IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

BEST BUY STORES, L.P.,	)	CASE NO. 05 CV 2310 DSD/JJG
	)	
Plaintiff,	)	
	)	**DEFENDANTS' BRIEF IN SUPPORT**
vs.	)	**OF THEIR MOTION TO ENLARGE**
	)	**THE FEBRUARY 2, 2007 DEADLINE**
DEVELOPERS DIVERSIFIED	)	**FOR E-DISCOVERY CONTAINED IN**
REALTY CORPORATION, et al.,	)	**THE COURT'S JANUARY 4, 2007**
	)	**ORDER**
Defendants.	)	

I. INTRODUCTION

On January 4, 2007, this Court ordered defendants to produce by February 2, 2007, materials from disaster recovery back-up tapes reflecting "how charges under the first dollar program are calculated." January 5, 2007 Order, at 11, Docket at 199. Defendants immediately started working to comply with the Court's Order, including multiple phone conferences and other communications with e-discovery vendor Kroll OnTrack ("Kroll"); internal investigation regarding how and on what internal servers documents were created and saved since 1998; and identification of appropriate custodians and key word searches for the production ordered by the Court. Defendants have worked diligently in an effort to do everything in their power to comply.

Unfortunately, technological constraints beyond defendants' control make it impossible for them to comply with this deadline as applied to materials from back-up

tapes. It will take approximately 102 to 122 business days[1] to retrieve, process and ready for attorney review e-discovery, if any exists, from approximately 345 disaster recovery tapes that contain information from defendant Developers Diversified Realty Corporation's ("DDR's") computer system for the time period beginning in 1998, and to ready those materials for review.

Consequently, defendants seek a more focused review and production of materials from a more limited number of tapes that are most likely to include responsive materials, if any exist, and an extension of time within which to perform that focused review and production.[2] The initial tapes from this more focused approach will be ready for defendants' review for responsiveness and privilege within approximately one week from this date, and a rolling production will begin immediately thereafter. The last of this proposed limited number of tapes will be ready for attorney review in 38 to 46 business days. Defendants' proposal will permit the parties to more expeditiously retrieve information, if any exists, from sources where it is most likely to be found and to determine whether broader production is necessary. Plaintiff does not object to an enlargement but only so long as compliance could be completed by March 31, 2007. *See* letter dated February 2, 2007 from R. Machson to D. Kobasic. Ex. 1. Even the focused

[1] Defendants provided this information as soon as it became available. The parties were not asked to indicate how long such production would take in advance of the hearing on plaintiff's motion to compel.

[2] Defendants likewise seek enlargement of time within which to produce to the extent this Court refuses the proposed focused search. In that event, defendants seek to enlarge the period for production to 30 days after the last back-up tape is available from Kroll for attorney review.

search and production proposed by defendants cannot be completed within this time frame.[3]

II. FACTS AND PROCEDURAL HISTORY

A. Defendants' Electronic Data

Defendant DDR maintains a back-up system for disaster-recovery purposes. *See* Affidavit of Michael O. Carmody, at ¶3 ("Carmody Aff."). Pursuant to that system, data from DDR's entire computer system is periodically copied onto so-called back-up tapes. *Id*. The back-up tapes are kept so that in the event that a disaster, such as a fire or an earthquake, wipes out DDR's system, the system can be recreated and restored. *Id.*

Because the back-up tapes are only maintained for dire, and unlikely, circumstances, and for cost economy, the information copied onto the tapes is not sorted or organized in a way that makes the data searchable. Carmody, Aff. at ¶4. Instead the data is merely "dumped" onto the tapes. *Id.* For storage purposes, the information is also compressed. *Id.*

Additionally, the back-up tapes are not used in connection with DDR's ordinary course of business. Carmody Aff., at ¶5. In fact, *DDR is unable to retrieve any information from any back-up tapes. Id.*[4] Each back-up tape contains all the unsorted and

[3] On January 31, 2007, plaintiff proposed a focused review beginning with January 2005. For reasons set out herein, defendants propose focus on a different period.

