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.

REPLY IN SUPPORT OF MOTION OF KMART CORPORATION
TO SHIFT ELECTRONIC DISCOVERY COSTS

Kmart Corporation ("Kmart") respectfully submits this Reply in Support of Its Motion to Shift Electronic Discovery Costs. For its motion, Kmart states as follows:

INTRODUCTION

Unfortunately, in an attempt to avoid its appropriate share of costs relating to the discovery of reasonably accessible data, which Global contends is necessary to pursue its $20 million claim against Kmart, Global misconstrues the Court's July 31, 2007 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]."

Global contends that the provision in the July 31 Order that ordered Kmart to conduct a systematic search of the P and W drives was a "sanction." This is not the case. The only sanction set forth in the Court's July 31 Order was that the Court may award Global, after the trial on the merits of Global's claims, a portion of attorney's fees and costs relating to Global's motions for sanctions. There were no sanctions imposed against Kmart for the spoliation of evidence, incomplete production or other purported discovery abuses.

As its main argument, curiously, Global insists that Rule 26 does not apply. Yet, Global tacitly acknowledges, as it must, that Rule 26 applies to this discovery dispute by conceding that

Global's document requests provide the basis for the current dispute over the search for documents stored on the P and W drives. The Court did not order further searching of the P and W drives as a sanction but rather to ensure that Kmart had produced, from all sources within its possession, custody and control, documents responsive to Global's non-objectionable requests. Accordingly, Global's argument that Rule 26 does not apply must be dismissed.

Finally, Global's Response fails to address the case law or many of the substantive arguments that Kmart's raises in its Motion to Shift Costs. Therefore, Kmart respectfully requests that the Court issue an order to direct Global to pay fifty percent (50%) of the costs of Phase 2 as requested in Kmart's Motion to Shift Costs.

A. THE JULY 31 ORDER DOES NOT SANCTION KMART FOR ITS P AND W DRIVE PRODUCTION.

Global fundamentally misconstrues 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. Global contends that the Court sanctioned Kmart by ordering it to systematically search the P and W for documents responsive to Global's claims. Global concludes that, by seeking to shift half of the costs associated with this search, Kmart is seeking to "have the victim share in the costs of the punishment." Creditor Global Property Services, Inc.'s Response in Opposition to Debtor Kmart Corporation's Motion to Shift Electronic Discovery Costs ("Global's Response") at 1. Global's argument is predicated on a faulty premise – that the Court ordered Kmart to search the P and W drives – *at whatever cost* – as punishment for Kmart's purported discovery abuses. Global's reading of the July 31 Order is inconsistent with the Order and unsupported by the law.

First, the July 31 Order itself makes clear that Kmart was *not* sanctioned for spoliation of evidence or for that Kmart's conduct in discovery was willful or in bad faith:

> The court rejects, however, Global's contention that Kmart has acted with willfulness or in bad faith. Global has presented no evidence that Kmart destroyed documents intentionally or for the purpose of hiding adverse information.

July 31 Order, p. 36.

> Here, Global has failed to establish that Kmart knew there was relevant, discoverable information among the documents being destroyed pursuant to the company's preexisting document retention/destruction policy. Indeed, …, it is not entirely clear that such information was, in fact, destroyed. … Accordingly, the court finds that while Kmart's conduct evidences fault the record does not establish bad faith or willful misconduct. … [S]anctions for spoliation of evidence are not warranted on the present evidentiary record."

Id. at 38-39.

Kmart does not dispute that the Court found that Kmart had not adequately searched the W drive. Based on its finding, the Court ordered a systematic search of the P and W drives. But, again, the Court did not impose the systematic search of the P and W drives as a sanction:

> The court agrees that Kmart has not adequately searched the W-drive and declines to find that the National Contracts Call List, saved by Simmons to that drive, has been destroyed. While Kmart's failure to produce the list does not in these circumstances establish spoliation, it does tend to support Global's assertion that Kmart has failed in its duty to adequately search for and produce responsive information.
>
> Although the court finds that Global has failed to establish that sanctions for spoliation of evidence are warranted, the court does not condone the shortcomings in Kmart's document retrieval and production efforts or its fragmentary compliance with the July 11 Order. The efforts made by Kenneth Pocius to retrieve responsive information were woefully insufficient…
>
> Kmart shall, to the extent it has not already done so, perform a systematic search of all documents on its P-drive and W-drive and shall produce them to counsel for Global within fourteen days of the date hereof. In all other respects … the motion will be denied without prejudice.

