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

In re:	)	Case No. 02-02474
	)	(Jointly Administered)
KMART CORPORATION, et al.,	)	Chapter 11
	)	Hon. Susan Pierson Sonderby
Debtors.	)	
	)	
	)	

CREDITOR GLOBAL PROPERTY SERVICES, INC.'S RESPONSE IN OPPOSITION TO DEBTOR KMART CORPORATION'S MOTION TO SHIFT ELECTRONIC DISCOVERY COSTS

I. INTRODUCTION

This Court sanctioned Kmart and ordered Kmart to perform a systematic search of its P: and W: drives. Kmart now seeks to have Global share in the costs of Kmart's compliance with that order. To the best of Global's knowledge, this is the first time that a sanctioned party has sought to have the victim share in the costs of the punishment. Kmart seeks to accomplish this feat through the use of Federal Rule of Civil Procedure 26, a rule that has absolutely no application to these sanctions proceedings. If Kmart wins on its motion, Global will be forced to give up its court-ordered right to the information on the P: and W: drives, as it is unlikely that it will be able to pay for the hundreds of thousands of dollars in shifted costs. Even more fundamentally, if Kmart wins on its motion, it will – in practical terms – face no consequences for its multiple violations of this Court's Orders and it will have succeeded in causing Global to incur tens of thousands of dollars in legal fees over the course of four years without receiving the court-ordered discovery from Kmart.

In its motion, Kmart refers to the present situation as a "discovery dispute." In fact, after years of briefing and a three-day trial, there is little that remains in dispute with regard to Kmart's

conduct during discovery. We know that Kmart has failed to search and produce information from its P: and W: drives in direct violation of multiple court orders. This is not a discovery dispute. Rather, this is a party's attempt to avoid compliance with a direct order of the Court. It is telling that Kmart is forced to recast its years of discovery misconduct as a "discovery dispute," as this is the only way that it can even attempt to obtain relief under Rule 26. The reality is that Rule 26 does not apply in this instance, and Kmart would not be entitled to the relief it seeks even if that rule did somehow apply. For these reasons, Global respectfully requests that Kmart's motion be denied.

II. PROCEDURAL BACKGROUND

Four years after Kmart should have *produced* information from its P: and W: drives,[1] and a year and a half after the Court specifically ordered Kmart to produce the same information,[2] Kmart has finally agreed to a reasonable methodology to *begin searching* for information on its drives.

As the Court is well aware, Kmart unilaterally halted the court-ordered search of its P: and W: drives sometime in the fall of 2007. Kmart then filed a Motion for Protective Order from the Court's July 31 Order, seeking a ruling from the Court that it did not have to comply with the Court's July 31 Order, after it had already stopped complying with that order. Global opposed that motion on multiple grounds. Global also continues to maintain that Kmart is in contempt of the July 31 Order.

[1] Global served Kmart with its First Set of Interrogatories, First Set of Requests for Production of Documents, and First Set of Requests for Admission on February 14, 2005.

[2] The Court's Memorandum Opinion (the "July 31 Order") ordered Kmart to perform a systematic search of all documents on its P: and W: drives.

The Court refrained from ruling on Kmart's motion. On February 13, 2008, after Kmart's motion was fully briefed, the Court requested that the parties attempt to resolve Kmart's motion consensually. As Kmart notes in its briefing, both sides have since retained electronic discovery experts, and Global has incurred substantial additional costs in the past year.

In its most recent Motion for Protective Order, Kmart claims that it filed its First Motion for Protective Order (back on September 27, 2007) because it "was unable to conduct a systematic search of its P and W drives." Kmart's Mot. & Mem. to Shift Electronic Discovery Costs at 1 [Dkt. #31921]. That statement is not true.

Kmart of course now concedes that it can conduct a systematic search of its P: and W: drives. Implicit in that admission is Kmart's acknowledgement that its past efforts, as belated and brief as they have been, were inadequate and ineffective. Kmart does not explain why it did not retain an electronic discovery expert in the first place or why it instead hired contract attorneys to review documents from certain hand-picked folders at a rate of $20,000 per week.

The bottom line is that four years after its discovery responses were due, Kmart can now say, for the first time, that it has finally engaged the necessary resources and knows how to conduct a systematic search of its P: and W: drives. Kmart's education over the course of the past four years has come at great expense to Global. Kmart now wants to have Global pay for the costs of the search going forward. For the reasons set forth below, that request must be denied.

