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

In re:	)	Case No. 02 B 02474
	)	Chapter 11
KMART CORPORATION,	)	
	)	Hon. Susan Pierson Sonderby
Debtor.	)	
	)	Hearing Date: May 13, 2009
	)	Hearing Time: 10:30 a.m.

NOTICE OF MOTION

PLEASE TAKE NOTICE that on **Wednesday, May 13, 2009, at the hour of 10:30 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 and Memorandum of Kmart Corporation to Shift Electronic Discovery Costs**, 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: March 19, 2009
Chicago, Illinois

KMART CORPORATION

By: /s/ George R. Mesires
One of its Attorneys

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CERTIFICATE OF SERVICE

I, George R. Mesires, an attorney in the law firm of Barack Ferrazzano Kirschbaum & Nagelberg LLP, certify that I have this 19th day of March, 2009, caused to be served, via electronic mail, to the parties listed below, a copy of the foregoing **Notice of Motion** and **Motion and Memorandum of Kmart Corporation to Shift Electronic Discovery Costs**:

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UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

In re:	Case No. 02 B 02474
KMART CORPORATION,	Honorable Susan Pierson Sonderby Hearing Date: May 13, 2009
Debtor.	Hearing Time: 10:30 a.m.

MOTION AND MEMORANDUM OF KMART CORPORATION TO SHIFT ELECTRONIC DISCOVERY COSTS

Kmart Corporation ("Kmart"), pursuant to Fed. R. Civ. P. 26(c), made applicable hereto by Fed. R. Bankr. P. 7026, hereby moves the Court for entry of a protective order to shift a portion of the costs of electronic discovery relating to the continued efforts of Global Property Services ("Global") to seek documents residing on Kmart's P and W drives ("Motion to Shift Costs"). For its motion, Kmart respectfully states as follows:

I. FACTUAL BACKGROUND

A. EVENTS LEADING TO THIS MOTION.

This Motion to Shift Costs arises out of Kmart's efforts to comply with the July 31, 2007 Court's Memorandum Opinion (the "July 31 Order"), which ordered Kmart "to the extent it has not already done so, [to] perform a systematic search of all documents on its P-drive and W-drive [relating to Global's claims]." July 31 Order, p. 49. The P & W drives contain over 9 terabytes of information, which translates into roughly 3 billion pages of text. By September 2007, Kmart had spent over $60,000 attempting to comply with the Court's July 31 Order. *See* Kmart's Motion for Protective Order filed on September 27, 2007 ("Motion for Protective Order") [Dkt. No. 31165]), attached hereto as **Exhibit A** ("**Ex. A**"), ¶4. Despite its efforts, Kmart was unable to conduct a systematic search of the P and W drives.

Accordingly, on September 27, 2007, Kmart filed its Motion for a Protective Order

asking the Court to relieve it of the obligation to conduct a further search of its P and W drives. For alterative relief, Kmart requested that the Court shift the cost of the search and production of responsive documents to Global.

On February 13, 2008, after the motion was fully briefed, the Court requested that the parties attempt to resolve this discovery dispute consensually. Both parties retained electronic discovery experts and have expended substantial resources to determine the best way to efficiently review the over 9 terabytes of data residing on the P and W drives. Kmart provided Global's expert detailed information about the hardware, software, and the architecture relating to the P and W drives, and the parties exchanged their experts' proposals for conducting the search on a cost effective basis given the limitations of Kmart's computer systems and the necessity that the search not disrupt Kmart's business operations or jeopardize theses drives.[1]

On February 3, 2009, after exchanging their experts' proposals, counsel and the experts met and discussed each party's proposal. During that meeting, Global agreed to implement Kmart's proposed search protocol, which broke the systematic search into five phases, as discussed below. Kmart proposed that the parties split the $18,000 cost of the first phase of this project. Acknowledging the cost was reasonable, Global nonetheless refused to bear any of it.

At the February 4, 2009, hearing, the Court ordered that Kmart and Global split the $18,000 in costs associated with the first phase of Kmart's proposed search protocol, which is now being conducted, and permitted the parties to address by motion the costs for Phase 2 of this project.