Id. at 42, 47, 48, 49.

The only “sanction” that this Court imposed was a limited one:

> While the court believes that an award of attorney’s fees and costs is appropriate here, only a portion of those incurred by Global in the drafting, presentation, and trial of its motion will be allowed. The amount of the award will be determined after trial, at the time of the disposition on the merits of this litigation. It would be counterproductive to find the amount at this time, and the court will be in a better position in any event to assess the reasonableness of an award at the time of the disposition on the merits.

Id. at 48-49.

Global is thus mistaken in asserting that if the Court orders cost-sharing, “Kmart 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 received the court-ordered discovery from Kmart.” Global’s Response, p. 1.

Second, Global’s argument that Rule 26 does not govern Kmart’s request for a protective order has no basis in law. It is not surprising that Global cites no authority to support this contention.[1] As Global admitted at the hearing on its motion for sanctions any need to search Kmart’s P and W drive was rooted in Global’s document requests:

- “Four years after Kmart should have produced information from its P: and W: drives … 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.” (*See* Global’s Response, p. 2.)
- “[In its motion for sanctions,] Global complained that for months after submitting its first document production request on February 14, 2005, Global struggled to obtain any responsive documents from Kmart.” (July 31 Order, p. 6.).

[1] Moreover, Global has cited no authority to support its underlying premise – that a court has the power to order *sua sponte* the production of documents that are not subject to (i) a party’s obligation to provide initial disclosures under Rule 26, or, (ii) an opposing party’s document requests.

The Court's July 31 Order is similarly predicated on the question of whether there was an adequate search of the P and W drives for information responsive to Global's document requests:

> The court agrees that Kmart has not adequately searched the W-drive [pursuant to the Global's document requests]…

July 31 Order at p. 42.

Thus, there can be no serious doubt that Kmart's Motion for a Protective Order and Motion to Shift Costs is governed by Rule 26 and the relevant cost shifting case law.

B. GLOBAL MISAPPLIES THE COST-SHIFTING LAW AND IGNORES THE EVIDENCE SUPPORTING KMART'S POSITION.

When Global does address the substantive Rule 26 arguments, it misapplies the law and ignores the evidence supporting Kmart's contention that the information residing on the P and W drives is not reasonably accessible and that cost shifting is warranted.

1. Global Oversimplifies the Media-Based Analytical Approach.

First, Global contends that Kmart failed to establish that the information on the P and W drives is not reasonably accessible because the information is stored "in the most accessible electronic format possible, namely hard drives." Global's Response, 6. As discussed at length in Kmart's Motion for Protective Order, this understanding of the "media based analytical approach" is overly simplistic. Motion for Protective Order, ¶¶20-24; *see also W.E. Aubuchon Co. v. Benefirst, LLC*, 245 F.R.D. 38, 43 (D. Mass. Feb 6, 2007).

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 and costs. *Id.* at 43 (holding that the requested documents, even though stored on an accessible server, were not "reasonably accessible" because retrieval would cost at most $80,000). As *Aubuchon* makes clear, the media

in which the information is stored is not determinative of whether the information is reasonably accessible or not for purposes of Rule 16(b)(2)(B). Rather, the determination turns on whether the retrieval of the potentially relevant information involves undue burden and cost, which Kmart has amply demonstrated.

Second, Global chooses to ignore the evidence upon which Kmart bases its contention that the information on the P and W drives is not reasonably accessible. Instead, Global contends that Kmart based its argument solely on the cost of the legal fees associated with the relevance and privilege review of the information.[2] Global's Response, 6-7. This is not correct.

