

# **EXHIBIT A**

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: October 3, 2007  
) Hearing Time: 11:00 a.m.

**NOTICE OF MOTION**

PLEASE TAKE NOTICE that on **Wednesday, October 3, 2007, at the hour of 11:00 a.m.**, we shall appear before Judge Susan Pierson Sonderby, Courtroom 642, Everett McKinley Dirksen Building, 219 South Dearborn Street, Chicago, Illinois, or before any other judge who may be sitting in her place and stead, and shall present the **Motion of Kmart Corporation for Protective Order**, 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: September 27, 2007  
Chicago, Illinois

KMART CORPORATION

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

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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: October 3, 2007

Hearing Time: 11:00 a.m.

**MOTION OF KMART CORPORATION FOR PROTECTIVE ORDER**

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 relieving Kmart of the obligation to conduct a further search of its P drive and W drive relating to the claims asserted by Global Property Services, Inc. (“Global”). Alternatively, to the extent that the Court requires Kmart to conduct further searching of the P and W drives, Kmart seeks a protective order that will shift the cost of the search, review, and production of documents to Global.

To date, Kmart has expended significant resources to comply with the Court’s Memorandum Opinion, dated July 31, 2007 (the “July 31 Order”), which ordered Kmart “to the extent it has not already done so, perform a systematic search of all documents on its P-drive and W-drive.” July 31 Order, 49. However, despite its efforts, Kmart has not completed the task of searching the over 3 billion pages of text on these drives. Further efforts to comply with the Court’s July 31 Order will subject Kmart to undue burden and expense.

Specifically,

- Despite three weeks of searching for documents at an approximate cost of \$60,000, the search to date has yielded documents with little relevance to Global’s claim;
- The vast majority of the documents that even mention Global contain irrelevant

and/or confidential information, and redacting such information will be an unduly burdensome and cost prohibitive task; and,

- Completion of the search (not including outside counsel's review for responsiveness and privilege) will take at least an additional six weeks at a cost of approximately \$20,000 per week.

## I. FACTUAL BACKGROUND

### A. KMART'S P & W DRIVES

1. It is a massive endeavor to systematically search the P drive and W drive for documents relating to this litigation pursuant to the Court's order. Kmart operates approximately 1,400 retail stores in 49 states, Guam, Puerto Rico, and the U.S. Virgin Islands, and employs over 100,000 associates. The P drive is a public drive, *i.e.* a shared repository of information accessible by all Kmart employees. *See* July 31 Order, 11. The P drive holds mainly office documents (*e.g.*, Word files, Excel spreadsheets, PowerPoint files), *not e-mail* in its native format. *Id.* at 11-12. As of August 2007, the P drive held 2,815,167,415,168 bytes of data, or over 2.8 terabytes, consisting of approximately 3.6 million files. *See* Declaration of George Mesires, attached hereto as Exhibit A, ¶2.

2. The W drive is a working group drive, and is similar to the P drive but more secure. *See* July 31 Order, 12. It is designed to allow Kmart employees within a department to share data. *Id.* Like the P drive, the W drive holds primarily office documents (*e.g.*, Word files, Excel spreadsheets, PowerPoint files), *not e-mail* in its native format. *Id.* As of August 2007, the W-drive held 3,416,977,409,137 bytes of information, or approximately 3.4 terabytes of information, consisting of over 36 million files. *See* Exhibit A (Declaration of George Mesires), ¶2.

3. Thus, the universe of data ordered to be searched is over 6 terabytes of information, or the equivalent of over 3 billion pages of text. “To put things in perspective (courtesy of Microsoft), a [single] terabyte holds a 100-byte record for every person on earth, as well as an index of those records; or a JPEG-compressed pixel for every square meter of land on earth, which is plenty to create a high-resolution photograph; or 1 billion business letters, which would fill 150 miles of bookshelf space; or 10 million JPEG images, which would provide 10 days and nights of continuous video.” Harry Newton, *Newton’s Telecom Dictionary*, 16th ed. (emphasis added).