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[1] *See* Letter to Hon. Susan P. Sonderby and Brion Doyle from Wendi E. Sloane, dated February 22, 2008, attached hereto as **Exhibit B**; Letter to Brion B. Doyle from George R. Mesires, dated April 29, 2008, attached hereto as **Exhibit C**; Letter to Brion B. Doyle from George R. Mesires, dated July 3, 2008, attached hereto as **Exhibit D**; Letter to Brion B. Doyle from George R. Mesires, dated August 15, 2008, attached hereto as **Exhibit E**; Letter to Richard A. Samdal and Brion B. Doyle from Wendi E. Sloane, dated January 12, 2009, attached hereto as **Exhibit F**.

B. THE COST OF THE AGREED-UPON SEARCH PROTOCOL.

Not surprisingly, a project of this scale does not come cheaply. Precision Discovery has estimated that the cost of Phase 2 is approximately $77,000, and the total cost of production is over $4 million, as summarized below and explained in depth in the declaration of Thomas Avery, head of Precision Discovery's electronic discovery practice group, attached hereto as **Exhibit G**:

1. Phase 1: Data collection.

The first phase is the data collection phase, as explained in Mr. Avery's Declaration (**Ex. G,** ¶¶4-6.). Phase 1 is in process, and the Court has ordered each party to bear one-half of the cost.

2. Phase 2: Searching.

Once the data has been collected, it must be searched for documents potentially relevant to Global's claim, which is the search phase of the protocol. *See* **Ex. G,** ¶¶7-8. The search phase is a two-step project. The first step is to build a searchable index for each document. The results of each search, including the underlying responsive document, will be available to counsel for review. The second step is to develop the search term list used to identify potentially responsive documents. Because numerous keyword searches can be run quickly, this method is effective in distilling the keywords to develop an effective search term list. Once the keyword list has been set, the responsive files will be extracted from the data set with the original file system metadata intact. The completion of Phase 2 will enable the parties to move to Phase 3, discussed below.

Precision Discovery estimates that it will cost $71,625 to index the acquired data population (indexing 2.865 terabytes at $25/GB), plus approximately $5,000 in hourly fees to configure the index, for a total cost of $76,625. Adding additional keyword searches and/or date

range searches will not have a significant impact on cost. However, it should be noted that the cost estimate set forth above does *not* include counsel's time to review the keyword search hits and to evaluate the results. It is this $76,625 cost that is at issue in this motion.

3. Phases 3-5.

After Phase 2, there are three more phases to complete this protocol. Although the cost-sharing for these phases are not at issue in this motion, Kmart believes that a short description of the phases will assist the Court in understanding the magnitude of the project.

Phase 3: Data Processing. During this phase, responsive data will have its associated metadata extracted and fielded so that it can be hosted in an online database for counsel's review for relevancy and privileged information. *See* **Ex. G,** ¶¶9-10. It is not clear how much responsive data the final keyword set will yield. Based on Precision Discovery's experience, responsive data can range from 10% to 50% of the searched data. Precision Discovery will charge $600 per gigabyte for data processing. Based on the estimate of potentially responsive data (*i.e.*, 10% - 50%), the cost will range from $171,900 to $859,500; however, a better cost estimate will be available after the completion of Phase 2.

Phase 4: Data hosting and review. The fourth phase is the hosting of the data by Precision Discovery in an online database accessible to Kmart's counsel for counsel's review of the data for responsive and privileged information. To estimate the cost of the review, Precision Discovery has used a number of conservative assumptions, which are set forth in Mr. Avery's Declaration. *See* **Ex. G,** ¶¶11-14. Precision Discovery estimates that the approximate cost of the review would be $3,744,000. A better cost estimate will be available after the completion of Phase 3.

Phase 5: Production. The final phase is document production in TIFF format. *See* **Ex. G,** ¶15.) Precision Discovery charges $0.06 per page to render TIFF images, $0.01 per page to endorse a Bates number, and $0.01 per page to endorse a message such as "Confidential." Given the variables at issue, we cannot provide an estimate for production.

