

EXHIBIT F

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DESIGNATED AS CONFIDENTIAL PURSUANT TO AGREED PROTECTIVE ORDER

January 12, 2009

VIA EMAIL & FIRST CLASS MAIL

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Re: *In re Kmart Corp.* – Claims of Global Property Services, Inc. (“Global”)

Dear Rich and Brion:

We have reviewed Brion Doyle’s letter to George Mesires, dated September 15, 2008, and the accompanying proposal submitted by LDiscovery/D.C. Estrada LLC (“LDiscovery’s Proposal”) concerning the search of Kmart’s P and W drives.

LDiscovery’s Proposal is comprised of four substantive sections:

1. Collection
2. Keywords and Statistical Sampling
3. Pre-Search and Production in Searchable Database Form
4. Keyword Searching and E-Discovery Production

We respond to each section, below. In section II of this letter, we set forth a proposal developed by Kmart’s electronic discovery expert, Thomas Avery of Precision Discovery, LLC (“Precision Discovery”). As discussed below, Kmart stands on its contention that the information residing on the P and W drives is not reasonably accessible because of undue burden or cost. Fed. R. Civ. P. 26(b)(2)(C); *see also The Sedona Principles, Second Edition* (2007), Cmt. 8.b. (“The 2006 Amendments to the Federal Rules limits the obligation to search and produce from sources of relevant electronically stored information that is not reasonably accessible due to undue burden or cost.”); *see also W.E. Aubuchon Co. v. Benefirst, LLC*, 245 F.R.D. 38 (D. Mass. 2007). In any event, further discovery from these drives should be at Global’s expense, and only under the supervision and direction of Kmart and Precision Discovery.

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I. LDiscovery's Proposal

Section 1: Collection

First, as a threshold matter, LDiscovery's Proposal to attach Universal Serial Bus ("USB") storage devices locally to each of the 10 servers is not feasible. Kmart will not permit direct access to the file servers because of the risk of interfering with the operations of the servers, which are critical to both Kmart's and Sears'¹ business operations. Any malfunctioning of the existing servers could have catastrophic results to Kmart and Sears.

Second, LDiscovery's Proposal understates the complexity of Kmart's network infrastructure. Kmart's network relating to the P and W drives is essentially two networks inside of the data center. First, there is a 1 gigabit per second ("GBPS") fiber optic network, which is utilized by the servers to access the storage area network ("SAN") through Host Bus Adaptors. Second, there is a 100 megabit per second ("MBPS") network, which users utilize to access the file servers. The fiber optic network is restricted to the file servers only and is not accessible directly by the user. Therefore, file access, including data collection, must be accomplished across the 100 MBPS network, which, as noted above, handles all of Kmart's and Sears' user access. Because the 100 MBPS network is already in high demand by Kmart's and Sears' clients (and internal processes) we are concerned that large data movement, such as copying 9.1 terabytes of data, will negatively impact the network's availability to clients and thus, adversely effect Kmart's and Sears' daily business operations.

Each of Kmart's file servers "see" selected zones of the SAN by utilizing the Windows 2000 Distributed File System and the fiber optic backbone. In other words, no single server can see all of the data as it relates to the P and W drives because the data residing in those network shares is divided into different zones. Each of the 10 file servers must be targeted to acquire data related to the P and W network shares, which places a load across all 10 servers, as well as consuming network bandwidth.

LDiscovery estimates that it would take one week to collect 9.1 terabytes of data, which we believe is optimistic and not possible. Kmart's expert advises that, typically, approximately 1.5 terabytes of data can be copied across a 100 MBPS network per week, assuming 5 days of network access and no unforeseen issues. For this project, assuming all 9.1 terabytes of information would be collected, Kmart's expert estimates that data collection would take no

¹ Although the network supports both Kmart and Sears, for ease of reference, the network will be referred to as "Kmart's network." Notwithstanding this label, it should be understood that the IT network described in this letter supports Sears Holding Corporation, which is the parent company of both Kmart Corporation and Sears, Roebuck & Co., the third largest broadline retailing company in the United States.

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less than 9 weeks (assuming network access was available 5 days per week). However, as explained below, network access for data collection is available only two days per week (Saturday and Sunday) and will be limited to evening hours during the week between backup cycles.

