

**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  
Reorganized Debtor. )  
) RE: Objection to the Claims of  
) Global Property Services, Inc.  
)  
)  
) Hearing Date: January 13, 2010, 11:00 a.m.

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**KMART CORPORATION'S INTERIM REPORT  
CONCERNING THE SAMPLING OF ELECTRONIC DOCUMENTS**

Kmart Corporation ("Kmart") respectfully submits this Interim Report Concerning the Sampling of Electronic Documents in connection with Kmart's pending Motion to Shift Electronic Discovery Costs (the "Motion") [docket number 31921].

**A. Background of the Sampling Protocol.**

1. In connection with Kmart's Motion to Shift Electronic Discovery Costs, the Court ordered Kmart to review a sample of documents from five (5) folders of the thirty-eight (38) root folders on the P and W drives.

2. As the Court is aware, on October 19, 2009, Kmart provided Global with the initial search results for the search terms that Global identified. Initially, there were 340,455 hits for the individual search terms in the five root folders. The total number of hits in unique documents was less – 212,786 – because there were multiple hits in the same document. Those hits comprised a vast amount of data, about 57 Gigabytes which would constitute approximately 1,700 bankers boxes if the electronic documents were printed in hard copy.

3. The costs associated with the data processing and hosting/review phases for this volume of data were significant -- over \$34,000 for data processing (\$600 per gigabyte for data processing X 57 GB), and over \$2,800 (\$50 GB per month hosting fee) to host the data per month, excluding license user fees of \$100 per month per user. Notably, these costs did *not* include attorney review time to review the sampled data for privilege and responsiveness, which would have been substantial.

4. To expedite the review of the sampled data, and to mitigate costs, Kmart proposed to Global a protocol to streamline the review. First, Kmart proposed limiting five search terms with a proximity connector, which was intended to exclude positive hits from completely unrelated documents by requiring the presence of another term specific to the case. The revised search string reduced the number of hits from 340,455 hits to 38,701.

5. Second, of the 38,701 hits, 4,097 hits were associated with file types that Kmart's expert believes will not likely contain relevant information:

- Single byte text;
- Filtered binary files;
- Html files;
- Media database record 12;
- wmf files;
- xml files;
- win write files;
- Unicode;
- Flash swf files; and
- ami files

6. Third, approximately 29,000 of the 38,701 hits were associated with Excel files, which Kmart contends would be duplicative of the paid history report previously produced to Global, or would not otherwise be relevant to Global's tort claims. By eliminating these two categories of file types (*i.e.*, non-responsive file types and Excel files), the amount of data needed to be processed, hosted and reviewed would be reduced dramatically from 38,701 to 5,650 hits (excluding attachments), or 2 GB of data. Under Kmart's proposal, because the number of hits would be reduced, the processing costs, hosting and reviewing costs would drop considerably.

7. On November 3, 2009, Global agreed to Kmart's proposal, conditioned on Global's request that Kmart determine whether any of the Excel spreadsheets contain information other than the information that was previously produced.

**B. Status of the Kmart's Review of the Documents Identified for Sampling.**

8. On December 9, 2009, Kmart advised the Court and Global of the status of its on-going document review. Kmart's counsel indicated that, after data processing, the 5,650 hits were comprised of approximately 12,000 documents (exclusive of Excel spreadsheets). Counsel further advised that as of that date, Kmart's in-house document review team had reviewed approximately 800 documents, and only three related in any way to facilities management.

9. With respect to the approximately 29,000 Excel spreadsheets, Kmart's counsel explained that these documents were highly likely to be either irrelevant or duplicative of what had already been produced. Accordingly, Kmart's in-house discovery team was evaluating whether there was a protocol that could be used to cull groups of irrelevant/non-responsive documents to alleviate the burden and expense of this part of the review. The Court ordered that

Kmart submit a written report to the Court on January 4, 2010, which the parties continued by stipulated order to January 11, 2010.

10. On December 22, 2009, counsel for Kmart provided an email update to counsel for Global regarding the status of Kmart's document review and production.

**i. The Non-Excel Documents.**

11. As of January 11, 2009, of the 12,506 non-Excel documents that recorded a "hit" of one of the search terms, Kmart' in-house review team has reviewed 8,989 documents, or over 71% of the original data set of 12,506. Kmart estimates that the in-house review of the remaining 29% of the documents to be reviewed will be completed by January 15, 2009. Counsel expects that any responsive documents will be produced by January 22, 2009.