As previously discussed, Kmart bases its contention that the information on the P and W drives is not reasonably accessible on the following evidence:

- Kmart has spent over $60,000 in costs associated with the *search* of such documents. Motion for Protective Order, ¶22.
- The cost of Phase 1, the data collection phase, which was identified by Kmart's expert, and agreed to by Global, was $18,000. Motion to Shift Costs, p. 7.
- The cost of Phase 2, the searching phase, which was identified by Kmart's expert, and not disputed by Global, was *estimated* to cost approximately $77,000. In fact, based on the volume of information that was actually collected in Phase 1, Phase 2 is now estimated to cost $86,925. *See* Declaration of Thomas Avery, attached hereto as Exhibit A; *see also* Motion to Shift Costs, p. 7.
- The cost of Phase 3, the data processing phase, which was identified by Kmart's expert, and not disputed by Global, is estimated to cost between approximately $172,000 and $860,000. Motion to Shift Costs, p. 7.

Thus, Kmart's conclusion that the information on the P and W drives is not reasonably accessible is based on the costs to collect, search, and process the data, which is estimated to be

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[2] Although Kmart does not concede that attorney's fees associated with the review of electronic documents should never be considered in a cost-shifting analysis, for purposes of the "reasonably accessible" analysis, Kmart will not include such fees in its analysis.

between $336,925 and $1,024,925. Such cost is for preparing the data for attorney review; it does ***not*** include such attorney review costs.

2. Cost Shifting is Not Premature.

Next, Global contends that Kmart's cost-shifting motion is premature because there is no evidence what Phase 2 will cost. Global Response, p. 7. This too is incorrect. The explanation of how the costs associated with Phase 2 are derived was first provided to and discussed with Global in January 2009, and subsequently explained in Kmart's Motion to Shift Costs. *See* Motion to Shift Costs, Ex. F (Letter to Richard A. Samdal and Brion B. Doyle from Wendi E. Sloane, dated January 12, 2009); Motion to Shift Costs, 3. Until now, Global has not challenged the costs associated with Phase 2.

The method of determining the costs associated with Phase 2 are not speculative. Kmart's expert, Thomas Avery of Precision Discovery, explained that it will cost $25 per Gigabyte to build a searchable index. Based on the approximately 2.865 terabytes of information Mr. Avery projected would be copied from the P and W Drives, he estimated that the cost of building a searchable index would be $76,625. Global's own expert did not take issue with this projection.

Now that the vast majority of the data has actually been collected, the cost for Phase 2 is estimated to be $86,925. The cost increase is attributable to the fact that the actual amount of data collected was 3.277 terabytes, not the 2.865 terabytes estimated before the data collection began. Despite Global's contention, there is nothing speculative about this cost; it is directly correlated to the amount of data collected in Phase 1, which is 3.277 terabytes.[3]

[3] As discussed above, approximately 98.6% of the identified data was not collected because of a technical issue. If such data is actually collected, the additional cost will simply be the amount of additional data collected multiplied by $25 per gigabyte.

3. Global Previously Agreed That Sampling Is Not Appropriate.

Alternatively, Global revives its previously-abandoned suggestion that Kmart produce a sample production at Kmart's expense. This request is directly contrary to the concession of Global's expert that sampling was not appropriate, and his acceptance of Mr. Avery's proposed methodology.

As the Court is aware, on February 3, 2009, after exchanging their experts' proposals, counsel and their experts met and discussed each party's proposal. Although Global's expert had initially proposed a sampling methodology, Global abandoned that notion after Mr. Avery identified the methodological flaws of sampling. Global jettisoned its own expert's proposal, instead agreeing to Mr. Avery's proposed methodology. The parties reported this agreement to the Court during the status hearing on February 4, 2009. Thus, any request for sampling by Global has been waived.