II. ARGUMENT

A. RELEVANT LEGAL STANDARD.

As the Court is aware, there is a general presumption that the responding party must bear the expense of complying with discovery requests. *Oppenheimer Fund, Inc. v. Sanders,* 437 U.S. 340, 358 (1978). The presumption operates even when electronic documents are involved. *Wiginton v. C.B. Richard Ellis, Inc.,* 229 F.R.D. 568, 571-72 (N.D.Ill. 2004).

Electronic documents, however, present special cost concerns. The 2006 amendments to the Federal Rules of Civil Procedure Rule were promulgated to address, *inter alia*, the challenges and costs presented by electronic discovery.[2] The amendments added a Rule 26(b)(2)(B) to address the discovery limitations on electronically stored data:

> A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion … for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

Thus, the movant bears the initial burden to demonstrate that the electronic data is not reasonably accessible because of undue burden or cost. After the movant makes that showing,

[2] Even before the 2006 amendments, the Court had discretion to shift all or part of the costs of production to the requesting party. Fed. R. Civ. P. 26(b)(2)(B) ("The court may specify conditions for the discovery."); Fed. R. Civ. P. 34 advisory committee's notes (1970) (court may issue orders that "require[] that the discovering party pay costs"); *Oppenheimer, supra,* 437 U.S. at 358 (court may "condition[] discovery on the requesting party's payments of the costs of discovery").

the Court may still order discovery only if the requesting party can show that good cause exists, subject to the limitations of Rule 26(b)(2)(C). Rule 26(b)(2)(C) requires the court to limit or condition the extent of the discovery if it finds, *inter alia*, that the burden or expense of the proposed discovery outweighs its likely benefits.

> The conditions may take the form of limits on the amount, type or sources of information required to be accessed and produced. *The conditions may also include payment by the requesting party of part or all of the reasonable costs of obtaining information from sources that are not reasonably accessible.*"

Rule 26(b)(2), Advisory Committee Notes, 2006 amendments (emphasis added). Further, a requesting party's willingness to share costs may be considered by the court in determining whether there is good cause. *Id*.

Under *Wiginton v. CB Richard Ellis, Inc.*, 229 F.R.D. 568, 572-73 (N.D. Ill. 2004), the leading case on cost-shifting in this District, courts consider eight factors to "determine when it is appropriate to shift the costs of searching and producing inaccessible data to the requesting party in order to protect the producing party from unduly burdensome e-discovery requests:"

(i) The likelihood of discovery of critical information;
(ii) The availability of such information from other sources;
(iii) The amount in controversy as compared to the total cost of production;
(iv) The parties' resources as compared to the total cost of production;
(v) The relative ability of each party to control costs and its incentive to do so;
(vi) The importance of the issues at stake in the litigation;
(vii) The importance of the requested discovery in resolving the issues at stake in the litigation;
(viii) The relative benefits to the parties to obtaining the information.

Wiginton, supra, 229 F.R.D at 572-573.

Courts are not to mechanically "just add up the factors." *Zubulake*, 217 F.R.D. at 322, citing *Noble v. United States*, 231 F.3d 352, 359 (7th Cir. 2000). Moreover, the eight *Wiginton* factors are listed in descending order of importance. *Zubulake*, 217 F.R.D. at 322. The first two factors comprise the marginal utility test. *Wiginton, supra*, 229 F.R.D. at 572 ("[U]nder the

marginal utility approach, the more likely it is that the search will discover critical information, the fairer it is to have the responding party search at its own expense. … We agree with both the *Rowe* court and the *Zubulake* court that the marginal utility test is the most important factor."). Thus, factors one and two are considered the most important. *Id.,* at 575.