**B. THE SEARCH CONDUCTED TO DATE.**

4. From approximately August 10 to August 31, 2007, Kmart had a team of seven contract attorneys, all with extensive document review experience, searching the massive amount of information on the P drive and W drive to locate documents that may relate to this litigation. *See* Exhibit A (Declaration of George Mesires), ¶3. Kmart has incurred approximately \$60,000 to date -- approximately \$16,240 per week in fees, exclusive of overtime pay in connection with this project. *Id.* at ¶3.

5. Generally, Kmart employed the following search methodology to conduct the search:

- Kmart provided the contract attorneys with a list of search terms such as “Global Property,” “Idzior,” and “Exterior Maintenance.”
- Kmart identified all of the folders in the P and W drives to determine which folders could include information relevant to this litigation. Kmart identified 51 folders to be searched.
- The contract attorneys were individually assigned specific folders and search terms, and conducted searches using the Windows search tool as well as manually reviewing a folder’s contents. For example, some folders were so small that a manual review was deemed to be more efficient than a computer

search, which allowed the team to quickly review clearly non-responsive folders (e.g., the “Food Safety” folder of the W drive).

*Id.* at ¶4.

6. Despite running searches for several weeks, the search is not yet complete. *Id.* at ¶5. A typical search takes a few hours. Other searches take significantly longer depending on the folder size, with some searches taking as much as several days. *Id.* In order to accelerate the process, the contract attorneys each used multiple computers to run additional simultaneous searches. *Id.* Several large searches returned many gigabytes of data. *Id.*

7. Although the vast majority of searches yielded no responsive information (*id.* at ¶6), the search term “Global Property” has returned facially responsive documents. *Id.* To date, at least 9.1 gigabytes of data, consisting of approximately 3,000 files and over 1.5 million pages, have included the search terms. *Id.* Kmart has not completed a thorough review for responsiveness and privilege. *Id.* However, based on the review of the responsive documents collected to date, virtually all of the documents are large financial spreadsheets with the term “Global Property Services” identified in a few line items among many line items that are not relevant to the issues raised in this dispute. *Id.*

8. Most of these spreadsheets appear to be akin to the paid history report of exterior maintenance services previously produced by Kmart (Bates number KMRT0000016555) (the “Paid History Report”), which contained approximately 33.8 MB of information, or about 8,000 pages. *Id.* at ¶7. However, in contrast to the raw data found on the documents in the P and W drives, the Paid History Report was generated at the request of counsel to filter out the non-responsive and confidential information relating to vendors for services and/or products other than exterior maintenance. *Id.*

9. However, the limited review that Kmart has been able to conduct reveals that the documents identified by the systematic search appears to be of limited, if any, value. For example, one responsive file found in the W drive is an Excel file comprised of two spreadsheets -- one is labeled "Cleaning;" the other is labeled "Air Cond[itioning]." *Id.* at ¶8. This single Excel file is over 1,300 pages. *Id.* The two spreadsheets, consisting of approximately 23,000 rows, are a paid history report for Cleaning and Air Conditioning vendors. Each row represents an invoice. *Id.* Thus, the spreadsheet shows the payment detail for approximately 23,000 invoices submitted to Kmart by air conditioning vendors and cleaning vendors. *Id.* Among the approximately 23,000 invoices is a sole, purported Global invoice (row 9,293 of the Air Conditioning spreadsheet). *Id.* The document reflects that Kmart paid a purported Global Property Services' invoice, dated 7/15/2001, in the amount of \$209.89 for store number 7581. *Id.* However, this invoice is not included as part of Global's claim. As we know, Global was a provider of exterior maintenance services, not air conditioning services. Either the vendor payment code or the payee information for this invoice was likely mis-keyed. Thus, the only reference to Global, which appears to be in error, is in *one line* of a 1,300 page document.

