

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

In re:)	Case No. 02-02474
)	(Jointly Administered)
KMART CORPORATION, <i>et al.</i> ,)	Chapter 11
)	Hon. Susan Pierson Sonderby
Reorganized Debtor.)	
)	RE: Objection to the Claims of
)	Global Property Services, Inc.
)	
)	Hearing Date: February 2, 2010, 11:00 a.m.

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

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

A. Background of the Sampling Protocol and Kmart's Review of the Documents Identified for Sampling.

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. A detailed account of the sampling protocol is set forth in Kmart's Interim Report Concerning the Sampling of Electronic Documents [docket number 32158], which is incorporated herein by reference ("First Interim Report").

i. The Non-Excel Documents.

2. During the status hearing on January 13, 2010, Kmart's counsel advised the Court that Kmart's in-house review team had completed the review of the 12,506 non-Excel documents that recorded a "hit" of one of the search terms. Counsel further advised that of the 12,506

documents, only 163 documents – approximately 1.3% - were identified as even *potentially* relevant to Global's claims.

3. Since that status hearing, Kmart's outside counsel completed its review of the 163 documents to determine whether any of those documents are relevant to Global's claims. Of those 163 potentially relevant documents, 42 were deemed to be responsive. On January 22, 2010, those 42 documents were produced to Global. Copies of the responsive documents are attached hereto as Exhibit A.

4. Notably, of these 42 documents, many appear to be duplicate copies when printed in hard copy, but were nonetheless produced to Global because the embedded metadata indicates that they are different documents (*e.g.*, the same document was found under two different files names). Of the 42 documents, 23 documents (including copies) were previously produced. *To put it another way: of the 12,506 potentially responsive documents found in the five root folders on the P and W drives, only seven (7) unique, responsive documents – or .06% (six-hundreds of one percent) – were not previously produced by Kmart.* However, none of these seven documents support Global's case. To the contrary – five of these documents undermine Global's theory of the case.

5. Kmart's document production is discussed below:

a. **Documents previously produced.**

- (i) **April 22 and June 18, 2003 group email report (KMRT 18075 – 18085; 18084 - 18094)**: As indicated in Kmart's First Status Report, the April 22 and June 18, 2003 group emails, which included copies of emails sent by Bill Ellis on April 22, 2003 and June 18, 2003, were previously produced to Global over four years ago. *See e.g.*, KMRT 867 and KMRT 869. In these emails, 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).¹

¹ Emails cannot be saved on the P or W drives as .pst files (*i.e.*, in their native format). Although

- (ii) **2003 and 2004 National Program Overviews (KMRT 18096 – 18100; 18104 – 18109; 18111 – 18116):** As discussed in Kmart's First Interim Report, the 2003 and 2004 National Programs Overview, which identify Kmart's national contractors, were previously produced to Global. *See e.g.*, KMRT 17404-17427. What is notable about these documents is that Global is not identified as a national contractor, thereby undermining Global's contention that it was a national contractor during this time period.
- (iii) **Internal Kmart email string regarding exterior services, dated May 29, 2001 (KMRT 18140):** This email string concerns Kmart's purported selection of Global by Tim Slimp to work with stores to reduce exterior maintenance costs. This email string was previously produced to Global. *See e.g.*, KMRT 1152-53.
- (iv) **Drafts of Jan. 23, 2002 memorandum from Facility Services Division re Exterior Common Area Maintenance Services (KMRT 18142; 18228):** These documents are previously produced drafts (*see e.g.*, 10016) of the January 23, 2002 memorandum sent to Kmart Store Team Directors and Managers wherein Kmart purportedly recommended Global as a contractor of choice for exterior maintenance services.
- (v) **Internal Kmart email strings among Gary Crull and Loss Control, et al., dated 2003 (KMRT 18230 - 18234; 18236 – 18238; 18240 – 18242; 18244 – 18246; 18248 – 18250; 18252 – 18253; 18255; 18257 – 18260; 18262; 18264):** These emails concern discussions relating to the liability for damage to a light pole caused by a snow plow operated by Global or one of its subcontractors. At least one such email concerning this subject was previously produced to Global. *See e.g.*, KMRT 10155. Kmart's counsel is conducting a further good-faith search to verify its belief that additional emails concerning this subject were previously produced.
- (vi) **Internal Kmart Outlook meeting acceptances (KMRT 18266; 18268; 18270; 18272):** These Microsoft Outlook meeting acceptance notices concern an internal meeting held on September 17, 2004 regarding Global Property Services. Kmart's counsel believes that these notices were previously produced to Global and is conducting a good-faith effort to verify this belief.
- (vii) **Draft letter from Store 3196 to Henry Clark (Global), dated October 29, 2003 (KMRT 18274):** This draft letter advises Global's property manager, Henry Clark, that Kmart was cancelling snowplowing services for store 3196. Kmart's counsel believes that this cancellation notice was previously produced to Global and counsel is conducting a good-faith search to verify this belief. Notwithstanding, Global is in possession of the cancellation notice. *See Idzior*