B. APPLICATION OF THE CONTROLLING LEGAL STANDARD.

1. The Documents On The P and W Drives Are Not Reasonably Accessible Because Of Undue Burden and Cost.

In its Motion for Protective Order, Kmart demonstrated that the burden and cost of retrieving the documents on the P and W drives render the documents not "reasonably accessible" under Rule 26(b)(2)(B). **Ex. A**. *See W.E. Aubuchon Co. Inc. v. Benefirst, LLC*, 245 F.R.D. 38, 43 (D. Mass 2007) (the requested documents, even though stored on an accessible server, were not "reasonably accessible" because retrieval would cost $80,000); *Byers v. Illinois State Police,* 2002 WL 1264004, at *11 (N.D. Ill. 2002) (estimated cost of $20,000-$30,000 to license old email software, download backup tapes, and search for responsive documents (a four week process) was unduly burdensome); *OpenTV v. Liberate Technologies,* 219 F.R.D. 474, 477 (N.D. Cal. 2003) (source codes were inaccessible data because approximately 150 hours of labor were needed to extract source code from database). To the extent that the Court requires additional proof to make a determination that the information on the P and W drive is not reasonable accessible, Kmart proffers the attached declaration of Thomas Avery (**Ex. G.**).

2. The Court Should Require Global To Pay One-Half Of The Cost Of Phase 2 Of The Electronic Discovery Project.

As discussed in Kmart's Motion for Protective Order, Kmart disputes that Global has demonstrated that good cause exists to proceed with the P and W drive discovery project. Nevertheless, Kmart is willing to proceed with Phase 2 without further briefing on the issue of

"good cause" if Global is ordered to pay 50% of the costs associated with Phase 2. Under the *Wiginton* factors, Global should be ordered to pay one-half of the Phase 2 costs, currently estimated to be $77,000.[3]

i. The likelihood of discovery of critical information.

Under the first factor of the marginal utility test, the extent to which the discovery request appears to be specifically tailored should be considered. *Wiginton,* 229 F.R.D. at 573. The broad directive of the Court's July 31 Order has made the search of the P and W drives a burdensome task. *See* July 31 Order ("[T]o the extent it has not already done so, perform a systematic search of all documents on its P-drive and W-drive."). Even by limiting the universe of potentially responsive documents to the 38 folders identified as the most likely repositories of information relating to Global, and by utilizing search terms to focus the search, Global has not proffered any evidence to suggest a likelihood of finding critical information:

- The P and W drives contain no emails in native format. **Ex. A at ¶2.**
- William Simmons, one of the Kmart employees involved with Global, conducted a search of the P and W drives when he was compiling documents in response to Global's discovery requests. Mr. Simmons, who stored information on the W drive and knew what to search for, likely produced any relevant documents still stored on those drives. *See* April 26, 2007 Transcript of Hearing on Global's Motion for Sanctions for Spoliation ("I opened up, of course, my own hard drive, take [sic] a look if I had any notes and documents that we stored there. Further I went down to look into our (W:) drive in the various folders there. This was a manual search for any information that dealt with exterior maintenance or Global Property Service. I also continued my search … into the (P:) drive to also search for exterior maintenance for [sic] Global Property Services.")
- Kmart's initial efforts to conduct a systematic search of the P and W drives did not locate any relevant documents not already produced. The majority of references to Global appeared as a line item in lengthy accounting documents.

[3] Because of the substantial costs associated with the remaining phases of the discovery protocol, Kmart reserves its right to seek the primary relief requested in the Motion for Protective Order – that the discovery not be had at all. Further, Kmart reserves its right to seek further cost shifting with respect to the remaining phases of the discovery.

The accounting documents relating to Global have already been produced. **Ex. A at ¶¶7-9.**

- Global has failed to identify any documents, either by name or by category, it believes are stored on the P&W drives but not yet produced.

Thus, consideration of the first factor weighs in favor of cost-shifting.

ii. <u>The availability of such information from other sources</u>.