10. Because of the vast scope of this project and the expected technological challenges relating to the transfer of the responsive documents to outside counsel for a responsiveness and privilege review, Kmart was not able to meet the August 31, 2007 deadline agreed to between the parties. *See* Stipulation and Agreed Order, entered on August 16, 2007 (extending the deadline to search the P and W drives to August 31, 2007). On August 31, 2007, counsel for Global agreed that Kmart could temporarily suspend its search of the P and

W drives while the parties focused their efforts on a mediation session held on September 10, 2007. If the mediation had been successful, this motion would be moot. However, the mediation was not successful and thus, discovery continues. *See* Stipulation and Agreed Order, entered on September 10, 2007 (extending the deadline to search the P and W drives to September 11, 2007 barring further agreement by the parties).

11. On September 21, 2007, pursuant to Fed. R. Civ. P. 26(c), and Local Rule 37.2 of the Northern District of Illinois, Kmart conferred with Global in good faith in an effort to resolve the dispute without court action. *See* Exhibit A (Declaration of George Mesires), ¶10. Kmart's counsel requested that Global agree to a permanent suspension of the search of the P and W drives. *Id.* Global would not agree to a permanent suspension of the search. *Id.* Alternatively, Kmart's counsel requested that Global pay the costs of the search, review, and production of the documents. *Id.* Global's counsel would not agree to this request. *Id.*

12. As Kmart advised the Court during the status hearing on September 11, 2007, and as discussed below, completing the search of the P and W drives will involve undue burden and expense. Thus, the discovery should not be had.

## II. ARGUMENT

### A. RELEVANT STANDARDS.

13. Federal Rule of Civil Procedure 26(c) governs the issuance of protective orders. Rule 26(c) provides, in relevant part, that “for good cause shown, the court in which the action is pending . . . may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense . . . .” Fed. R. Civ. P. 26(c). The Court has discretion in determining whether to grant a protective order. *Williams*

*v. Chartwell Fin. Servs.*, 204 F.3d 748, 758-59 (7th Cir. 2000).

14. 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. Specifically, the amendments added a provision to address the discovery limitations on electronically stored data. Rule 26(b)(2)(B) provides:

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.

Fed. R. Civ. P. 26(b)(2)(B).

Thus, Kmart bears the initial burden to demonstrate that the electronic data on the P and W drives is not reasonably accessible because of undue burden or cost. After Kmart makes that showing, as it does below, the burden shifts to Global to demonstrate that good cause exists for the discovery to continue, subject to the limitations of Rule 26(b)(2)(C). If Global can not show that good cause exists, the discovery should not be had.

15. Global may only obtain the discovery by “showing good cause considering the limitations of Rule 26(b)(2)(C) that balance the costs and potential benefits of discovery.” *See* Fed. R. Civ. P. 26(b)(2)(C), Advisory Committee Notes, 2006 amendments; *see also*, *PSEG Power N.Y., Inc. v. Alberici Constructors, Inc.*, 2007 WL 2687670 at \*10-\*11 (N.D.N.Y. Sept. 7, 2007); *W.E. Aubuchon Co. v. Benefirst, LLC*, \_\_\_ F.R.D. \_\_\_, 2007 WL 1765610, at \*4 (D. Mass. Feb. 6, 2007).

16. In making the determination of whether the requesting party has established good cause, the Court must consider, *inter alia*, whether: (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; ... or (iii) the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues." Fed. R. Civ. P. 26(b)(2)(C); *see also W.E. Aubuchon Co.* at \*4.

17. As the Advisory Committee Notes explain, the decision whether to require a responding party to search for and produce information that it has showed to be not reasonably accessible depends not only on the burdens and costs, but also on whether those burdens and costs can be justified in the circumstances of the case. Thus, to the extent not covered by the Rule 26(b)(2)(C) factors cited above, the Court should also consider:

(1) the specificity of the discovery request; (2) the quantity of information available from other and more easily accessed sources (3) the failure to produce relevant information that seems likely to have existed but is no longer available on more easily accessed sources; (4) the likelihood of finding relevant, responsive information that cannot be obtained from other, more easily accessed sources; (5) predictions as to the importance and usefulness of the further information (6) the importance of the issues at stake in the litigation; and (7) the parties resources.

