DISTRICT COURT, JEFFERSON COUNTY, COLORADO Court Address: 100 Jefferson County Parkway, Golden, CO, 80401-6002	DATE FILED: September 4, 2014 4:31 PM CASE NUMBER: 2013CV30751
Plaintiff(s) WALMART STORES INC v. **Defendant(s)** UNITED FOOD AND COMMERCIAL WORKERS INTL et al.	⚠ COURT USE ONLY ⚠ Case Number: 2013CV30751 Division: 12 Courtroom:
Order: Exhibit A	

The motion/proposed order attached hereto: GRANTED.

Issue Date: 9/4/2014

Philip J. McNulty

PHILIP JAMES MCNULTY
District Court Judge

EXHIBIT A

DISTRICT COURT, JEFFERSON COUNTY, COLORADO 100 Jefferson County Parkway Golden, CO 80401	
Plaintiff: WAL-MART STORES, INC., WAL-MART REAL ESTATE BUSINESS TRUST, WAL-MART STORES EAST, L.P., SAM'S WEST, INC., and SAM'S PW INC. **v.** **Defendants:** UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION; ORGANIZATION UNITED FOR RESPECT AT WALMART; and DOES I-X.	**COURT USE ONLY** Case Number: 2013 CV 30751 Division 12 Hon. Philip James McNulty District Court Judge
[PROPOSED] FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER	

This matter came before the Court on Wal-Mart Stores, Inc.'s, Wal-Mart Real Estate Business Trust's, Wal-Mart Stores East, L.P.'s, Sam's West, Inc.'s, and Sam's PW Inc.'s (hereinafter "Plaintiffs" or "Walmart") Motion for Summary Judgment and request for injunctive relief with due notice having been given. The Court has reviewed the motions, the responsive pleadings, and numerous exhibits which were attached to the parties' filings. The Court has also viewed Plaintiffs' Summary Judgment Exhibit 35, which is a DVD of events and demonstrations at various Walmart stores. Additionally, the Court heard oral argument on August 7, 2014. As such, being fully advised, the Court makes the following findings of fact and conclusions of law:

1. The Court finds that Walmart filed its original complaint on May 30, 2013, and filed an amended complaint on September 13, 2013. The complaints requested injunctive and declaratory relief. Plaintiffs filed their Motion for Summary Judgment on March 14, 2014.

2. Plaintiffs operate retail stores internationally, including stores in Colorado and specifically in Jefferson County.

3. The Defendants include the United Food and Commercial Workers International Union ("UFCW"), a national labor organization headquartered in Washington DC, and the Organization United for Respect at Walmart ("OUR Walmart"), a labor organization that receives assistance from UFCW. No current Walmart employees are included as defendants in this case.

A. Summary Judgment

4. The Court notes that summary judgment is a drastic remedy and is never warranted except on a clear showing that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law. *Churchey v. Adolph Coors Co.*, 759 P.2d 1336 (Colo. 1987). In the context of summary judgment, a fact is material if its resolution will affect the outcome of the case. *Krane v. Saint Anthony Hospital System*, 738 P.2d, 75 (Colo. App. 1987). The moving party has the burden of establishing the lack of a triable issue of fact. *Cung La v. State Farm Auto. Ins. Co.*, 830 P.2d 1007 (Colo. 1992). Colorado Rule of Civil Procedure 56 is properly exercised only where the facts are clear and undisputed leaving as the sole duty of the Court the determination of the correct legal principles applicable thereto. Once the moving party establishes there are no genuine issues of material fact, the opposing party must, with relevant and specific facts, demonstrate that a real controversy exists. *Westerman v. Rogers*, 1 P.3d 228, (Colo. App. 1999). The opposing party cannot rely on mere allegations or denials, but must provide specific facts that demonstrate the existence of a genuine issue for trial. In assessing a summary judgment motion, the Court must view all the facts in the light most favorable to the non-moving party.