Moreover, Global's effort to revive this waived methodology is suspect. Global nowhere provides an explanation to support its renewed request for a methodology that its expert conceded was flawed. Rather, faced with having to pay for a search of the massive amount of information housed on the P and W drives (and perhaps tacitly acknowledging that it is unlikely to find responsive information not already produced), Global seeks a less expensive option.

4. Global's Consideration of the *Wiginton* Factors Ignores the Evidence Previously Submitted by Kmart.

Although it deems Kmart's motion to be premature, Global does not dispute that the *Wiginton* case articulates the relevant cost shifting case law in this district. *See Wiginton v. CB Richard Ellis, Inc.*, 229 F.R.D. 568, 572-73 (N.D. Ill. 2004). Of the eight factors identified in *Wiginton*, only factors (i) – (iii) and (vii) are at issue.

<u>*Wiginton* factor (i) - the likelihood of discovery of critical information</u>.

In Kmart's Motion to Shift Costs, Kmart argued that it was not likely that critical information will be discovered in the P and W drives. Among other reasons, the P and W drives contain no emails in native format. *See* Motion to Shift Costs, Ex. A at ¶2. Further, Kmart's initial efforts to conduct a systematic search of the P and W drives did not locate any relevant documents not already produced. Indeed, the majority of references to Global appeared as a line item in lengthy accounting documents. The accounting documents relating to Global have already been produced. *See* Motion to Shift Costs, Ex. A at ¶¶7-9.

Global inexplicably ignores Kmart's arguments why it is not likely that critical information relating to Global's claims will be found in the P and W drives. Instead, Global makes two arguments, both of which can be summarily dismissed. <u>First</u>, Global contends that the drives are likely to contain critical information because the drives contain millions of files. Global's Response, 11. However, just because the drives contain millions of files, it does not mean that such files are responsive to Global's requests. Rather, this argument underscores the fact that Global is "looking for a needle in the haystack."

Global's second argument as to why it believes critical information is likely to be found on the P and W drives is based on William Simmons's testimony during the spoliation trial that he searched for documents on the P and W drives. However, what Global fails to acknowledge is that Mr. Simmons, the only Kmart employee to testify that he saved information in those drives, also testified that he conducted a search of the P and W drives and likely produced any relevant documents still stored on those drives:

> 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.")

See April 26, 2007 Transcript of Hearing on Global's Motion for Sanctions for Spoliation.

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

***Wiginton* factor (ii) - the availability of such information from other sources.**

In Kmart's briefing in support of the Motion for Protective Order and the Motion to Shift Costs, Kmart demonstrated that the vast majority of the documents found in Kmart's initial search of the P and W drives appear to be spreadsheets similar to the Paid History Report – *a document that was previously provided to Global*. 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. Motion to Shift Costs, Ex. A at ¶8**.** Moreover, because the P and W drives contain no emails, other repositories are more likely to hold responsive documents than the P and W drives. Indeed, Kmart has produced over 25,000 documents during this litigation from sources *other* than the P and W drives. Motion to Shift Costs, Ex. A at ¶25(ii).

In its Response, Global fails to address Kmart's arguments. Global has not identified any relevant documents it believes are stored on the P or W drive but not yet produced. Global does point to the National Contractors Call List authored by William Simmons, one of the documents saved on the hard-drive of Tim Slimp's Kmart laptop. As the Court noted, however, this document (which as this Court acknowledged, was "frequently revised") has already been produced. *See* July 31 Order, pp. 41-42. Global offers no evidence that this frequently-revised document was not replaced by an updated version (which would explain why Mr. Simmons did not locate it in his review in September 2005, several years after the document was created).

Wiginton factor (iii) - the amount in controversy as compared to the total cost of production.

In its Motion to Shift Costs, Kmart argued that Global's damages claim is overstated and accordingly, the amount in controversy versus the cost of the electronic discovery militates in favor of cost-shifting. For its Response, Global argues that cost shifting is not appropriate because Kmart (i) inflated the total cost of production, and (ii) "concedes" Global's damages claim. Global's Response, 13.