[4] In June 2002, a new network server was installed. Affidavit of Lorraine McGlone, at ¶4 ("McGlone Aff."). Tapes made from the prior server are incompatible with the new server. McGlone Aff., at ¶5. In addition, information from the post-June 2002 tapes made from the new server cannot be accessed by DDR because DDR lacks the technical proficiency and data storage space required to convert or restore the data to a searchable format. McGlone Aff., at ¶6.

unorganized data for the entire computer system on the day that the tape was created. Carmody Aff., at ¶6. Before information can be extracted from the tapes, the data must be transferred to a separate computer system, sorted and organized, and the entire computer system in existence at DDR on the day the tape was created must be rebuilt. *Id.* This requires technical tools and data storage space beyond that possessed by DDR. *Id.*

B. The Process of Restoring Defendants' Electronic Data

Kroll, the contractor that possesses the requisite technical tools and storage space to extract information from the tapes, estimates that it will take approximately six to eight business days to have the first data available for attorney review. Affidavit of Stuart Hanley, at ¶17 ("Hanley Aff."). This process is already underway. Hanley Aff., at ¶17. The back-up tapes utilized by DDR are high capacity tapes, referred to as DLT and LTO type back-up tapes. Hanley Aff., at ¶11. The LTO tapes can hold up to 200 gigabytes of information. Hanley Aff., at ¶11. Two hundred gigabytes translates into approximately fifteen million pages of material. Hanley Aff., at ¶11. Disaster recovery tapes such as those utilized by DDR contain complete backups of multiple file servers including the email server which contain employees' mailboxes and file and print servers which contain general working documents such as Microsoft Word, Excel, PowerPoint, etc., documents. Hanley Aff., at ¶7.

To process a high capacity tape, Kroll must first create an exact duplicate copy of the original media so that Kroll does not risk damage to the original: a standard protocol when working on media/data involved in litigation. Hanley Aff., at ¶9. Kroll next

restores the data contained on the tape to a file server so the data is active. Hanley Aff., at ¶10. Once the data from a tape is restored in this manner, the data needs to be segregated and extracted by the identified file server volumes that need to be processed. Hanley Aff., at ¶12. Also, DDR's Lotus Notes email server data, which contains approximately 600 mailboxes, will need to be separated and mailboxes for the 16 identified custodians extracted. Hanley Aff., at ¶13. Because the parties have identified sixteen custodians from whom emails are sought, Kroll must locate any data related to those sixteen custodians. Hanley Aff., at ¶13. *See also*, plaintiffs December 13, 2006 letter to D. Kobasic, Ex. 2, defendants' letter dated January 22, 2007 to R. Machson, Ex. 3. This process must be repeated for each tape. Hanley Aff., at ¶13.

Once the data related to emails and documents is segregated, Kroll will process all identified (segregated) data which includes filtering out executable and application files that are not readable and cannot contain responsive information. Hanley Aff., at ¶14. Kroll then performs keyword searches on the extracted and filtered data. Hanley Aff., at ¶14. The proposed keyword searches in this case are "First Dollar," "Liability Escrow," and "Property Escrow." Hanley Aff., at ¶14. After the keyword searching is completed, Kroll will load the results onto its online review database for review by counsel for responsive, non-privileged documents. Hanley Aff., at ¶15. Many of the tasks outlined above are performed simultaneously by different Kroll engineers and team members. Hanley Aff., at ¶16. Kroll's staff works 10-12 hours per day, and eight to 12 Kroll

employees will be simultaneously working on the restoration, extraction and filtering of DDR's back-up tapes at various task points. Hanley Aff., at ¶16.

The estimated time required for Kroll to process and have available for attorney review the entirety of the 345 back-up tapes is 102-122 business days. The more focused search proposed by defendants of 105 disaster recovery back-up tapes (the tapes related to the months of July, August, September and December for the period 1998-2004) will take 38-46 business days. Hanley Aff., at ¶18. *See also* Kroll Estimates, Ex. 4.

C. The Technological Impossibility of Complying With the February 2, 2007 Deadline

On January 5, 2007, this Court ordered defendants to produce "documents that show *how* charges under the first dollar program are calculated." January 5, 2007 Order, at 11, Docket at 199. This Order appears to encompass e-versions of such documents. Paper copies of such documents that are readily accessible have already been produced. Readily accessible electronic versions of the same, housed on current computer systems or CDs, will be produced on February 2, 2007.[5]

As set out herein, defendants desire to comply and have made diligent efforts to do so. Nonetheless, e-versions of documents that may have been created and deleted before this litigation was imminent cannot be produced by that date. If such items exist, they exist only on the disaster recovery tapes described above. The Kroll search process described above is underway, but as explained, it will take approximately 102 to 122

business days to perform these tasks for the approximately 345 disaster recovery tapes that cover the entire time frame at issue. January 22, 2007 email to Dena Kobasic, Ex. 5. Upon learning that the restoration of back-up tapes could not be completed by February 2, 2007, defendants promptly asked plaintiff for cooperation with regard to the timing of production. *See* January 22, 2007 Letter to Robert Machson, attached as Ex. 3. Plaintiff at that time refused to agree to an extension of the deadline for producing ediscovery. *See* Machson email dated January 26, 2007, attached as Ex. 6.