5. The Defendants in this case dispute that there are no questions of material fact. Specifically, in their Response to Plaintiffs' Motion for Summary Judgment, Defendants dispute whether demonstration participants blocked store customers, obstructed traffic, harassed Walmart employees and refused to leave stores when asked. Defendants' Response went point-by-point through a number of different demonstrations at different Walmart stores in Colorado. In oral argument, Defendants' counsel specifically denied certain allegations regarding the demonstration on the night of November 23, 2012, at Store 2125 in Lakewood, Colorado where pots and pans were used in the nature of drums, and contended that such demonstration was not UFCW or OUR Walmart activity.

6. Plaintiffs' Summary Judgment Exhibit 45, which was filed May 2, 2014 and attached to the Plaintiffs' Reply in Further Support of its Motion for Summary Judgment, is a comprehensive list of facts that are and are not in dispute. The Court finds that to the extent that there are any disputed facts, they are not material.

7. The Court further finds that the case has been pending for over a year. It appears there has been substantial discovery and a number of affidavits and other exhibits submitted to the Court. The Court has reviewed a DVD (Plaintiffs' Summary Judgment Exhibit 35) of some of the activities complained of, and finds that if the matter had gone to trial there would have been witness testimony describing some of the same incidents that were captured in the DVD.

8. Based on all of the above, the Court finds that there is a clear showing that no genuine issue of material fact exists and summary judgment is appropriate.

B. Permanent Injunction

9. The Court held a status conference on January 8, 2014. At that time, the parties

agreed that there was no need for a separate hearing on the preliminary injunction, and that the case should proceed to the question of whether a permanent injunction should be entered.

10. In ruling on a request for injunctive relief, Courts look to C.R.C.P. 65 and the substantial body of case law in Colorado. See, e.g., *Rathke v. MacFarlane*, 648 P.2d 648 (Colo. 1982); *Kourlis v. Colorado District Court El Paso County*, 930 P.2d 1329 (Colo. 1997). To be entitled to a permanent injunction, a moving party must demonstrate the following factors: (1) the danger of real, immediate, and irreparable injury which may be prevented by injunctive relief; (2) the lack of a plain, speedy, and adequate remedy of law; (3) no disservice to the public interest; and (4) the balance of equities favor the injunction. *Id.*

11. Before addressing the individual factors, the Court will consider three other issues.

12. First, the parties agree that the Colorado Labor Peace Act ("CLPA"), C.R.S. § 8-3-101, *et seq.*, does not apply here. The Defendants contend that they raised the CLPA and two cases – *Pueblo Building and Construction Trades Council v. Harper Construction Company of Colorado*, 307 P.2d 468 (Colo. 1957) and *United Mine Workers of America vs. Golden Cycle Corporation*, 300 P.2d 799 (Colo. 1956) – for the proposition that the Court should proceed very cautiously because the nature of the dispute and the parties involved. The Court is mindful of the fact that there is a string of cases dating back over a hundred years that state the power to issue an injunction should be exercised with great discretion and only when necessary. *See City of Denver v. Beede*, 25 P. 624 (Colo. 1898) (noting that the Court's power to issue an injunction is an "extraordinary remedy" that should only issue when necessary); *Rathke*, 648 P.2d 648. The history of this case demonstrates that the Court has exercised caution to date. The case has been pending for over a year. The Plaintiffs filed a motion for preliminary injunction on October 30, 2013, and requested the earliest possible hearing date because of planned demonstrations, including a demonstration at the Lakeside Mall on Black Friday of 2013. At the status conference in January 2014, all parties were in agreement to set the case for hearing on permanent injunction. The Court is also mindful of the case *Lloyd Corporation, Ltd. v. Tanner*, 407 U.S. 551 (1972), in which the United States Supreme Court held that property does not lose its private character merely because the public is generally invited to use it for designated purposes.