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 Compel and for Sanctions, Tr. 40: 4-12; 46:13-17; 48:5-7 49:14-22).

Deposition Exhibit No. 189, dated 11/8/07, which is a summary of contract cancellations prepared by Global (“Melvin Clark signed the contract [for store 3196] on October 26 *but then we received a cancellation via mail from William J. Szykula at Kmart Corp dated October 29, 2003.*”) (emphasis added).

b. Documents not previously produced.

- (i) **Financial Reporting Department Procedure Manual (KMRT 18065):** This one-page document identifies the account number that is to be charged for exterior maintenance costs. The document makes no reference to Global Property Services, and is not helpful to Global’s case. The document is only relevant to the extent that it identifies the data-entry accounting procedure to be followed for exterior maintenance expenses.
- (ii) **Facility Management Reminder - Memorandum re Snow Removal Arrangements – Landscaping Protection (2000, 2003 – 2006) (Kmart 18067; 18069; 18071; 18074; 18102; 18118 - 18126; 18128; 18130 - 31; 18133 - 18134; 18136; 18138.** As reported in Kmart’s First Interim Report, these documents undermine Global’s contention that it was a national contractor. 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).

See e.g., Kmart 18067.

- (iii) **Drafts of Services Agreement between Kmart and Horn Murdoch Cole (“HMC”) concerning audit of Global's invoices in Fall 2003 (KMRT 18144 – 18154; 18156 – 18166; 18168 – 18178; 18180- 91; 18192 – 18202; 18204 – 18214; 18216 – 18226):** These seven draft documents concern the audit conducted by HMC in Fall 2003 of amounts invoiced to Kmart by Global for exterior maintenance services. Kmart contends that the only agreement that would be relevant on the scope of HMC’s audit would be the final agreement that defined the scope of the engagement. Global subpoenaed HMC, and HMC’s document production did not include a signed contract. See HMC 1-20. Neither Nancy Clark nor David Flynn, the HMC deposition witnesses, testified that there was a fully executed final agreement between Kmart and HMC for this engagement. Notwithstanding, numerous documents concerning the audit,

including correspondence between Kmart and HMC concerning the audit, was previously produced to Global. *See e.g.*, KMRT 1159; 1681; 1683.

ii. The Excel Documents.

6. As Kmart previously advised the Court, there are approximately 28,000 Excel documents that recorded a “hit” of a search term. Given this enormous volume of documents, Kmart has investigated whether the 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 Excel spreadsheets, Kmart’s discovery team has identified several search term phrases that have culled approximately 83% of non-responsive documents from the sample set. Applying that same cull rate to the entire 28,000 corpus, Kmart’s discovery team may be able to reduce the approximately 28,000 Excel documents to a set of between about 4,800 spreadsheets. Notwithstanding the significant progress that Kmart has made in eliminating non-responsive documents, the review of these spreadsheets will still take significant resources.

a. Kmart’s culling methodology.

7. To cull out non-responsive spreadsheets from the sample set, Kmart’s in-house counsel took a two tiered approach. The first cut was intended to identify search terms that yielded obvious bad hits. Search terms like Global and Brock are common enough to produce many obvious false hits in the context of this search. Thus, in-house counsel created a subset of documents containing the words “global” or “brock” and reviewed them in an effort to capture the most frequent bad hits. Kmart’s in-house counsel contends that there is only a *de minimus* chance that these search terms will eliminate any responsive document. The search string list used to eliminate obvious bad hits is as follows:

- (global recycling)
- or “global steel”

- or “global trading”
- or “global sourcing”
- or “Adams Global”
- or “Alexander Global”
- or “IMG Global”
- or “Global Net”
- or “American Global”
- or “Global Designs”
- or “Global Sourcing”
- or “Global Operations”
- or “bax global”
- or “global stone james”
- or “global household”
- or “global monitor”
- or “valdi global”
- or “global imprints”
- or “ghim li global”
- or “global maintenance”
- or brach
- or “rick brock”
- or “brock, chad”
- or “uhlenbrock”
- or “uhlen brock”
- or “brock todd”
- or “charles brock”
- or “brockham”
- or “brock n e”
- or “global ops”
- or brockton
- or Brockport
- or “tracey brock”

8. Because it is possible that the subset of documents could also include information concerning Global Property, the search was modified with the Boolean phrase ‘and not “global property.”’