III. LAW AND ARGUMENT

Kmart's motion to shift the costs of electronic discovery is premised on Federal Rule of Civil Procedure 26. There is nothing in that rule, and there is no authority in Kmart's briefing, that allows a party to shift the costs of complying with an order of sanctions. Kmart, knowing this to be true, continues to posture its position as nothing more than a party involved in a

discovery dispute. Kmart does so in an awkward attempt to fit its request for relief within the framework of Rule 26 and avail itself of the protections contained therein. The reality is that Rule 26, including the provisions regarding cost-shifting, has no bearing on a party's compliance with a court's order. On this basis alone, Kmart's motion should be denied.

Rule 26 does not apply here. For the sake of argument, however, Global will apply that rule and the common law tests that have arisen from that rule to Kmart's motion to shift costs. Under those tests, the result is still the same: Kmart's motion must be denied.

A. RULE 26 DOES NOT AUTHORIZE THE COURT TO SHIFT THE COSTS OF KMART'S COMPLIANCE WITH THE COURT'S ORDER.

For the reasons set forth below, Kmart could not prevail on its motion to shift costs pursuant to Rule 26 of the Federal Rules of Civil Procedure even if its motion were properly brought under that rule. The more fundamental problem for Kmart is that Rule 26 does not contemplate or authorize the type of relief that Kmart seeks.

Rules 26(b)(2)(B) and (C) contemplate and require that parties comply with the following procedure in order to obtain cost-shifting relief:

1. Party A serves discovery requests.
2. Party B identifies sources of information by category or type that it is neither searching nor producing on the basis that the information is not reasonably accessible (*see* Fed. R. Civ. P. 26(b)(2)(B) and Fed. R. Civ. P. Advisory Committee Notes (2006)).
3. The parties meet and confer. If the parties cannot agree whether, or on what terms, the information identified as not reasonably accessible should be searched and produced, the issue may be raised by Party A filing a motion to compel or by Party B filing a motion for protective order. *Id*.
4. The court rules on the motion to compel and/or the motion for protective order. The court orders that information be produced subject to cost-shifting.

In this case, the Court is dealing with a scenario that is completely divorced from the confines and requirements of Rule 26:

1. Global serves Kmart with discovery requests.
2. Kmart does not search its P: and W: drives and does not produce any information from its P: and W: drives.
3. At the same time, Kmart never designates any of the requested discovery, including the information on its P: and W: drives, as not reasonably accessible. In fact, Kmart does not raise any objections regarding the production of information from its P: and W: drives—not in response to Global's discovery requests, and not even in response to Global's motion to compel.
4. The parties meet and confer in advance of Global's motion to compel and for sanctions. Kmart does not disclose the existence of information on its P: and W: drives, much less designate that information as not reasonably accessible.
5. Global files a motion to compel and for sanctions.
6. Kmart's outside counsel learns for the first time during the trial on Global's motion that Kmart has information stored on P: and W: drives.
7. The Court sanctions Kmart and orders Kmart to search its P: and W: drives in its July 31 Order.
8. Kmart unilaterally stops its court-ordered search.
9. Kmart seeks relief from the Court's order by way of a motion for protective order.[3]

None of the cases cited in Kmart's briefing involve anything close to the factual scenario before the Court. Global is unable to find any case law that supports cost-shifting under the circumstances of this case. Rule 26 certainly does not authorize such relief. Kmart's motion must be denied for the simple and fundamental reason that the Court has no authority to grant a Rule 26 motion for cost-shifting for relief from a court order of sanctions.

B. EVEN ASSUMING, FOR PURPOSES OF ARGUMENT, THAT RULE 26 SOMEHOW APPLIES, KMART'S MOTION MUST STILL BE DENIED.

Even assuming, for purposes of argument, that Kmart were somehow entitled to bring a motion to shift costs of its compliance with a court order under Federal Rule of Civil Procedure

[3] Global continues to maintain that a motion for protective order is an improper vehicle for seeking relief from a court order. Kmart must file a motion for reconsideration to obtain relief from the Court's interlocutory order and satisfy one of the narrow grounds for relief under such a motion.

26, Kmart is not entitled to that relief. First, Kmart has not demonstrated that the information on its P: and W: drives is not reasonable accessible. Moreover, even if Kmart could demonstrate that the requested information is not reasonably accessible, Kmart's request to shift costs is premature, as it has not yet completed a sampling of the P: and W: drives using the agreed upon search protocol. Finally, there is no basis to shift the costs of electronic discovery in this case, as the relevant factors in the cost-shifting analysis overwhelming weigh against Kmart's requested relief.