Global first contends that Kmart inflated the cost of production by inappropriately including the cost of attorney review time in the overall cost of document production. This is not the case with respect to the first three phases of the production process. Even if the cost of review and production cannot be included in considering the total cost of production (which Kmart disputes), the cost of Phases 1 – 3 (collection, search, and processing) alone – ***without any attorney review time*** – is between $336,925 and $1,024,925.

Such costs are sufficiently significant that cost-shifting is required, even if Global's assessment of its damage claim were realistic. *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).

Next, Global contends that Kmart concedes that Global's damages are $20 million. This is not true. While Kmart does not dispute that Global *alleges* that its damages are over $20 million, the evidence adduced to date demonstrates that this damage claim has no basis in fact.

As Kmart argued in its Motion for Protective Order and Motion to Shift Costs, Global's $20 million is mainly based 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. However, Global has failed to produce any evidence to support this claim.

Indeed, 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.

> 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.

July 31 Order, p. 44. 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.

Even if Global could establish liability, which it cannot, based on the evidence adduced to date, it is unlikely that Global will be able to prove its damage claim. As Kmart argued in its Motion to Shift Costs, there is no basis for the assumption of a ten year business relationship. Indeed, 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. Motion to Shift Costs, Exhibit H, 152:6-154:12. Rather, the contracts between Global and the individual stores provided they could be terminated by Kmart upon 24 hours notice. *See* Motion to Shift Costs, Ex. I.

Finally, Global's refusal to bear any of the costs for the search of the P and W drives suggests it is aware such a search is not cost-effective.[4] If Global really believes its claim is worth tens of millions of dollars, and if it honestly thought that there is a likelihood that a search of the P and W drives will locate relevant documents not already produced, it should be willing to pay approximately $43,000 (one-half of the Phase 2 cost) to collect the data that it contends it

[4] Global even refused to agree to pay one-half of the $18,000 cost for Phase One of the project, requiring the Court to order it to do so.

needs to support its claim. Not surprisingly, courts consider a party's unwillingness to share costs as a factor in deciding whether to that a search for electronic documents should even proceed. *Zubulake*, 217 F.R.D. at 322.

Wiginton **factor (vii) - the importance of the requested discovery in resolving the issues at stake in the litigation.**

In its Motion to Shift Costs, Kmart argued that based on the information identified during the searches performed to date, it is not likely that the information will be important to resolving the issues at stake in the litigation. The vast majority of the documents initially identified relates to invoices, and would not be relevant to Global's tort claims, which comprise the vast majority of its damages claim. Motion for Protective Order, ¶25(v); Motion to Shift Costs, 12.

In its Response, Global ignores the evidence that Kmart previously adduced that demonstrates that it is not likely that information from the P and W drives will be important or useful to Global's prosecution of its claim. Importantly, Global does not dispute that the lion's share of Global's claim stems from its tort and breach of oral contract claims, which, to date, the evidence from any source fails to support. Even the extrinsic evidence that purportedly supports Global's national contract undermines the tort and breach of contract claims. *See* July 31 Order, 44. Nor does Global dispute that its claim for unpaid invoices is approximately $360,000, excluding interest, which represents less than 2% of Global's total claim against Kmart.

Instead, Global contends that even if the additional information only relates to the invoice claims, the discovery is warranted. Thus, Global's argument is that even if its potential damages were $360,000, Kmart should be required to incur between $172,000 and $860,000 in electronic discovery costs to produce documents that might support Global's claims. There is no legal authority to support such an illogical result. Nor does public policy favor such a result, which would encourage parties with relatively small or weak claims to leverage settlements based on

the cost of searching massive amounts of electronic information for the proverbial needle in a haystack.

In sum, as detailed in Kmart's discussion of the relevant case law in the Motion for Protective Order and Motion to Shift Costs, which Global curiously ignores, all of the relevant factors (except for the resources factor) considered by courts to determine whether the costs of discovery should be shifted are either neutral or weigh heavily in favor of shifting at least a significant portion of the costs to Global.

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.

Dated: May 11, 2009

Respectfully submitted,

KMART CORPORATION

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