Section 2: Keywords and Statistical Sampling

LDISCOVERY states: "Determination of what to sample should be based upon two, related factors: 1) a sample size of statistical significance; and, 2) the manner in which data is organized on the P and W drives." LDISCOVERY makes the erroneous assumption that the data stored on the network shares is organized by region, state or store, which would make the categorization of the data easier to search. In fact, the data is not stored in this manner.

Based on this erroneous assumption, LDISCOVERY's sampling proposal is flawed. First, LDISCOVERY fails to explain why any sampling methodology will be effective. Second, LDISCOVERY fails to explain why the data sampled will be relevant to this litigation. Third, LDISCOVERY fails to demonstrate that the remaining (non-sampled) data on the P and W drives will bear similar results to the proposed sample data set.

The size of sampled data has no relevancy to the amount of responsive documents that will be discovered in a sample set. LDISCOVERY's Proposal assumes that the random sample data set of 100 gigabytes ("GB") will accurately represent the remainder of the 9.1 terabytes of data. LDISCOVERY has not demonstrated the logic as to why a random sample of 100 GB will bear any statistical relevance to the remaining 9.1 terabytes of data contained on these network shares.

With respect to the data's organization, the data is not stored by region, state or store. To make the manner of organization at all relevant, operational knowledge of the manner in which the data is stored on the SAN is required. Therefore, LDISCOVERY's assumption that LDISCOVERY can derive meaningful results from a random sample of 100 GB of data is without merit.

With respect to LDISCOVERY's keyword search proposal, essentially what LDISCOVERY is proposing is the use of a forensic tool (such as EnCase) to perform a search across a sample data set to generate a bookmark report. A bookmark report is not probative because such a report simply shows a list of files that are responsive to keywords, without indicating *why* the file was marked as responsive. Additionally, since only a bookmark report would be generated by LDISCOVERY's Proposal, there is no ability to look at the actual file that registered a hit.

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Section 3: Pre-Search and Production in Searchable Database Form

As an alternative to its keyword and statistical sampling proposal, LDiscovery proposes a full electronic discovery processing solution whereby the collected data is processed to build a search index, extract metadata, deduplicate and apply keywords to the index to show responsive files.

This proposal is also flawed. First, it is premised on the same faulty assumption that a sample set of 100 GB of data will represent the remainder of the data stored on the P and W network shares. LDiscovery has not demonstrated any logic or methodology that would show why any results derived from the sample set will represent the rest of the data on the network shares.

Second, because the keywords relevant to this matter are relatively generic (*e.g.*, “global” or “gps”), we are concerned that a significant number of the keyword hits will be false-positives. Indeed, based on our prior experience using such keywords, the words “global” and “GPS” are common and occur in documents that have no relevance to this matter.

Third, LDiscovery grossly understates the actual cost associated with this process. LDiscovery indicates that they will “pre-search” data at \$150 per gigabyte. They will “produce” responsive data at \$700 per gigabyte and host the “produced” data at \$60 per gigabyte. The proposal does not identify whether the “produced” data will be in native file or TIFF format, which can significantly impact the price because of the disparity in file sizes associated with each format. If the responsive files are kept in native format for hosting and review, then there will be an additional cost to convert those native files to TIFF format for production.

LDiscovery estimates that 5 GB of data from the sample data set will be responsive to this process. However, LDiscovery provides no support why it believes only 5 GB will be responsive. As discussed above, because keywords relevant to this matter are somewhat generic, we believe that the documents responsive to the keywords will likely be much greater than 5 GB per 100 GB.

Further, LDiscovery only provided the estimated costs for *100 GB of data*. Because of the flaws identified in LDiscovery’s methodology discussed above, we believe that ultimately all 9.1 terabytes of data would have to be subject to LDiscovery’s proposed process. Based on LDiscovery’s fee structure, *supra*, the fees associated with running this proposal against the entire 9.1 terabyte corpus of data would be approximately as follows:

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Pre Searching 9.1 TB @ \$150/GB	=	\$1,365,000
Producing 455 GB ² of data @ \$700/GB	=	\$318,500
Hosting 455 GB of data @ \$60/GB per month	=	\$27,300 (per month)
		<u>At least, \$1,710,800</u>

Further, LDiscovery fails to mention other costs associated with this proposal. First, LDiscovery fails to mention user access fees, such as license fees, which are typically assessed for online review environments. Second, LDiscovery's Proposal fails to identify whether document production fees are included, which are typically assessed in e-discovery productions. Third, and perhaps most significant, LDiscovery fails to mention that Kmart would incur legal fees associated with the privilege and responsiveness review of the hosted data.