Fed. R. Civ. P. 26(b), Advisory Committee Notes, 2006 amendments; *see also W.E. Aubuchon Co.* at \*5.

18. These factors are derived mainly from the factors considered in pre-amendment, cost-shifting case law, such as *Rowe Entertainment Inc. v. William Morris Agency, Inc.*, 205



F.R.D. 421 (S.D.N.Y. 2002) and *Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309 (S.D.N.Y. 2003), including the leading case from this district, *Wiginton v. CB Richard Ellis, Inc.*, 229 F.R.D. 568, 572-73 (N.D. Ill. 2004) (adopting factors set forth in *Rowe* and *Zubulake* and adding a factor that considers the importance of the requested discovery in resolving the issues of the litigation). *See PSEG*, 2007 WL 2687670, \*11 at fn 6. Under *Wiginton*, a pre-amendment case from the Northern District of Illinois, the marginal utility test was considered the most important factor. *See Wiginton*, 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.”).

19. Pursuant to Rule 26(b)(2)(C), the court must 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. Moreover, a requesting party’s willingness to share costs may be considered by the court in determining whether there is good cause. *Id.* “But the producing party’s burdens in reviewing the information for relevance and privilege may weigh against permitting the requested discovery.” *Id.*

**B. APPLICATION IN THIS CASE.**

**1. THE DOCUMENTS ON THE P AND W DRIVES ARE NOT REASONABLY ACCESSIBLE BECAUSE OF UNDUE BURDEN AND COST.**

20. Courts have held that the “time and expense required to retrieve documents and electronic data depends primarily on whether such data “is kept in an accessible or inaccessible format ... [furthermore,] [w]hether electronic data is accessible or inaccessible turns largely on the media on which it is stored.” *Aubuchon* at \*3 citing *Zubulake v. UBS Warburg*, 217 F.R.D. 309, 318 (S.D.N.Y. 2003). Electronic data that is stored as “active on-line data,” such as servers, is generally considered “accessible.” *Aubuchon* at \*3 citing *Zubulake* at 318-20. “That the data is deemed “accessible” does not mean it is readily obtainable, “the time it takes to actually access [such] data ranges from milliseconds to days, [however] the data does not need to be restored or otherwise manipulated to be usable.” *Id.* at \*4 citing *Zubulake* at 320.

21. The *Aubuchon* court used *Zubulake*’s “media based analytical approach in considering whether electronic data is “reasonably accessible” for purposes of the new Rule 26(b)(2)(B).” *Aubuchon* at \*4. In *Aubuchon*, the court held that even though the requested records – approximately 3,000 medical benefit claim records – were stored in an accessible format (on a server), the records were not reasonably accessible within the meaning of Rule 26(b)(2)(B) because the retrieval of the records would involve undue burden or costs. *Aubuchon* at \*4 (holding that the requested documents, even though stored on an accessible server, were not “reasonably accessible” because retrieval would cost at most \$80,000).

22. Here, even though Kmart’s P and W drives are accessible servers, the burden and cost of retrieving the documents render the documents not “reasonably accessible” under

Rule 26(b)(2)(B). To date, Kmart has spent approximately 840 attorney hours searching for responsive documents among the approximately 39 million files (over 6 terabytes of information) in the P and W drives at a cost of approximately \$60,000. *See* Exhibit A (Declaration of George Mesires), ¶3. Moreover, the search of the P and W drives is not complete. Kmart estimates that it will take at least six additional weeks to conduct the search at a cost of approximately \$20,000 per week, not including the review and redaction process. *See* Exhibit B (Declaration of George Mesires) at ¶9.

23. The review and redaction process will be burdensome and costly. As noted above, most of the documents identified to date are large financial spreadsheets with the term “Global Property Services” found in just a few lines. To date, there have been approximately 3,000 files identified as having a search term somewhere in the document. First, counsel must manually review each document to determine whether it is relevant to the litigation. Second, counsel must manually redact the irrelevant and/or confidential data in the documents. This task will be labor-intensive because, based on the documents found to date, the vast majority of each document must be redacted. Kmart estimates that the review and redaction process may take several months and cost well in excess of \$100,000. *Id.* at ¶9.