1. Kmart Has Failed to Demonstrate that the Requested Information Is Not Reasonably Accessible.

Kmart has failed to meet its initial burden of demonstrating that the requested data is not reasonably accessible under Rule 26(b)(2)(B). The documents on Kmart's P: and W: drives are stored in the most accessible electronic format possible, namely hard drives. *Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309, 318 (S.D.N.Y. 2003) ("*Zubulake I*"). Despite this fact, Kmart argues that the information is not reasonably accessible, since "counsel must manually review each document to determine whether it is relevant to the litigation, [and] counsel must manually redact the irrelevant and/or confidential data in the documents." Ex. A to Kmart's Mot. to Shift Costs ¶ 23.

What Kmart refuses to recognize is that "the responding party should *always* bear the cost of reviewing and producing electronic data . . . ." *Zubulake v. UBS Warburg LLC*, 216 F.R.D. 280, 290 (S.D.N.Y. 2003) ("*Zubulake III*") (emphasis in original); *Semsroth v. City of Wichita*, 239 F.R.D. 630, 637 n.12 (D. Kans. 2006). The fact that Kmart and its attorneys may need to review the results, thereby inflating the time and expense of responding to Global's request, does not render the information inaccessible. *See id.* Kmart's remaining "proof" amounts to little more than a series of cost estimates and conclusory allegations. *See* Kmart's

Mot. to Shift Costs at 7. The fact remains that Kmart has refused to produce any tangible evidence that would allow the Court or Global to evaluate whether the requested information is actually inaccessible. Kmart's unsupported assertions fall far short of the "particular and specific demonstration of fact" necessary to carry Kmart's burden. *Semsroth*, 239 F.R.D. at 633.[4]

2. Even if Kmart Could Demonstrate that the Requested Information Is Not Reasonably Accessible, Its Motion to Shift Costs Is Premature.

Kmart asks this Court to shift costs for Phase 2 of the response plan. Kmart's Mot. to Shift Costs at 4. However, as Kmart acknowledges in its brief, Phase 2 has not even begun. *See id.* at 3–4. There simply is no evidence in terms of what relevant information Phase 2 will produce. Similarly, there is no evidence in terms of what Phase 2 will *actually* cost. In effect, Kmart is asking the Court to "take its word for it," disregard the presumption against cost-shifting, and shift costs based solely on speculation rather than fact. *See Hagemeyer N. Am. Inc. v. Gateway Data Sci. Corp.*, 222 F.R.D. 594, 602–03 (E.D. Wis. 2004). Courts considering cost-shifting have routinely declined where, as here, there is insufficient tangible evidence to inform the decision. *See, e.g., Zubulake I*, 217 F.R.D. at 322–24; *McPeek v. Ashcroft*, 202 F.R.D. 31 (D.D.C. 2001); *Hagemeyer*, 222 F.R.D. at 602–03; *Mikron Indus. Inc. v. Hurd Windows & Doors, Inc.*, 2008 WL 1805727, at *2 (W.D. Wash. 2008).

A common response to cost-shifting requests that are unsupported by any real evidence is to order a sample production at the responding party's expense. Indeed, this was ordered in several cases that Kmart relies on. Of course, Kmart glosses over this point in its brief. For

[4] Global previously established in its Response to Kmart's Motion for Protective Order that good cause exists for Kmart to search its P: and W: drives even if Kmart could demonstrate that the data on those drives is not reasonably accessible. *See* Resp. to Kmart's Mot. for Prot. Order at 13–17 [Dkt. #31237].

instance, explaining the need for a factual basis to support the cost-shifting analysis, the *Zubulake I* court observed:

> Such proof will rarely exist in advance of obtaining the requested discovery. The suggestion that a plaintiff must not only demonstrate that probative evidence exists, but also prove that electronic discovery will yield a 'gold mine,' is contrary to the plain language of Rule 26(b)(1), which permits discovery of 'any mater' that is 'relevant to a claim or defense.'
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> Requiring the responding party to restore and produce responsive documents from a small sample of [requested data] will inform the cost-shifting analysis laid out above. When based on an actual sample, the marginal utility test will not be an exercise in speculation—there will be tangible evidence of what the [requested data] may have to offer. There will also be tangible evidence of the time and cost required to [recover the requested information], which in turn will inform the second group of cost-shifting factors. *Thus, by requiring a sample restoration of [the requested data], the entire cost-shifting analysis can be grounded in fact rather than guesswork.*
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> * * *
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> Because the cost-shifting analysis is so fact-intensive, it is necessary to determine what data may be found on inaccessible media. Requiring the responding party to restore and produce responsive documents from a small sample of the requested [data] is a sensible approach in most cases.