Section 4: Keyword Searching and E-Discovery Production

As an alternative to the two approaches discussed above, LDiscovery proposes a third alternative, which involves the use of a forensic tool (such as EnCase) to search the data. However, instead of generating a bookmark report (discussed above), the actual files would be exported by the forensic tool. The results of this process will simply yield a folder containing all of the native files that were exported from the forensic tool. Thus, if there are 10,000 responsive files, the files will be exported to a folder, which would then be processed with an electronic discovery tool and hosted in a database for review.

Again, this proposal is flawed because it is premised on the same faulty assumption that a sample set of 100 GB of data will represent the remainder of the data stored on the P and W network shares. LDiscovery has not demonstrated any logic or methodology that would show why any results derived from the sample set will represent the rest of the data on the network shares.

The actual methodology suggested by LDiscovery in this section is not clear. However, LDiscovery states that this method will take longer to search than the method in Section 3 (above) because any change in search terms or date ranges will require the search to be repeated. Apparently, the results of this process cannot be assessed until the data has gone through the entire process and hosted for review. If the results are not desirable, then the entire process must be repeated.

² 455 GB was derived by assuming that only 5 GB per 100 GB will be responsive. As discussed above, the responsive rate may be much higher, significantly raising the cost.

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A fundamental problem with this method is that using a forensic tool to perform the initial search is highly inefficient. Typically, forensic tools do not create a searchable index, which can be quickly searched and re-searched if the initial results are undesirable. Under LDiscovery's proposal, if it takes 8 hours to generate the results of a keyword search (as described in the proposal), which are then discovered to be flawed (*e.g.*, either inaccurate or too voluminous), then the results must be discarded, and the process started anew.

Conclusion:

LDiscovery's Proposal does not offer a valid methodology regarding the collection, processing and relevancy of the data contained on the P and W network drives. At no time does LDiscovery demonstrate why any of the referenced sample data will be relevant to this litigation or will represent the results that can be expected from searching the rest of the data contained on the P and W network shares. Even assuming that LDiscovery can develop a valid collection methodology (which it has not), there are significant flaws with the proposal that make it impractical. First, the costs associated with this proposal are grossly understated. Second, the proposal fails to take into account the impact that would be placed on Kmart's network as a result of the process.

II. Kmart's Proposal:

As noted above, Kmart retained an electronic discovery expert, Thomas Avery³ from Precision Discovery, to analyze Global's proposal and to determine whether it is technically feasible to identify and collect data from the P and W drives relating to Global's claims. Mr. Avery has determined that although it is likely technically possible to collect and identify data relevant to this litigation from the P and W drives, the cost of doing so is substantial. Precision Discovery's proposal, which is a five-phased approach, is presented below.

Phase 1: Data collection

Data relevant to this matter is likely contained in 38 folders that reside on the P and W network shares. These folders represent an approximate total of 2.865 terabytes of data. Approximately 400 GB of this data resides on two local servers (uskihfil5 and uskihsvpdfs03) while the remainder of the data resides on the SAN. The network environment is complex because the data resides on different types of storage devices.

If the data extraction is to proceed, Precision Discovery recommends introducing a single server into the Kmart network that has enough internal storage to acquire the 2.865

³ Mr. Avery's *curriculum vitae* is attached hereto as Exhibit A.

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terabytes in question by copying the data over the 100 MBPS network. The data acquisition could likely be accomplished utilizing Microsoft's RoboCopy, which would preserve the file system metadata related to each file. Due to the high volume of usage of the Kmart network in connection with the ordinary business operations of the company, data collection would be limited to weekends and off-hours as designated by the Kmart staff so as to have a minimal impact on Kmart's day-to-day operations and the daily backups of the network. Because of the limited time to conduct the data collection, Precision Discovery estimates that it will take approximately 10 weeks to acquire the targeted data. Of course, this estimate may vary due to network traffic, disk access or other unforeseen issues that could arise during the data acquisition. The storage server could likely be remotely accessed by Precision Discovery personnel, and will not likely require a physical presence of Precision Discovery staff.

