Disqualification of judges is governed by MCR 2.003 in the State of Michigan which states as follows:

**Rule 2.003 Disqualification of Judge**

- (A) Who May Raise. A party may raise the issue of a judge's disqualification by motion, or the judge may raise it.
- (B) Grounds. A judge is disqualified when the judge cannot impartially hear a case, including but not limited to instances in which:
  - (1) The judge is personally biased or prejudiced for or against a party or attorney.
  - (2) The judge has personal knowledge of disputed evidentiary facts concerning the proceeding.
  - (3) The judge has been consulted or employed as an attorney in the matter in controversy.
  - (4) The judge was a partner of a party, attorney for a party, or a member of a law firm representing a party within the preceding two years.

- (5) The judge knows that he or she, individually or as a fiduciary, or the judge's spouse, parent or child wherever residing, or any other member of the judge's family residing in the judge's household, has an economic interest in the subject matter in controversy or in a party to the proceeding or has any other more than de minimis interest that could be substantially affected by the proceeding.
- (6) The judge or the judge's spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:
  - (a) is a party to the proceeding, or an officer, director or trustee of a party;
  - (b) is acting as a lawyer in the proceeding;
  - © is known by the judge to have a more than de minimis interest that could be substantially affected by the proceeding;
  - (d) is to the judge's knowledge likely to be a material witness in the proceeding.

A judge is not disqualified merely because the judge's former law clerk is an attorney of record for a party in an action that is before the judge or is associated with a law firm representing a party in an action that is before the judge.

© Procedure.

- (1) **Time for Filing.** To avoid delaying trial and inconveniencing the witnesses, a motion to disqualify must be filed within 14 days after the moving party discovers the ground for disqualification. If the discovery is made within 14 days of the trial date, the motion must be made forthwith. If a motion is not timely filed, untimeliness, including delay in waiving jury trial, is a factor in deciding whether the motion should be granted.
- (2) **All Grounds to be Included; Affidavit.** In any motion under this rule, the moving party must include all grounds for disqualification that are known at the time the motion is filed. An affidavit must accompany the motion.
- (3) ***Ruling. The challenged judge shall decide the motion. If the challenged judge denies the motion,***

- (a) in a court having two or more judges, on the request of a party, the challenged judge shall refer the motion to the chief judge, who shall decide the motion de novo;
  - (b) *in a single-judge court, or if the challenged judge is the chief judge, on the request of a party, the challenged judge shall refer the motion to the state court administrator for assignment to another judge, who shall decide the motion de novo.*
- (4) Motion Granted. When a judge is disqualified, the action must be assigned to another judge of the same court, or, if one is not available, the state court administrator shall assign another judge.
- (D) Remittal of Disqualification. If it appears that there may be grounds for disqualification, the judge may ask the parties and their lawyers to consider, out of the presence of the judge, whether to waive disqualification. If, following disclosure of any basis for disqualification other than personal bias or prejudice concerning a party, the parties without participation by the judge, all agree that the judge should not be disqualified, and the judge is then willing to participate, the judge may participate in the proceedings. The agreement shall be in writing or placed on the record.

When a motion to disqualify a judge is filed and a de novo review hearing is requested, the judge must stop the case and permit the de novo review hearing by the chief judge of the court or if the chief judge is disqualification notify the SCAO to appoint a judge to hold the denovo review hearing. See *IN RE HON. DAVID M. BRADFIELD* 465 Mich. 1308; 638 N.W.2d 107; 2002 Mich. [exhibit 21].

The Judges of 46<sup>th</sup> have been disqualified on all cases involving Kersh and/or his corporations for years. Each time a case was filed in 46<sup>th</sup> involving Kersh and/or the Metro corporations, all the judges would sign the disqualification forms at the back of exhibit 7 [Appendix B & C] and submit them to the SCAO. The SCAO would then assign a judge to act in the case [exhibit 8]. It should be clear from reading the SCAO Assignment form that the case

can't be assigned to another judge without written SCAO approval and that the assignment terminates upon filing of Report on Assignment.

**1. KERSH V KMART CORPORATION**

An examination of Exhibit 1 establishes that Judge Hammer was assigned the PASSBOOKS case on May 28, 1997 and his assignment was terminated on January 20, 1998. The SCAO did not issue any continuation of assignment as they did in the Kersh v Elias Bros Restaurant case [exhibit 1]. Therefore, as Judge Hammer's legal authority to act in the PASSBOOKS case terminated on January 20, 1998, he had no legal authority to enter any order after that date. Exhibit 1 also shows that the PASSBOOKS case was subsequently assigned to Judges Bowman and Nicholson but never reassigned to Judge Hammer.