Zubulake I, 217 F.R.D. at 323–24 (emphasis added). The *Wiginton* decision, upon which Kmart heavily relies, also required a "test run" before considering whether cost-shifting was appropriate. *See Wiginton v. CB Richard Ellis Inc.*, 229 F.R.D. 568, 573 (N.D. Ill. 2004). In fact, this approach to cost-shifting has become widely accepted. *See McPeek*, 202 F.R.D. at 34–35 (requiring responding party to complete sample production, carefully document its time and costs, and file a sworn certification before considering whether cost-shifting was justified); *Hagemeyer*, 222 F.R.D. at 602–04 (same).

Even assuming the requested information is not reasonably accessible, which Global does not concede, Kmart has not produced any tangible evidence to support its motion, and the motion should be denied as premature. At the very least, the Court should order Kmart to conduct a

sample search and production at its own expense to allow the Court and Global to evaluate the *Wiginton* factors in a meaningful way. Again, in evaluating the actual cost of production, Kmart's attorney's fees should not be considered. *Zubulake III*, 216 F.R.D. at 290; *Semsroth*, 239 F.R.D. at 637 n.12.

3. Cost-Shifting Would Be Unwarranted Even if Kmart Could Show that the Requested Information Is Not Reasonably Accessible and Even if Kmart's Motion Was Not Premature.

There is a well-established presumption that the responding party must bear the expense of complying with discovery requests. *See, e.g., Wiginton*, 229 F.R.D. at 571–72. "Any principled approach to electronic evidence must respect his presumption." *Zubulake I*, 217 F.R.D. at 317. While courts have discretion to shift the costs of compliance, this presumption should not be lightly disregarded: "Courts should remember that cost-shifting may effectively end discovery . . . [and] the frequent use of cost-shifting will have the effect of crippling discovery . . ." *Id.* at 317–18. Accordingly, close cases should be resolved against cost-shifting. *Id.* at 320.

For these reasons, courts may decline to order cost-shifting even if the responding party demonstrates that the requested information is not reasonably accessible. *See, e.g., W.E. Aubuchon Co. Inc. v. Benefirst LLC*, 245 F.R.D. 38 (D. Mass. 2007) (ordering responding party to produce requested data at its own expense, despite fact that it was inaccessible); *see also Xpedior Creditor Trust v. Credit Suisse First Boston (USA) Inc.*, 309 F. Supp. 2d 459 (S.D.N.Y. 2003) (same). In evaluating whether to shift the costs of electronic discovery, courts in this circuit examine the following eight factors:

1) the likelihood of discovering critical information;
2) the availability of such information from other sources;
3) the amount in controversy as compared to the total cost of production;
4) the parties' resources as compared to the total cost of production;
5) the relative ability of each party to control costs and its incentive to do so;

6) the importance of the issues at stake in the litigation;
7) the importance of the requested discovery in resolving the issues at stake in the litigation; and
8) the relative benefits to the parties of obtaining the information.

Wiginton, 229 F.R.D. at 573. These factors are listed in descending order of importance and should not be applied mechanically. *Zubulake I*, 217 F.R.D. at 323.

Notably, cost is not the primary focus of the inquiry. Instead, the most important considerations are the likelihood of discovering useful information and the availability of that information from other sources. *Id.*; *Wiginton*, 229 F.R.D. at 572. "At all times, [the court should] keep in mind that because the presumption is that the responding party pays for discovery requests, the burden remains on [the responding party] to demonstrate that costs should be shifted to [the requesting party]." *Wiginton*, 229 F.R.D. at 573; *see also Zubulake III*, 216 F.R.D. at 283. If the court concludes that cost-shifting is appropriate, it should be limited, since "[a] share that is too costly may chill the rights of litigants to pursue meritorious claims." *Zubulake III*, 216 F.R.D. at 289.