D. Procedural History

While attempting to reach an agreement with plaintiff on January 22, 2007, defendants simultaneously filed a timely Objection to the February 2, 2007 deadline as it applied to the e-discovery of items created and deleted before litigation was imminent and that are consequently not readily accessible. *See* Objection attached as Ex. 7. Plaintiff responded on January 30, 2007. *See* Docket at 226. In its papers, plaintiff stated: "to the extent the Court is prepared to set reasonable deadlines for production of so-called 'e-documents' and make corresponding extensions of the existing scheduling Order, Plaintiff does not object." *Id*. Plaintiff thus recognized the need for reasonable deadlines and voiced no prejudice if the schedule were changed to accommodate the technological reality described herein. Judge Doty likewise recognized that "a modification of the deadline might be warranted if compliance with the deadline is in fact

[5] Specifically, electronic versions of Excel spreadsheets that are readily accessible will be produced on February 2, 2007. This includes spreadsheets showing first dollar charges for the 2004-2005 and 2005-2006 time frame.

technologically impossible." *See* Docket at 241, pg. 2. Despite substantial efforts, compliance is technologically impossible.

E. Defendants' Efforts to Comply With the February 2, 2007 Deadline

Defendants have done everything in their power to complete e-discovery as quickly as possible. Defendants identified the persons most likely to have sent or received emails containing potentially relevant, responsive information. Defendants also identified the persons most likely to have created potentially responsive documents.

In addition, although emails and the loose documents both exist on the same tapes, the methods for retrieving them differ and must be searched for using different types of information. Accordingly, after discussing with Kroll how to best accomplish e-discovery, defendants also obtained additional information for Kroll regarding the configuration and server use relating to DDR's computer systems and back-up tapes in order to define project parameters. This entailed interviewing members of DDR's IT department to determine how much active data exists on current systems so that Kroll could estimate how much data might exist on back-up tapes. Such information is important because timing is driven, in part, by the amount of data contained on the tapes that must be processed.

Defendants also interviewed email custodians and others about their practices with regard to the creation and saving of documents. This enabled defendants to define what shared network drives were used historically to create or save documents.

Defendants have also continued their attempts to work with plaintiff to reach a compromise. In fact, on January 31, 2007, plaintiff suggested that defendants take a focused approach to e-discovery by processing back-up tapes containing information from January of 2005 to the present.[6] Defendants' suggested alternative is believed to be more likely to result in discovery of responsive documents, if any exist.

F. Defendants' Identification of Sources That Are Most Likely to Contain Responsive Information

Defendants also have continued to investigate internally to determine what parameters may make e-discovery more manageable, and therefore, more expeditious. That internal analysis confirms that there is no way to determine whether responsive documents exist on back-up tapes. However, if such documents exist, they are most likely to be found on tapes that contain information from July, August, September and December. July, August and September correspond to the periods during which DDR historically created budgets for the following year; when DDR went through the process of determining relevant tenant charges for the coming year; and when documents related to how charges under the First Dollar Program were calculated, if they exist, would have been most likely to have been created. Affidavit of Diane Goodrich at ¶¶4, 5 ("Goodrich Aff."). During December, DDR historically made adjustments to actual expenses, and during this time, documents reflecting those adjustments may have been created. To the

[6] This time frame is not a valid focus, in part, because defendants have produced electronic versions of the spreadsheets showing first dollar charges for the period after January 2005.

extent that such adjustments may have included first dollar charges, they are likely to be reflected in December back-up tapes. Goodrich Aff., at ¶7.

There are approximately 105 back-up tapes that cover these time frames. *See* Hanley Aff., at ¶18. The process of restoring, processing, filtering, and searching these tapes will take approximately 38 to 46 business days after which, they could be reviewed for responsiveness and privilege. Hanley Aff., at ¶18. The first of these tapes will be available for attorney review within approximately the next week. Defendants will immediately begin review for responsiveness and privilege and propose a rolling production of responsive materials will commence immediately thereafter.

Consequently, defendants seek an enlargement of time to conduct a focused production that would be accomplished by processing these 105 tapes first to see if any responsive materials do in fact exist. The parties could then revisit whether continued processing is necessary.