Exhibit 1 establishes that Judge Hammer was also assigned a case known as Kersh v Elias Bros. Kersh filed a motion to disqualify Judge Hammer in the Elias Bros case. An amended motion to disqualify the Judge and for a de novo review was filed on September 25, 1997 [exhibit 22] which was months before the January 3, 1998 order in the PASSBOOKS case was entered [debtor's exhibit C]. Under MCR2.003 Judge Hammer was required to stop acting in both the Elias Bros and the PASSBOOKS case and have the SCAO appoint a judge to hold the de novo review hearings [exhibit 21]. The judge refused to disqualify himself in both cases, refused to notify the SCAO to hold a de novo review and illegally proceeded to enter orders, under color of law, in both cases in violation of MCR 2.003. The SCAO acknowledged the misconduct of Judge Hammer by assigning the cases to Judge Bowman on September 9, 1998 [exhibit 1] after Donna Beaudet, the 46<sup>th</sup> Administrator demanded Kersh file a further motion to disqualify Judge Hammer [exhibit 18] which is primae fasciae evidence that the case was still

pending and there could not be any final judgment. As Judge Hammer both acted in violation of MCR 2.003, and acted after his assignment from the SCAO had been terminated, debtor's exhibits C & D are orders illegally entered under color of law.

Contrary to the claims of the debtor there is no final judgment in this case. It would also appear that, as the debtor failed to petition for this case to be removed to this court, any alleged automatic stay would have been dissolved when the debtor came out of bankruptcy in 2003. As such, interest at 1½ % would have continued to accrue and the secured debt would exceed \$100,000. As the debtor has been aware of this litigation for almost ten years and made no attempt to remove it to this court, it would appear that laches apply. As there are clear questions of fact no summary judgment can be granted.

## 2. KERSH V SOUTHFIELD POLICE DEPARTMENT

Kersh's Bill Blass Model Mark V collector's car was parked at KMART in the possession of the debtor who was to make certain repairs to the car. While parked at KMART, the car was illegally towed by Ross Towing at the request of the Southfield Police Department who had apparently made a sweep of the Tel Twelve Mall Parking lot at the request of Ramco Gershenson, the owner of the Mall. The car was not stolen from Kersh as falsely claimed by Barrett. The car had been tagged by the Southfield Police on Thursday, October 31, 1991. Kersh appeared at KMART that night and requested that KMART put air in the left front tire and jump the battery so he could take the car back to his home which was about 1/4 of a mile away. The KMART Auto Manager, Marty, said he was too busy but that he would drive the car to Kersh's home the next day. Kersh then flew to New York on November 1, 1991. When Kersh returned on Monday, November 4, 1991 the car was not parked at his home nor was it in the parking lot at

KMART. Marty claimed he got "busy" and forgot about his promise to drive the car back to Kersh's home. Kersh then contacted the Southfield Police, gave them the VIN number of the car and was told the Police had not towed his car. The Police then called him back and said there was no such VIN number in the State Computer. Kersh then verified with the State, that the police department, through its liaison with the Ross Towing had accessed the State Computer on November 5, 1991 at which time the VIN number apparently disappeared from the State Computer. Kersh then tracked the car down to Ross Towing who admitted they had the car, had declared it abandoned and would own it for the towing fee in 21 days. Kersh then called the Southfield Police back, reported that the car was at Ross and that he owned it. The police then stopped the abandoned sale of the car and demanded that Kersh bring proof of ownership to the Police Station. Kersh and his mother, Belle Kersh [ Belle], then appeared at the Police Station wherein then Sergeant Ted Quisenberry who demanded that Kersh and his mother give him the original of the title showing Kersh owned the car. After providing that information, Quisenberry wrote a note asserting that Kersh owned the car and directed him to file suit, under the Michigan Abandoned Car Statute, to get his car back. Kersh then filed MARK V which the SCAO assigned to Judge Sauer.

When Kersh and his mother appeared before Judge Sauer for the hearing, they produced a copy of the title showing that Kersh owned the car for the court. Judge Sauer refused to accept the copy and demanded the original title. Kersh then contacted Quisenberry who claimed the title had been "misplaced." Kersh called the Secretary of State again who claimed all of the VIN records had disappeared from the computer. Apparently, the Southfield Assistant attorney had the Secretary of State do a manual search of the records which showed the ownership but conspired

to lock Kersh out of the court. Although Judge Sauer had the note from the Southfield Police, a sworn affidavit from Belle that David Kersh was the owner of the car, copies of the registration of the car which contained Kersh's driver's license, the City of Southfield attorney and Judge Sauer conspired to dismiss the suit, deny Kersh's motion to disqualify Judge Sauer, refused to permit a de novo review hearing and ignored Kersh's subsequent motions. Exhibits 13-14 deal with what transpired at the hearings. At no time was KMART a named party to the lawsuit however KMART conspired with Southfield and Judge Sauer by instructing its Auto Department manager to dodge Kersh's subpoenas and to not show up for the hearings to testify.