24. Based on the foregoing, Kmart submits that any relevant information relating to Global’s claims residing on the P and W drives is not reasonably accessible.

2. **GLOBAL CANNOT DEMONSTRATE THAT GOOD CAUSE EXISTS TO CONTINUE THE DISCOVERY OF THE P & W DRIVES BECAUSE THE COSTS FAR OUTWEIGH THE BENEFITS OF THE DISCOVERY.**

25. Global cannot demonstrate that good cause exists to continue the search of the P and W drives because the costs associated with the search will far exceed the benefits of the

discovery. The Advisory Committee Notes identifies seven factors to be considered to determine whether a responding party should be required to search for and produce information that is not reasonably accessible. *See* paragraph 16, *supra*. Five of the seven factors (one being neutral) weigh against requiring Kmart to continue to search for and produce documents from the P and W drives. These factors are considered below:

**i. The specificity of the discovery request.**

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.”). As discussed above, because Kmart is not looking for a particular document, Kmart conducted its search by using unique search terms to locate documents relevant to this litigation. Many search terms result in no responsive documents; other search terms return gigabytes of data. Coupled with the vastness of the P and W drives, the broad search has resulted in a slow and costly search.

**ii. The quantity of information available from other and more easily accessed sources.**

As discussed above, the vast majority of the documents found to date 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. Moreover, Kmart has produced over 25,000 documents during this litigation. Thus, a vast amount of responsive information has been produced to Global from other and more easily accessed sources.

iii. **The failure to produce relevant information that seems likely to have existed but is no longer available on more easily accessed sources.**

Global contends that Kmart failed to produce certain documents that purportedly existed on its P and W drives either because they were deleted or because Kmart failed to search for the documents. *See* July 31 Order at 19-20. Even if Kmart failed to produce relevant information from the P and W drives, Global has not, and will not, be prejudiced because the very documents that Global claims Kmart failed to produce *have already been produced to Global from a third party*. *See* July 31 Order, 43-44. The documents that Global contends were not produced by Kmart were produced to Global from the purloined laptop computer of a former Kmart employee, Tim Slimp, which Mr. Slimp failed to return when he was terminated by Kmart. Thus, there is no evidence that Kmart has failed to produce any documents that seem likely to have existed but are no longer available on more easily accessed sources.

iv. **The likelihood of finding relevant, responsive information that cannot be obtained from other, more easily accessed sources.**

There is little likelihood that the search will result in relevant, responsive information that has not already been produced to Global. In pre-2006 amendment case law, this factor – the marginal utility factor – was considered by several courts, including courts in this district, to be the most important factor in the analysis. *See Wiginton*, 229 F.R.D. at 572-73. As noted above, the P and W drives contain no emails in native format. Thus, no emails will be recovered from the P and W drives in native format. Moreover, based on the vast majority of the documents identified during the search to date, it is not likely that relevant, responsive information will be found that has not already been produced to Global in the form of the Paid History Report. Thus, the marginal utility of continuing to search the P and W drives is low.

v. **Predictions as to the importance and usefulness of the further information.**

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. For example, the spreadsheets identified in paragraph 9, *supra*, contain one purported Global invoice out of approximately 23,000 invoices. However, the invoice appears to be mis-keyed as the invoice is not subject to Global's claim against Kmart. Moreover, the vast majority of the documents identified to date 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 under two percent of Global's total claim against Kmart. The bulk of Global's claim against Kmart lies in Global's tort theories. However, to date no documents to support Global's tort claims have been identified in the P and W drives, nor are any likely to be found. Indeed, in its July 31 Order, the Court observed that the extrinsic evidence relied upon by Global to support its claims do not support Global's tort theories. *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.").

vi. **The importance of the issues at stake in the litigation.**

Several courts have not given this factor much weight and consider it neutral. *See, e.g., Wiginton*, 229 F.R.D. at 576 citing *Zubulake v. UBS Warburg LLC*, 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) (finding that a potential securities fraud class action does not raise the kind of public policy issues that might affect cost-shifting.). Here, Kmart submits that 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 parties resources.**

Admittedly, Kmart's resources are likely in excess of Global's resources.