The vast majority of the documents found to date on the P and W drives appear to be large financial spreadsheets similar to the Paid History Report previously produced by Kmart. The Paid History Report, which was almost 34 MB of data (approximately 8,000 pages), contained a detailed accounting of all invoices paid by Kmart to vendors of exterior maintenance services, including Global, for the time period of 2001 – 2004. **Ex. A at ¶8.** Moreover, Kmart has produced over 25,000 documents during this litigation. **Ex. A at ¶25(ii).** A vast amount of responsive information from other sources has already been produced to Global. Again, Global has not identified any relevant documents it believes are stored on the P or W drive but not yet produced. Thus, the marginal utility of a continued search is low, weighing in favor of cost-shifting.

iii. <u>The amount in controversy as compared to the total cost of production</u>.

Global seeks over $20 million in damages, which is based primarily on Global's claim that Global had a national contract to perform exterior maintenance for the Kmart stores, and that Global would perform those services for at least 10 years.

Despite years of discovery, Global has failed to produce any evidence to support this claim. In the Court's July 31st Order, the Court found that Global had presented no evidence to support its national contractor theory and that the evidence that Global did present tended to show that the decision to hire Global was made at the store level. *See* July 31 Order, 44. ("And as for Global's "national contractor" theory, there is nothing in this chain of e-mails to support it.

In fact, they tend to show that the decision whether to contract with Global was made locally, at the store level. If this chain of e-mails is otherwise supportive of the theories Global has advanced in its claims, Global has failed to explain why."). When making this finding, the Court had before it the "National Contractor List" at one time stored by Mr. Simmons on the P Drive, which appears to be the genesis for Global's original demand for a broader search of the P and W Drives.

Nor does Kmart believe Global will be able to sustain its massive damage claim, even if it could establish liability. For example, there is no basis for the assumption of a ten year business relationship. Mr. Brock testified at his deposition that, even under his claim that there was an oral contract, it had no definite term and there was no discussion that Kmart's ability to terminate the purported oral contract was limited. (Excerpts of the Deposition of Tom Brock, attached hereto as **Exhibit H,** 152:6-154:12.) The contracts between Global and the individual stores provided they could be terminated by Kmart upon 24 hours notice. *See* **Ex. I.**

Thus, this factor weighs in favor of cost-shifting. *See Wiginton* at 575 (finding in favor of cost-shifting when estimated cost of production was $184,000 - $250,000 and damages were possibly in the tens of millions of dollars). Moreover, if Global really believes its claim is worth tens of millions of dollars, it should be willing to pay one-half of the Phase 2 cost. In fact, if Global is unwilling to do so, the Court may consider Global's unwillingness in deciding whether to order that Phase 2 even proceed. *Zubulake*, 217 F.R.D. at 322.

iv. <u>The parties' resources as compared to the total cost of production.</u>

Kmart does not dispute that its resources surpasses Global's. However, Global's resources should not be understated. First, Global is a corporate plaintiff and, together with Mr. Brock's other closely held entities, remains an on-going business operation. Second, Global (and

its affiliated entity, Brock Sweeping) was a provider of exterior maintenance services to several large retailers, including Kmart, one of the nation's largest, generating revenues in the millions of dollars. Third, Global is valuing its claim at over $20 million.

Admittedly, while this factor likely weighs against cost shifting, "it does not rule it out." For example, in *Zubulake,* despite the defendant's far greater resources, the court still shifted costs.

> There is no question that UBS has exponentially more resources available to it than Zubulake. . . . On the other hand, she asserts that she has a $19 million claim against UBS. So while UBS' resources clearly dwarf Zubulake's, she may have the financial wherewithal to cover at least some of the cost of restoration. In addition, it is not unheard of for plaintiff's firms to front huge expenses when the multi-million dollar recoveries are in sight."

229 F.R.D. at 288

v. <u>The relative ability of each party to control costs and its incentive to do so.</u>

This factor is a neutral. Global has agreed to use Precision Discovery's protocol and has not disputed Precision Discovery's estimated cost for Phase 2. Both factors indicate that Kmart's choice of Precision Discovery was judicious, and that Precision Discovery's cost estimate is reasonable. As discussed above, adding additional keyword searches and/or date range searches will not have a significant impact on cost for Phase 2, although it will impact the costs of Phases 3 and 4. Accordingly, the possibility of fee sharing for later phases of the project may well encourage Global to be more considered in working with Kmart to structure search terms.

vi. <u>The importance of the issues at stake in the litigation</u>.