Precision Discovery estimates that it will cost \$18,000 to acquire the data (excluding travel costs). The bases for the estimate is as follows:

Install/configure server	=	\$3,375 (15 hours @ \$225/HR)
Collect data and validation of same	=	\$14,625 (65 hours @ \$225/HR)

Phase 2: Searching

Precision Discovery recommends applying a search technology to the collected data set. First, an index would be compiled for each document to enable the data set to be readily searched. Unlike LDiscovery's Proposal, there is no significant incremental increase of time or cost associated with running additional keyword searches in a searchable index. The results of each search, including the underlying responsive document, would be available to Kmart's counsel for review. 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, original file system metadata intact, and be processed utilizing Precision Discovery's distributed processing platform.

Precision Discovery estimates that it will cost \$71,625 to index the acquired data population (indexing 2.865 terabytes at \$25/GB). As discussed above, 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.

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Phase 3: Data Processing

During the data processing 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. At this point, 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. We stress that this is only an estimate. The actual responsive data set will vary in size depending on the keywords applied to the data. If the keywords are broad and general, the size of the data set may exceed 50% and the cost of processing would increase accordingly. As discussed above, given the broad search terms relevant to this litigation, we are concerned that the volume of responsive data will be at the high end of the estimate.

Phase 4: Data hosting and review

If the search proceeds under Precision Discovery's proposal, the next 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.

Precision Discovery will charge \$50/GB per month for hosting the data. There will be a \$100 user license fee per month for each user that accesses the database. Based on the above estimates, if 10% of the data is responsive, then the monthly hosting fees would be \$14,325. If 50% of the data is responsive, then the monthly hosting fees would be \$50,137. Again, we stress that these are only estimates and that the actual size of the responsive data set depends largely on the keyword list.

Set forth below is the estimated cost for the review of the hosted data. For these purposes, we are assuming a 10% responsive rate for the collected data. As discussed above, the targeted data set is approximately 2.865 terabytes. If 10% of that data is responsive to keywords, then 286 gigabytes of data will need to be hosted for review. The estimate is based on the following assumptions, which Precision Discovery believes are conservative:

- 1 GB equals approximately 10,000 electronic pages (Precision Discovery has encountered data where a single gigabyte of data has contained 75,000 pages)
- Average document size is 3 pages. If the net result is 10,000 pages per GB, then there will be approximately 3,300 documents per GB (rounded down)

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- Based on 286 GB of data averaging 3,300 documents per gigabyte, the review population will be 943,800 documents.
- The average reviewer can review 400 documents per day (very high estimate). At that rate, it would take 2,359 days for a single reviewer to review this data set.
- Because it is not reasonable for a single reviewer to conduct the review, a team of reviewers would be required to review this data set. We assume 20 contract attorneys could review the entire data set in 117 review days.
- We assume a contract attorney billing rate of \$200 per hour and an 8 hour work day. The approximate cost of the review would be \$3,744,000.

We stress that this estimate is based on a conservative data set size of 10%. Further, this cost is in addition to all other electronic discovery costs associated with this proposal.

Phase 5: Production

Assuming the production proceeds to this phase, the final phase is document production in TIFF format. 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." Because of the numerous variables at issue, we do not provide an estimate for production.

Cost summary:

Cost of collection	\$18,000
Cost of indexing	\$71,625
Cost of data processing	\$171,000 (based on a 10% hit rate)
Cost of hosting data	\$14,325/ per month (estimated 4 months)
Cost of attorney review	\$3,744,000
Cost of production	<u>Unknown</u>

At least, \$4,061,925

As we argued in Kmart's motion for a protective order, we believe that the information residing on the P and W drives is not reasonably accessible because of undue burden or cost. See *W.E. Aubuchon Co. v. Benefirst, LLC*, 245 F.R.D. 38 (D. Mass. 2007) (holding that the requested documents were not reasonably accessible because retrieval would cost approximately \$80,000). Thus, if Global contends that further discovery is required from the P and W drives, Global should be responsible for the associated costs. Moreover, any further

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discovery must proceed pursuant to the discovery procedures set forth by Precision Discovery and be conducted by Kmart's IT staff and Precision Discovery because of the potential risks such procedures pose to the integrity of Kmart's network and Kmart's on-going business activities.

We look forward to the meeting between our technical experts before the end of the month. In the interim, if you have any questions about this letter or Precision Discovery's proposal, please call me.

Very truly yours,

Wendi Sloane by GRM

Wendi E. Sloane

Enclosure

cc: Diana Hsu
Deborah Ratterman
Stephen Burke
Thomas Avery
George Mesires