12. Of the 8,989 documents reviewed to date, only 163 documents – approximately 1.8 % – were identified as even *potentially* relevant to Global's claims. Of these 163 documents, fifty-nine (59) were created on or before January 1, 2005, twenty-five (25) of which have been identified as privileged.

13. Outside counsel has begun its review of the remaining 34 documents to determine whether any of them are relevant to Global's claims. To date, only five responsive documents have been identified, at least four of which have been previously produced. Two such documents are copies of emails sent by Bill Ellis on April 22, 2003 and June 18, 2003, wherein Mr. Ellis advised Store Managers/Directors that Global was misrepresenting the nature of its relationship with Kmart (*i.e.*, Global was misrepresenting to individual store managers that Global was a national contractor).<sup>1</sup> Copies of the documents from the P drive are attached hereto

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<sup>1</sup> Emails cannot be saved on the P or W drives as .pst files (*i.e.*, in their native format). Although it is not common practice, an employee may save an email on the P or W drive when the employee intends that the email be publically shared or shared within a work group. (Testimony of Stephen Burke, then systems manager for Kmart, at the April 26, 2006 hearing on Global's Motion to

as **Exhibit A** (irrelevant portions of which have been redacted). The emails previously produced to Global (over four years ago) are bates-stamped KMRT 867 and KMRT 869, and are attached hereto as **Exhibit B**.

14. Two other documents found to be responsive in the P drive are also believed to have been previously produced. These documents are the 2003 and 2004 National Programs Overview, which identify Kmart's national contractors. Notably, Global is not identified therein. A copy of the 2004 National Programs Overview from the P drive is attached hereto as **Exhibit C**. A nearly identical version of the 2004 National Programs Overview was previously produced to Global, under bates-stamp KMRT 17404-17427 and is attached hereto as **Exhibit D**.

15. The only other responsive document in the P drive reviewed to date undermines Global's contention that it was a national contractor. The document, attached hereto as **Exhibit E**, is a Memorandum to Store Managers and Directors from the Facility Management/Store Operations department, dated September 10, 2003, regarding Snow Removal Arrangements and Landscaping Protection. Among other things, the memorandum directs store managers and directors

to make arrangements for snowplowing and snow removal where necessary for the coming winter. Store Manager/Directors are responsible for completing the initial bidding and negotiations process. **NO Contract** for Snow Removal should be entered without direct approval from your District Manager. ... Use the attached Snow Removal Proposal to contract for any stores that do not presently have a contractor lined up or needs to fine [sic] a new contractor. (emphasis in original).

ii. **The Excel Documents.**

16. There were approximately 29,000 Excel documents that recorded a "hit" of a search term. Given this enormous volume of documents, Kmart has investigated whether the

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Compel and for Sanctions, Tr. 40: 4-12; 46:13-17; 48:5-7 49:14-22.) Of the 34 documents identified as potentially responsive and not privileged, only one is an email.

universe of Excel documents could be limited by using search term phrases to eliminate “bad hits,” *i.e.*, documents that are completely irrelevant, such as documents relating to Global Steel and Global Trading, which are different companies. Using a sample set of 867 Excel spreadsheets, Kmart’s discovery team has identified several search term phrases that have culled approximately 48% of non-responsive documents from the sample set. Applying that same cull rate to the entire 29,000 corpus, Kmart’s discovery team may be able to reduce the 29,000 Excel documents to a set of between 14,000-15,000 spreadsheets. The review of these spreadsheets will still take significant resources.

17. Kmart suggests that it now apply these search term phrases to the remaining Excel documents to determine the number of spreadsheets left after culling readily identified non-responsive documents. We can then revisit the issue of reviewing the remaining spreadsheets.

**C. Proposed Schedule to Apprise Global and the Court On The Status.**

18. Kmart proposes providing a further interim update to the Court and Global on or by January 29, 2010.

19. Pursuant to the Court’s July 10, 2009 Order, Kmart expressly reserves the right to, and intends to, recoup the cost borne by Kmart associated with the processing, hosting and reviewing the electronic data in accordance with the Court’s final determination on Kmart’s Motion, which is reserved for ruling on a future date.

Dated: January 11, 2009

Respectfully submitted,

KMART CORPORATION

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