As noted above, Kmart's motion is premature. It is difficult to give meaningful consideration to the *Wiginton* factors because Kmart has not yet commenced "Phase 2" of its search of the P: and W: drives. To the extent the analysis is possible at this point, the *Wiginton* factors weigh overwhelmingly against shifting the costs of electronic discovery in this case.

a. The Likelihood of Discovering Critical Information

Despite Kmart's assertions to the contrary, Global is not obligated to proffer evidence suggesting the likelihood of finding critical information; rather, the burden is on Kmart, as the moving party, to establish that the request is unlikely to discover critical information. *See, e.g., Wiginton*, 229 F.R.D. at 573; *see also Zubulake III*, 216 F.R.D. at 283 ("the responding party has the burden of proof on a motion for cost-shifting"). To require Global to identify with specificity

the probative evidence that exists on the P: and W: drives would be contrary to well-established principles allowing broad discovery. *See Zubulake I*, 217 F.R.D. at 323 (citing Fed. R. Civ. P. 26(b)(1)). Kmart's representations throughout the course of this litigation demonstrate that the P: and W: drives are likely to contain critical information.

Kmart's P: and W: drives were discussed at trial, in the parties' Proposed Findings of Fact and Conclusions of Law, and in the Court's Memorandum Opinion. Specifically, in Kmart's Proposed Findings of Fact and Conclusions of Law Kmart discussed its P: and W: drives, describing the types of information that could be stored on each drive, as well as the security for each drive. Kmart stated that "[t]here are millions of . . . documents stored on the P: and W:-drives." Kmart's Findings of Fact & Conclusions of Law at 6 ¶ 14. Similarly, Kmart employee Steven Burke described the contents of the P: and W: drives and testified that there are "millions" of files on the P: drive and "millions" of files stored on the W: drive—even more than are stored on the P: drive. Trial Tr. 48–49, Apr. 26, 2006. The Court adopted these factual findings in its Memorandum Opinion, specifically noting the volume of files that are stored on both the P: and W: drives. Mem. Op. at 11–12.

The Court also heard testimony at trial concerning the P: and W: drives from Kmart employee William Simmons. Mr. Simmons was offered for the limited purpose of testifying about his previous search for responsive documents on the P: and W: drives. Trial Tr. 128:3–5. Mr. Simmons testified that he did in fact search both drives. *Id.* 138:16–20, 139:7–12. Mr. Simmons described that in conducting his search, he reviewed a list of all of the folders that were available on the drives and conducted a manual search of those folders for information related to Global. *Id.* 138:22–24, 139:2–3. While Kmart's counsel indicated that she had only learned of the existence of the P: and W: drives on the day before the evidentiary hearing, Mr. Simmons

testified that he was searching for responsive documents on these drives as early as September 2005. *Id.* The Court referenced Mr. Simmons's testimony in its Memorandum Opinion. *See* Mem. Op. at 20–21

Given Kmart's own description of the broad variety of information contained on the P: and W: drives, it is likely that they contain information responsive to Global's requests. Accordingly, the first *Wiginton* factor weighs against cost-shifting.

b. The Availability of Such Information From Other Sources

Ignoring the fact that it, and not Global, has the burden of showing that cost-shifting is appropriate, Kmart again implies that Global has an obligation to identify the relevant documents contained on the P: or W: drives. *See* Kmart's Mot. to Shift Costs at 9. Once more, Kmart, as the moving party, bears the burden of establishing that the requested information is available from other sources. *See Zubulake III*, 219 F.R.D. at 283. It is unlikely that Kmart can make this showing. Unlike Kmart's other electronic data sources, information on Kmart's P: and W: drives has not been subjected to Kmart's automatic deletion policies. Kmart did not place a legal hold on its automatic deletion policies until October 2005, over two years after its legal obligation to place a legal hold arose. Mem. Op. at 33–34. Thus, at this point in this case there is very little likelihood that responsive information can be obtained from sources other than Kmart's P: and W: drives. Therefore, the second *Wiginton* factor weighs against cost-shifting.

c. The Amount in Controversy as Compared to the Total Cost of Production

It bears noting that the vast majority of Kmart's estimated $4 million "total cost of production" comes in the form of attorneys' fees. Ex. G to Kmart's Mot. to Shift Costs ¶¶ 13, 16. While these inflated figures no doubt make Kmart's position appear more tenable, the case law is clear that Kmart is not entitled to any of these costs, *even if the court decides to order cost-*