13. Second, the Court will address the contention raised in the Defendants' Response to the Motion for Summary Judgment at page 6, that the Plaintiffs did not provide actual notice to the demonstration participants as required to prove trespass. The Court finds that it is not disputed that Plaintiffs notified the Defendants that they were not permitted to come on to Plaintiffs' property for any reason other than to shop. Notices were sent to Defendants on October 14, 2011, October 8, 2012, November 15, 2012, and April 4, 2013. Those invitations specifically revoke any invitation to enter and to engage in disruptive activities like picketing, flash mobs, manager confrontation, etc. For the actual language of those notices, the Court incorporates by reference the notices themselves, included as Plaintiffs' Summary Judgment Exhibit 7. The Defendants do not cite any authority on point in support of their position other

than criminal cases. The Defendants also admit to having planned, coordinated, conducted, and participated in numerous demonstrations on Walmart property after the notices were received. Defendants provided detailed instructions to the participants in these demonstrations. On this issue the Court agrees with Plaintiffs' Reply Brief filed in Further Support of their Motion for Summary Judgment on May 2, 2014, page 5, part C, paragraphs 12 through 16. The Court also finds that the issue of notice would go to enforcement issues if the injunction were granted. If that happened, individuals could then argue for lack of notice if they were cited for not complying with the injunction.

14. Third, the Court will address the real property issue, which is whether the Plaintiffs have exclusive property rights and thus the authority to exclude people from the premises. The Court finds that the following facts are undisputed on this issue:

a. Plaintiffs have approximately one hundred stores in Colorado.

b. Plaintiffs have ownership or right to exclusive possession of the inside of all of those stores.

c. In seventy-one of the approximately one hundred stores, Plaintiffs have exclusive possession to the apron sidewalks, and parking lots.

d. In twenty-three out of the approximately one hundred stores, Plaintiffs have granted reciprocal cross-easements over their apron sidewalks and parking lots. These easements are limited as adjunct to merchandising and shopping.

e. In approximately six out of the hundred, Plaintiffs have building only leases, with a right to use the apron sidewalks and parking lots.

15. Defendants argue that trespass claims require a right to exclusive possession, but the Defendants cited no cases where the owner of retail property was deprived of the ability to exclude people because they granted a cross-reciprocal easement to a neighboring retail business. On this issue the Court is persuaded by *A-W Land Co., LLC v. Anadarko E & P Company LP*, No. 09-cv-02293, 2010 WL 3894107, at *2 (D. Colo. 2010). In that case, the District of Colorado held that a person can be liable for trespass if acting outside the scope of the easement. *Id.* Although *A-W Land Co.* involved the grantee of the easement, not a third party, the Court finds that the reasoning in that case is applicable here. It is common sense that the property rights not given away are retained, and there is no evidence that the Plaintiffs gave away the right to exclude people from trespassing.

16. With respect to the six building-only lease stores, the Defendants argue that Plaintiffs do not have the right to exclude people from the apron sidewalks and parking lots unless there is an unreasonable interference with the right to customer access to the store and parking lot. Plaintiffs do not dispute that proposition except with respect to the unreasonableness of Defendants' conduct.

17. For purposes of determining whether Defendants' demonstrations in the parking lots and on apron sidewalks outside of a building-only lease store constitute an unreasonable interference with Walmart customers' use of those areas, the Court finds that the video submitted as part of Plaintiffs' Summary Judgment Exhibit 35, from Dallas, Texas (Store 949) from November 2012 showed conduct that constituted unreasonable interference and was unsafe. That video depicts a nighttime situation in which cars had their headlights on and many people were walking down the main drive aisle directly in front of the store, blocking cars from safely driving past the demonstrators. The Court finds that type of conduct to be unreasonable and unsafe. In contrast to the Texas video, the video from Lakewood (Store 2125), on Black Friday 2012, at the Colfax and Wadsworth store, showed conduct that did not constitute unreasonable interference. There, many people were parading directly in front of the store, and while they did pass in front of entrances, there was no evidence that anyone was blocked from entering or leaving the store. Although demonstrators were on the paved portion of the drive, it did not look like any cars had to swerve into the other lane to get out of their way, or were blocked in any similar manner. The Court finds that conduct to be an example of reasonable behavior.[1]