9. The second cut made by Kmart’s in-house counsel was intended to identify documents that are non-responsive duplicate documents. To create this set of documents, Kmart’s in-house counsel reviewed a sample of the documents culled from the first tier and attempted to determine unique identifiers for documents that had numerous duplicates or near

duplicates and that were clearly non-responsive. Examples of non-responsive duplicate documents are: (i) spreadsheets concerning merchandise as opposed to store operations, (ii) documents concerning the interior of the store, (iii) documents concerning loss prevention, (iv) documents concerning interior displays, and (v) phone books. The search terms used to create this tier of documents, including the rationale for using the particular search term, are as follows:

- (kcafe or k-café): The K-Café is an indoor restaurant found in many Kmart stores. Documents referencing the K-Café tend to be either reports about the K-Café itself, or documents dealing more broadly with the interior of the store.
- “ok to pay”: These documents concern some sort of invoice approval. Those for Global Property are preserved by the modifier (and not “global property”) at the end of the string.
- “section k” and not “exterior maintenance”: Eliminates financial reports concerning merchandise and interior issues. A modifier preserves exterior maintenance documents.
- “loss prevention”: Documents concern loss prevention issues.
- Sedgwick: Eliminates documents regarding Sedgwick, an internal department that handles in-store incident reports.
- “endcap description”: Relates entirely to interior store design.
- or “annual penetration”: Marketing document.
- “summary of other cost departments”: Eliminates a type of spreadsheet summary that does not deal with the exterior of the store.
- “softline”: Deals with softline merchandise.
- “salaries and wages”: Highly confidential salary document.
- “recon”: Eliminates a batch of accounting docs.
- “predictive”: Eliminates non-responsive, forward-looking financial docs.
- Mclane: Eliminates non-responsive financial documents. Mclane is a food service distribution vendor and appear on documents with vendors of a similar nature.

- “customize your invoice”: These documents reference one vendor at a time. The documents concerning Global Property will be captured by the modifier at the end of the string; all other vendors will be eliminated.
- “Big Beaver Road”: Eliminates the company directory.
- or “execute in triplicate”: Eliminates contractor proposals.
- “soft lines”: Alternate spelling of “softline.” *See* above.
- or “PE ratio”: Eliminates documents concerning stock price.
- “k-caf”: Alternate spelling of kcafe or k-café, above.
- or “samsung threshold”: Eliminates documents concerning a Samsung end-cap setup instruction.
- “lifo index”: Eliminates document dealing with inventory and accounting.
- “real estate suspense”: Eliminates leasing data documents.
- (“distribution center expense analysis” and not “exterior maintenance”): Eliminates specific expense reports.
- “top 50”: Eliminates a high level financial type document.
- and not “global property”: Preserves any specific mentions of Global Property

10. Admittedly, it is more challenging to categorically exclude all responsive documents from being eliminated in this tier. To mitigate this possibility, in-house counsel made strategic use of the Boolean phrase “and not “exterior maintenance.”” For example, for the search terms, “section k” and “distribution center expense analysis” the modifier “and not “exterior maintenance” was used to preserve certain financial reports and expense analysis documents that contain the phrase “exterior maintenance.” Although some documents containing the term “exterior maintenance” are excluded, Kmart’s in-house counsel believes that by strategically adding the modifier “and not “exterior maintenance”” the vast majority of the excluded documents refer to other vendors and are not responsive to Global’s claim.

11. Using the two-tiered approach as set forth above, Kmart's in-house team was able to eliminate approximately 83% of the Excel spreadsheets from the data set. Extrapolated to the total population of approximately 28,000 spreadsheets, the culling method described above will reduce the population to approximately 4,770 spreadsheets, which must then be reviewed.

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

12. Kmart proposes that it now apply the two-tiered culling methodology described above to the broader corpus of Excel documents to determine the exact number of spreadsheets that will need to be reviewed. Kmart further proposes that it provide an interim update to the Court and Global on or by February 17, 2010.

13. 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 28, 2010

Respectfully submitted,

KMART CORPORATION

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