shifting. See, e.g., Zubulake III, 216 F.R.D. at 290. Kmart's exaggerated cost estimates should be disregarded. Even assuming Kmart's estimates for Phase 2 are remotely accurate, the purported cost of Phase 2, approximately $76,725, is minimal when compared to the amount in controversy. When evaluating this factor, courts evaluate the amount in controversy based on the plaintiff's potential recovery if successful on the merits. *See id.* at 287–88 (assuming case was a multi-million dollar case, based on the plaintiff's alleged damages, and noting that an estimated response cost of $165,954.67 was not "significantly disproportionate" to the amount in controversy); *see also OpenTV v. Liberate Tech.*, 219 F.R.D. 474, 478 (N.D. Cal. 2003) (factor 3 weighed against cost-shifting where cost of production "paled in comparison" to overall amount in controversy); *Xpedior Creditor Trust*, 309 F. Supp. 2d at 466 (factor 3 weighed against cost-shifting in light of plaintiff's claimed damages, despite $400,000 estimated cost of production).

Kmart concedes that Global's damage claim exceeds $20 million. Kmart's Mot. to Shift Costs at 9. The amount of $76,725 pales in comparison to this potential recovery. Accordingly, factor 3 weighs against cost-shifting.

d. The Parties' Resources as Compared to the Total Cost of Production

Kmart admits that its resources surpass Global's and that factor 4 likely weighs against cost-shifting. *Id.* at 10–11. Where the responding party's resources exceed those of the requesting party's, courts routinely find that factor 4 weighs against cost-shifting. *See Xpedior Creditor Trust*, 309 F. Supp. 2d at 466 (responding corporation's assets "dwarfed" requesting corporation's, and factor 4 weighed against cost-shifting, despite the fact that plaintiff's counsel could contribute to the cost of discovery if necessary); *Wiginton*, 229 F.R.D. at 576 (factor 4 weighed against cost-shifting where defendant's resources were large compared to the total cost

of production, despite the fact that plaintiff's counsel probably could have contributed). Thus, factor 4 weighs against cost-shifting.

e. The Relative Ability of Each Party to Control Costs and Its Incentive to Do So

Global agrees with Kmart that this factor is neutral. Presumably, both Kmart and Global have an interest in minimizing the cost of discovery. Moreover, the parties have agreed to a vendor; once a vendor is selected, costs are not in control of either party. *Zubulake III*, 216 F.R.D. at 288.

f. The Importance of the Issues at Stake in the Litigation

Factor 6 is also neutral and is rarely considered in the cost-shifting analysis. *See Zubulake I*, 217 F.R.D. at 322; *Xpedior Creditor Trust*, 309 F. Supp. 2d at 466; *OpenTV*, 219 F.R.D. at 479. There is nothing before the Court to suggest factor 6 weighs in favor or against shifting costs in this case.

g. The Importance of the Requested Discovery in Resolving the Issues at Stake in the Litigation

Evaluating this factor is difficult in light of the fact that Kmart has provided no tangible evidence supporting its position. Once again, Kmart does not describe the data that it has uncovered to date, but only generally states that it has uncovered a large amount of information. As such, there is no way for Global to predict how important or useful this additional information will be to Global's claims. In its motion, Kmart generally states that the vast majority of the documents identified to date "appear to relate to invoices" and that "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." Kmart's Mot. for Protective Order at 14 ¶ 25. These statements are completely unsupported by any evidence, and there is no way for Global or the Court to determine their accuracy. Even taken at face value, the fact that the additional information only

relates to Global's invoice claim does not in any way diminish its importance or usefulness. Global is seeking hundreds of thousands of dollars in unpaid invoices. Any information that advances Global's claim could be of great importance to Global. Therefore, this factor weighs against cost-shifting or, at the very least, is neutral.

h. The Relative Benefits to the Parties of Obtaining the Information

Factor 8 is the least important factor and is rarely, if ever, determinative. This is because the requesting party almost always benefits more from production than the responding party. *See, e.g., Zubulake III*, 216 F.R.D. at 289. Thus, while factor 8 almost always weighs in favor of cost-shifting, it rarely, if ever, affects the outcome. As in other cases, the fact that Global may benefit more than Kmart from production should not affect the cost-shifting analysis in this case.

In sum, of the eight factors that courts consider when evaluating a request to shift electronic discovery costs, four factors—the most important factors—weigh heavily against cost-shifting, three of the factors are neutral, and the eighth factor is not determinative. Thus, even if Rule 26 of the Federal Rules of Civil Procedure somehow applied in this instance, Kmart's motion would be properly denied.

IV. CONCLUSION

Based on all of the foregoing, Global Property Services, Inc., respectfully requests that this Court deny Kmart's Motion to Shift Electronic Discovery Costs.

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Date: April 16, 2009

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