Under MCR 2.003, if Belle was the owner of the car, as the Southfield City Attorney claimed at the hearings, then the case could not have proceeded before Judge Sauer as no 46<sup>th</sup> Judge was disqualified in cases involving Belle. Prior to the assignment of Judge Sauer the following acts were required to be completed by 46<sup>th</sup>, its court administrator and its judges:

- a] The Court administrator was required to review the lawsuit to ascertain if David Kersh was a proper party.
- b] Donna Beaudet did so by reviewing the notes from the Southfield Police Department that they deemed Kersh to be the proper owner of the vehicle.
- c] Each of the three sitting Southfield judges were required to review the lawsuit and make a legal determination if Kersh was a party to the litigation.
- d] If Kersh was a party to the litigation they were required to disqualify themselves.
- E] The SCAO was then required to appoint a judge to act because Kersh was



a party to the lawsuit.

As such, if Judge Sauer purportedly found that Kersh did not own the car, he had no legal authority to enter any order because there was no legal authority for the SCAO to appoint him to act in the case. The files also show that:

- a] Kersh, as early as November 25, 1992 was inquiring as to why no judge had been assigned to hold a de novo review hearing [exhibit 11].
- b] Filed an amended complaint adding Belle as a plaintiff in the lawsuit along with her sworn affidavit.

As shown by Exhibit 1, the MARK V case is still pending before 46<sup>th</sup> and Sauer remained assigned to the MARK V case until January 13, 1994 but refused to hear Kersh's outstanding motions, enter orders or permit a de novo review. If there was a final judgment on August 25, 1992 as claimed by the debtor, Judge Sauer's assignment would have been terminated by the SCAO at that time. On July 2, 1998, Donna Beaudet, the 46<sup>th</sup> Court Administrator demanded that Kersh file a further motion to disqualify Judge's Sauer and Hammer. Those motions were attached to Kersh's letter to Beaudet on July 8, 1998 [exhibit 12].

On September 9, 1998, Judge Bowman was assigned to the MARK V case by the SCAO. On June 21, 2000, Judge Nicholson was assigned to the MARK V case by the SCAO. In fact, Judge Sauer admitted his prejudice and bias against Kersh when he was assigned City of Southfield v Kersh # 291-95-405 [Exhibit 2 page 7] on October 27, 1995 and disqualified himself on November 1, 1995 at which time the case was assigned to Judge Hammer.

As KMART was not a named party to the MARK V suit, this court has neither jurisdiction nor venue over the case which remains in the 46th District Court. However, as Kersh

was the owner of the car and KMART was negligent in failing to return the car to Kersh while it was in their possession, his claim is properly before this court. The claim is secured because KMART acquired no title to the car and therefore was only holding the car for Kersh. KMART committed fraud when it attempted to interfere in the Kersh v Southfield Police case.

No statute of limitations has run because, at all times KMART acknowledged liability for the car and never denied liability. Exhibit 101 [ attached to debtor's motion] is a letter from Floyd Hall, then chairman of KMART, dated January 23, 1996 referring to the Mark V being Kersh's car which was taken from the KMART store in Southfield, Michigan. Hall forwarded the letter to the debtor's public liability counsel, Chris Gullen. As the Kersh v Southfield Police case is still pending any alleged statute of limitations has been tolled.

Unless KMART can establish that the car was not in their possession at the time it was illegally towed they are liable for the loss irrespective of what happened in the 46<sup>th</sup> court between Kersh and the Southfield Police Department. As there are clear questions of fact no summary judgment can be granted.

### **3. KMART RAINCHECKS**

Contained in the KMART records are multiple rain check certificates submitted by Kersh to KMART along with his complaints that KMART was committing fraud. To the present date KMART has failed to produce those records or any of the correspondence between Kersh, KMART customer service and KMART legal. The one KMART rain check submitted by Kersh was obtained after the Bankruptcy petition was filed and was simply further proof of the fraud being committed by KMART. Kersh further sent four of the 100 fraudulent KMART rain checks to the State Attorney General [exhibit 17]. The rain checks are in storage in Michigan and are

being searched for along with other proof of the KMART rain check fraud. As discovery is not completed, any attempt by the debtor to "settle" this claim is premature. Kersh was turned down more than 100 times trying to buy advertised sale items and is entitled to damages.

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**4. 37<sup>TH</sup> DISTRICT COURT CASE**

The debtor has proposed paying 6.5% of \$750 which amounts to \$49.00. The debtor failed to move this case to the bankruptcy court prior to its exit from the bankruptcy. Kersh rejects the separation of the claim unless the debtor is willing to reclassify this claim as a Class 5 claim and provide Kersh with the same stock, at the same price and under the same terms as given Class 5 claimants when KMART emerged from bankruptcy. The failure of the debtor to deal with this claim for more than three years after it emerged from bankruptcy constitutes fraud.

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**CONCLUSION**

The motion filed by Barrett and his law firm is simply a continuation of the fraud perpetuated upon Kersh by the debtor and its Sears Holdings successor which have continued to the present date. There are no res judicata rulings. There are no final judgments and the motion filed by the debtor should be quashed and rule 11 sanctions ordered.

May 11, 2006

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