18. The Court will address each of the *Rathke* factors, but in reverse order. First is whether there is a disservice to the public interest and whether there is a balance of equities in favor of the injunction. These factors were not really disputed. The Court agrees with the proposition that it is not deciding if people can demonstrate against Walmart – they most certainly can. The only issue is where. Defendants also raised the issue of peaceful picketing. The Court finds that the issue of peacefulness is not material. From the video evidence, it does not appear that anyone was injured or run over or similar conduct, but the demonstrations were certainly disruptive, and being disruptive is the point of the demonstrations. There is no peaceful exception to trespass on private property.

19. Next, the Court will address the factor of lack of plain, speedy, and accurate remedy of law. Again, that factor is not really disputed. Plaintiffs argue that money damages are not adequate and that Plaintiffs would not know the impact, and the Court agrees with that assessment.

20. The only *Rathke* factor which Defendants seriously dispute is whether there is a danger of real, immediate, and irreparable injury. The Court already has found that there is no peaceful exception to trespassing on private property. Moreover, the Defendants have stipulated to their intent to continue actions including flash mobs, parades, handbilling, rallies, demonstrations, video bombing, and other disruptive behaviors of the same kind as shown in the videos in Plaintiffs' Summary Judgment Exhibit 35.

21. Defendants argue that there have not been any recent trespassory demonstrations, and point in particular to Black Friday 2013. The Court notes that this case was pending at that

[1] The Court notes that Store 2125 is not a building-only lease store, and for the reasons explained in more detail herein, the demonstration activity at Store 2125 on November 23, 2012 would be enjoined by this order. The Court refers to the activity at Store 2125 merely as an example of behavior that would not unreasonably interfere with the apron sidewalks or parking lots at building-only lease stores.

time and there was also a request pending for a temporary injunction and an immediate hearing. The Court finds that the threat of injury is real and immediate based upon the stipulation of the Defendants that they will continue to engage in trespassory demonstrations on Plaintiffs' property in Colorado.

22. Next the Court will address whether Plaintiffs have suffered an irreparable injury. Plaintiffs argue that the loss of customers, loss of goodwill, loss of reputation as a pleasant place to shop, and especially as a family friendly place to shop, particularly with children, constitutes irreparable injury. Additionally, based on the Court's review of the exhibits that were submitted, including orders from other courts, there are also issues of increased security risks, possible thefts because security personnel may be distracted by the demonstrations, and prevention of employees from doing their jobs and loss of productivity. (*See* Plaintiffs' Summary Judgment Exhibits 2-6.) While there was no evidence presented on those last issues, these concerns make sense to the Court in terms of who is minding the store and, if there is disruptive behavior, it tends to shift employees to that part of the store which would open other areas of the store to increased security risks.

23. Thus, the Court finds that Plaintiffs have established the *Rathke* factors, which are required for the Court to impose a permanent injunction with respect to the Walmart's stores that are currently open in Colorado, or which Walmart may open in the future. Therefore, the Court issues the following injunction:

24. With respect to all of the Colorado stores other than stores with building-only leases, Defendants and their parents, subsidiaries, affiliates, officers, employees, agents, and all other persons or entities who act in concert with them (except for current Walmart employees) are permanently prohibited and enjoined from: (i) entering onto or inside any store, facility, or other property, including, without limitation, any apron sidewalk or parking lot, in the State of Colorado that is owned, operated, or controlled by Walmart or any of their subsidiaries, affiliates, or operating entities to engage in activities such as picketing, patrolling, parading, demonstrations, "flash mobs," handbilling, solicitation, rallies, video-bombing, and manager confrontations; (ii) entering onto or inside any store, facility, or other property in the State of Colorado, including any apron sidewalk or parking lot, that is owned, operated, or controlled by Walmart or any of their subsidiaries, affiliates or operating entities without permission or authorization from Walmart for any purpose other than shopping for and/or purchasing Walmart merchandise; and/or (iii) barricading, blocking, or preventing access to or egress from any store, facility, or other property, including, without limitation, any apron sidewalk or parking lot in the State of Colorado that is owned, operated, or controlled by Walmart, or any of their subsidiaries, affiliates or operating entities.

25. As for stores with building-only leases, the Court will grant the same injunction for the entirety of the inside of those stores and, as it relates to the apron sidewalks or parking lots, the Court enjoins any unreasonable interference with the right to customer and employee access to the store and parking lot areas. The Court further finds that, presently, the following six Walmart stores have building-only leases: Arvada (Store 6630); Boulder (Store 3096);

Colorado Springs (Store 6219); Denver (Store 3021); Littleton (Store 5002); and Wheat Ridge (Store 1208).

As such, the Court finds that Plaintiffs' motion for summary judgment and request for permanent injunction are **GRANTED**, and

THEREFORE, this Court hereby **ORDERS** that:

(A) Plaintiffs' Motion for Summary Judgment is granted;

(B) The Court enters a permanent injunction as to Walmart's stores that are currently open in Colorado, or which Walmart may open in the future, as follows:

(i) Except as noted in subsection (B)(ii) below, Defendants and their parents, subsidiaries, affiliates, officers, employees, agents, and all other persons or entities who act in concert with them (except for current Walmart employees) are permanently prohibited and enjoined from:

(a) entering onto or inside any store, facility, or other property, including any apron sidewalk or parking lot, in the State of Colorado that is owned, operated, or controlled by Walmart or any of their subsidiaries, affiliates, or operating entities to engage in activities such as picketing, patrolling, parading, demonstrations, "flash mobs," handbilling, solicitation, rallies, video-bombing, and manager confrontations;

(b) entering onto or inside any store, facility, or other property in the State of Colorado, including any apron sidewalk or parking lot, that is owned, operated, or controlled by Walmart or any of their subsidiaries, affiliates or operating entities without permission or authorization from Walmart for any purpose other than shopping for and/or purchasing Walmart merchandise; and/or

(c) barricading, blocking, or preventing access to or egress from any store, facility, or other property, including any apron sidewalk or parking lot, in the State of Colorado that is owned, operated, or controlled by Walmart, or any of their subsidiaries, affiliates or operating entities.

(ii) With respect to stores or facilities in the State of Colorado for which Walmart, or any of their subsidiaries, affiliates or operating entities, has a building-only lease, Defendants and their parents, subsidiaries, affiliates, officers, employees, agents, and all other persons or entities who act in concert with them (except for current Walmart employees) are permanently prohibited and enjoined from:

(a) entering inside any such store or facility to engage in activities such as picketing, patrolling, parading, demonstrations, "flash mobs," handbilling, solicitation, rallies, video-bombing, and manager confrontations;

(b) entering inside any such store or facility for any purpose other than shopping for and/or purchasing Walmart merchandise; and/or

(c) unreasonably interfering with Walmart customers and employees' rights to use adjacent apron areas, sidewalks and parking lots to access any such store or facility.

(iii) Defendants immediately shall post this Order on Defendants' websites, Facebook pages, twitter sites and any other internet and/or social media outlets under their control.

(iv) The failure of Defendants to comply with this Order upon service of same may result in a finding of contempt of Court.

(C) The trial date (October 27-31, 2014) is vacated.

IT IS SO ORDERED.

DATED this ____ day of _____, 2014.

BY THE COURT:

_____
The Honorable Philip J. McNulty