26. In addition, the Advisory Committee Notes indicate that a requesting party's willingness to share costs may be considered by the court in determining whether there is good cause to require the requested discovery. Fed. R. Civ. P. 26(b), Advisory Committee Notes, 2006 amendments. Notably, Global failed to agree to share any of the costs relating to the proposed discovery, which militates against the discovery. *See* Exhibit A (Declaration of George Mesires), ¶10.

27. The Court may also consider the Kmart's burden in reviewing the information for relevance and privilege. *Id.* As discussed above, Kmart estimates that it will take approximately six additional weeks to search for the documents at a cost of approximately \$20,000 per week. Kmart estimates that it may cost well in excess of \$100,000 in additional attorneys' fees to review and redact the documents that contain one of search terms if Kmart is required to continue the search of the P and W drives.

28. In sum, all of the relevant factors (except for the resources factor) considered by courts to determine whether discovery should be limited or conditioned weigh in Kmart's favor and against Global. The burden and expense of the proposed discovery greatly outweighs its

likely benefits. Thus, pursuant to Rule 26(b)(2)(C), the Court must limit or condition the extent of the discovery.

### III. CONCLUSION

WHEREFORE, Kmart hereby respectfully requests that the Court enter a protective order: (i) relieving Kmart of the obligation to conduct a further search of its P drive and W drive relating to the claims asserted by Global, or alternatively, (ii) directing that the costs of the discovery of the P and W drives be borne by Global; or (iii) for such other and further relief as is just.

Dated: September 27, 2007

Respectfully submitted,

KMART CORPORATION

/s/ George Mesires

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# EXHIBIT A

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF ILLINOIS

EASTERN DIVISION

In re:

KMART CORPORATION,

Debtor.

Case No. 02 B 02474

Honorable Susan Pierson Sonderby

**DECLARATION OF GEORGE MESIRES**

I, George Mesires, having personal knowledge of the facts contained in this declaration and being competent to testify to them, hereby state as follows:

1. I am an attorney with the law firm of Barack Ferrazzano Kirschbaum & Nagelberg LLP, Kmart Corporation's ("Kmart") counsel in this matter.

2. Since early August 2007, I have conferred with Kmart's in-house counsel and Discovery Manager to develop a search methodology designed to systematically search Kmart's P and W drives for documents relating to the claims of Global Property Services, Inc. ("Global"). Together the P and W drives hold over 6 terabytes of data. As of August 2007, the P drive held 2,815,167,415,168 bytes of data, or over 2.8 terabytes, consisting of approximately 3.6 million files. As of August 2007, the W drive held 3,416,977,409,137 bytes of information, or approximately 3.4 terabytes of information, consisting of over 36 million files.

3. From approximately August 10 to August 31, 2007, Kmart had a team of seven contract attorneys, all with extensive document review experience, searching the massive amount of information on the P drive and W drive to locate documents that

may relate to this litigation. Kmart has incurred approximately \$60,000 to date -- approximately \$16,240 per week in fees, exclusive of overtime pay.

4. Generally, Kmart employed the following search methodology to conduct the search:

- Kmart provided the contract attorneys with a list of search terms such as “Global Property,” “Idzior,” and “Exterior Maintenance.”
- Kmart identified all of the folders in the P and W drives to determine which folders could include information relevant to this litigation. Kmart identified 51 folders to be searched.
- The contract attorneys were individually assigned specific folders and search terms, and conducted searches using the Windows search tool as well as manually reviewing a folder’s contents. For example, some folders were so small that a manual review was deemed to be more efficient than a computer search, which allowed the team to quickly review clearly non-responsive folders (*e.g.*, the “Food Safety” folder of the W drive).