Courts have given this factor little or no weight, considering it neutral. *See, e.g., Wiginton*, 229 F.R.D. at 576, citing *Zubulake, supra*, 216 F.R.D. 280, 289 (S.D.N.Y. 2003) (this factor "will only rarely come into play … [and that] discrimination in the

workplace … is hardly unique.") and *Xpedior Creditor Trust v. Credit Suisse First Boston (USA), Inc.*, 309 F. Supp. 2d 459, 466 (S.D.N.Y. 2003) (a potential securities fraud class action does not raise the kind of public policy issues that might affect cost-shifting.). Here, the nature of Global's claims – a claim for unpaid invoices and breach of contract and other alleged torts – do not implicate significant public policy concerns to merit Kmart bearing the cost of the discovery.

vii. The importance of the requested discovery in resolving the issues at stake in the litigation.

As discussed in the Motion for Protective Order, based on the information identified during the searches performed to date, it is not likely that the information will be important or useful to Global's prosecution of its claims. The vast majority of the documents initially identified appear to relate to invoices. In terms of the value of Global's claims, its claim for unpaid invoices is approximately $360,000, excluding interest, which represents less than 2% of Global's total claim against Kmart. The bulk of Global's claim against Kmart derives from its tort and breach of oral contract claims. Significantly, neither the initial search nor Global itself have identified any documents stored on the P or W drives that are likely to support Global's contract or tort claims. As emphasized above, in its July 31 Order, the Court found that the extrinsic evidence relied upon by Global to support its claims actually undercut its tort and breach of contract claims. *See* July 31 Order, 44.

viii The relative benefits to the parties to obtaining the information.

Generally, courts hold that the requesting party stands to gain the most from obtaining the information that it seeks. *See Zubulake*, 216 F.R.D. at 289, fn 75. Thus, this factor usually weighs in favor of cost-shifting.

In sum, all of the relevant factors (except for the resources factor) considered by courts to

determine whether the costs of discovery are either neutral of weigh heavily in favor of shifting at least a significant portion of the costs to Global.

3. GLOBAL SHOULD PAY AT LEAST FIFTY PERCENT OF THE ELECTRONIC DISCOVERY COSTS.

"The next question is how much of the cost should be shifted. It is beyond cavil that the precise allocation is a matter of judgment and fairness rather than a mathematical consequence of the … factors discussed above. Nonetheless, the analysis of those factors does inform the exercise of discretion." *Zubulake*, 216 F.R.D. at 289.

A survey of the leading cost-shifting cases indicates that a 50/50 allocation is certainly appropriate in these circumstances. Generally, Kmart's dispute with Global is distinguishable from the cases considered below because: (i) the marginal utility test weighs *heavily* in favor of cost-shifting here, and (ii) the costs of discovery are high in terms of absolute dollars, and as a proportion of the potential damages. Thus, in our case, both the marginal test and the cost factor weigh strongly in Kmart's favor. Courts under similar circumstances have shifted costs, requiring the requesting party to pay between 25% and 75% of discovery costs:

- ***Wiginton v. CB Richard Ellis, Inc.*, 229 F.R.D. 568 (N.D. Ill. 2004):** In *Wiginton*, a gender discrimination case and the leading case from this District, the court shifted 75% of the costs of electronic discovery to the plaintiff. Considering the marginal utility test, the court found that the factors weighed slightly in favor of cost-shifting because it was clear that the requested emails existed only on backup tapes held by the defendant. *Wiginton* at 575. With respect to the cost factor, the court found that the cost of the electronic discovery was approximately $183,000-$250,000 and the potential recovery to the plaintiff might have been in the tens of millions of dollars. *Id.* at 575. Despite the marginal utility test weighing only slightly in favor of cost-shifting, and the high potential award, the court found that 75% cost-shifting was appropriate.

- ***Byers v. Illinois State Police*, 2002 WL 1264004 (N.D. Ill. 2002)**: In *Byers*, a sexual discrimination case, the court shifted up to 40% of the electronic discovery costs associated with plaintiff's request for emails that were maintained on backup tape that were no longer compatible with the Illinois State Police's email system. The total cost of the electronic discovery was between $20,000 and

$30,000. The court required the requesting party to pay for the licensing fees for the old email system ($8,000 per month) based mainly on the cost of the proposed search and the plaintiff's failure to establish that the search will likely uncover information. *Byers* at *12.

- ***American International Specialty Lines Insurance Company v. NWI-I*, 240 F.R.D. 401 (N.D. Ill. 2007):** Although this case did not involve electronic discovery, it adopted the test articulated in *Wiginton* to determine whether the costs associated with searching 19,000 boxes of documents should be shifted to the requesting party. *NWI-I* involved litigation between a plaintiff insurance company and the insured's successor entities to determine whether the predecessor's $100 million insurance policy covered environmental remediation costs incurred by the successor entities. After a brief review of the *Wiginton* factors, the court ordered the parties to split costs (*i.e.*, 50%) and to develop jointly a discovery plan for the efficient resolution of the discovery of 19,000 boxes of documents. *Id.* at 413 ("By requiring the parties to share the cost, this Court encourages the parties to come up with a discovery plan that is both time and cost efficient."). The court seemed to base its decision on equity, finding that it would be equally burdensome on both parties, the liquidating trustee of the insured, and the successor entities of the insured, to review 19,000 boxes of documents.

- ***OpenTV v. Liberate Technologies*, 219 F.R.D. 474 (N.D. Cal. 2003)**: In *OpenTV*, an intellectual property case, OpenTV requested Liberate to produce approximately 100 additional versions of source code for various Liberate products. Liberate objected on the basis of undue burden. The court agreed that the 150 hours that Liberate said it would take to extract source code from its database would be unduly burdensome. The court further found that the marginal utility of the discovery was high, thus, weighing against cost-shifting, because the source code was very likely to contain relevant information. The parties failed to identify the total cost of production but the court estimated that the cost of production was not disproportionate to the total potential recovery. Both parties had equal resources but the producing party was in a better position to control costs. In sum, even though the marginal utility test weighed against cost-shifting, the court required the parties to split the cost "because of the undue burden and expense involved in extracting and copying the source code. The Court finds that because the parties are similarly situated they are to split equally the cost of extraction of the source code from the database." *OpenTV* at 479.

- ***Zubulake*, 216 F.R.D. 280 (S.D.N.Y. 2003):** In *Zubulake*, an employment discrimination case, the court shifted 25% of the costs to the requesting party, Zubulake. Zubulake was a former equities trader who sought emails stored on UBS' backup tapes. Considering the marginal utility test, the court found that the marginal utility was potentially quite high because after a sample tape restoration, numerous relevant (but not determinative) emails were produced. With respect to the cost factors, the court found that the total cost of restoring the backup tapes was approximately $165,000 and damages were potentially between over $1

> million, according to the defendant, and $19 million, according to the plaintiff. Assuming the case to be a multi-million case, the court found that the cost of restoration not disproportionate to the cost of production. Thus, the cost factor weighed against cost-shifting. "Because some of the factors cut against cost shifting, but only *slightly so*-in particular, the possibility that the continued production will produce valuable new information-some cost-shifting is appropriate in this case, although UBS should pay the majority of the costs. There is plainly relevant evidence that is only available on UBS's backup tapes. At the same time, Zubulake has not been able to show that there is indispensable evidence on those backup tapes." *Zubulake*, 216 F.R.D. at 289.

Based on the foregoing, because the marginal utility of further discovery of the P and W drives is so low, and because the cost factors weigh strongly in favor of cost shifting, a 50/50 allocation of the electronic discovery costs associated with Phase 2 is more than fair.

III. CONCLUSION

WHEREFORE, Kmart hereby respectfully requests that the Court enter a protective order directing that at least 50% of the costs of the discovery of the P and W drives be borne by Global; and (ii) for such other and further relief as is just.

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Respectfully submitted,

KMART CORPORATION

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