5. Despite running searches for several weeks, the search is not yet complete. A typical search takes a few hours. Other searches take significantly longer depending on the folder size, with some searches taking as much as several days. In order to accelerate the process, the contract attorneys each used multiple computers to run additional simultaneous searches. Several of these large searches have returned many gigabytes of data. It is expected to take approximately six additional weeks to complete the search of the P and W drives.

6. Although the vast majority of searches yielded no responsive information, the search of the term “Global Property” has returned facially responsive documents. To date, about 3,000 files consisting of 9.1 gigabyte of data – or over 1.5 million pages of Excel spreadsheets – has included the search terms. Kmart has not conducted a thorough review for responsiveness and privilege. However, based on the review of the responsive documents collected to date, virtually all of these documents are large financial spreadsheets with the term “Global Property Services” identified in a few line items among many line items that are not relevant to the issues raised in this dispute.

7. Most of these spreadsheets appear to be akin to the paid history report of exterior maintenance services previously produced by Kmart (Bates number KMRT0000016555) (the “Paid History Report”) which contained approximately 33.8 MB of information, or about 8,000 pages. However, in contrast to the raw data found on the documents in the P and W drives, the Paid History Report was generated at the request of counsel to filter out the non-responsive and confidential information relating to vendors for services and/or products other than exterior maintenance.

8. For example, one responsive file found in the W drive is an Excel file comprised of two spreadsheets -- one is labeled “Cleaning;” the other is labeled “Air Cond[itioning].” This single Excel file is over 1,300 pages. The two spreadsheets, consisting of approximately 23,000 rows, are a paid history report for Cleaning and Air Conditioning vendors. Each row represents an invoice. Thus, the spreadsheet shows the payment detail for approximately 23,000 invoices submitted to

Kmart by air conditioning vendors and cleaning vendors. Among the approximately 23,000 invoices is a sole, purported Global invoice (row 9,293 of the Air Conditioning spreadsheet). The document reflects that Kmart paid a purported Global Property Services' invoice, dated July 15, 2001, in the amount of \$209.89 for store number 7581. This invoice is not included as part of Global's claim against Kmart. Thus, the vendor payment code or the payee information was likely mis-keyed for this invoice.

9. The review and redaction process will be burdensome and costly. As noted above, most of the documents identified to date are large financial spreadsheets with the term "Global Property Services" found in just a few lines. To date, there have been approximately 3,000 files identified as having a search term somewhere in the document. First, counsel must manually review each document to determine whether it is relevant to the litigation. Second, counsel must manually redact the irrelevant and/or confidential data in the documents. This task will be labor-intensive because, based on the documents found to date, the vast majority of each document must be redacted. I estimate that the review and redaction process may take several months and cost well in excess of \$100,000.

10. On September 21, 2007, pursuant to Fed. R. Civ. P. 26(c), and Local Rule 37.2 of the Northern District of Illinois, I conferred with Global's counsel, Brion Doyle, by telephone in good faith in an effort to resolve the dispute without court action. I requested that Global agree to a permanent suspension of the search of the P and W drives. Global's counsel would not agree to a permanent suspension of the

search. I further requested that Global agree to bear the costs of the search, review and production of the documents. Global's counsel would not agree to this request.

11. Despite my good faith consultations with opposing counsel, we have been unable to reach an accord.

1. I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on September 27, 2007.

/s/ George Mesires  
George Mesires

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: October 3, 2007

Hearing Time: 11:00 a.m.

**ORDER ON MOTION OF KMART CORPORATION**  
**FOR PROTECTIVE ORDER**

This matter having come before the Court on Motion of Kmart Corporation (“Kmart”) For Protective Order, proper notice having been given, and the Court being fully advised in the premises, IT IS HEREBY ORDERED THAT Kmart shall be relieved of the obligation to conduct a further search of its P drive and W drive relating to the claims asserted by Global Property Services, Inc.

Dated:

Enter:

\_\_\_\_\_  
United States Bankruptcy Judge