III. LAW AND ARGUMENT

The Court should enlarge the February 2, 2007 deadline for e-discovery and permit defendants to conduct a focused review and production that can be performed expeditiously and will be more likely to result in the discovery of responsive materials, if there are any, from disaster recovery tapes.

A. The Court Should Enlarge the February 2, 2007 Deadline as it Applies to E-Discovery of Materials from Disaster Recovery Tapes

Rule 6(b)(1) of the Federal Rules of Civil Procedure provides:

> When… by order of court an act is required… to be done at or within a specified time, the court for cause shown may at any time in its discretion… order the period enlarged if request therefore is made before expiration of the period originally prescribed or as extended by a previous order.…

Requests for enlargements of time under Fed. R. Civ. P. 6(b) prior to the expiration of an original deadline are liberally permitted. Such enlargements may be made upon a mere showing of cause; they are not subject to the more exacting "good cause" standard. *Cf. U.S. v. Scherping*, No. 4-89-825, 1990 U.S. Dist. LEXIS 18604, at *9-10 (D. Minn. June 1, 1990) (explaining that requests for an enlargement of time under Fed. R. Civ. P. 6(b) prior to the expiration are "liberally permitted," while requests after expiration are subject to the good cause standard in Rule 4(j)).

In this case, under either standard, defendants' timely request for an enlargement of the February 2, 2007 deadline for e-discovery should be granted. Defendants' request for an enlargement is driven by forces entirely outside their control. Namely, that despite defendants concerted efforts to comply with the February 2 deadline, technological constraints make compliance impossible. The e-discovery of emails and documents containing relevant information that may have been deleted years before this litigation was imminent, if any even exist, cannot be performed by defendants. Rather, the tasks that will make searching for such documents possible must be performed by a contractor who possesses the requisite tools and expertise. The processing, review, extraction and filtering required to retrieve relevant documents cannot be technologically accomplished

by February 2, 2007. Under these circumstances, an enlargement of the February 2, 2007 deadline for production from disaster recovery back-up tapes is warranted.

B. The Court Should Permit a Focused Production Keyed to The Most Likely Sources of Information, If Any Exist

Defendants also seek to be permitted to perform a focused review and production. This endeavor would be based on the targeted restoration of disaster recovery tapes that are most likely to contain responsive documents, if any exist.

1. Focused Discovery Has Been Employed in Instances Involving the Type of Data at Issue Here

Courts and the Civil Rules Advisory Committee have consistently noted that information on disaster recovery tapes is not readily accessible because recovery tapes, such as the ones at issue here, are not designed to retrieve individual documents or files, but are instead used for the emergency uploading of data onto a computer system. *Rowe Entertainment, Inc. v. William Morris Agency, Inc.*, 205 F.R.D. 421, 429, (S.D. N.Y. 2002) (citing Kenneth J. Withers, *Computer-Based Discovery in Federal Civil Litigation*, SF97 ALI-ABA 1079, 1085 (2001) (holding that vestigial data maintained on back-up tapes for emergencies is different than electronic data maintained in connection with current activities); *Zubalake v. UBS Warburg LLC*, 217 F.R.D. 309, 319-320 (S.D.N.Y. 2003) (explaining that data stored on back-up tapes is not reasonably accessible because it is not readily usable and must be restored or manipulated to be used); *Concord Boat Corporation v. Brunswick Corporation*, (No. LR-C-95-781) 1997 WL 33352759, *8, *9-10 (E.D. Ark. August 29, 1997) (finding defendant not required to restore and search for

deleted emails on back-up tapes maintained solely for disaster-recovery purposes); *Murphy Oil USA, Inc. v. Fluor Daniel, Inc.*, (No. Civ.A 99-3564) 2002 WL 246439, at * 7-9, (E.D. La. 2002) (finding back-up tapes not reasonably accessible where emails existed on them and responding party had no means of retrieving data from those tapes); s*ee also The New E-Discovery Rules*: *Excerpts from the September 2005 Report of the Committee on Rules of Practice and Procedure, and the May 2005 Report of the Civil Rules Advisory Committee*, at 39, (explaining that difficulties accessing information can arise from the technology of storage systems, such as "back-up tapes intended to for disaster recovery purposes that are often not indexed, organized, or susceptible to electronic searching"), excerpts attached as Ex. 8.

Because the Federal Rule 26 (2)(B) provides that parties are not normally required to produce discovery of electronically stored information from sources that are not reasonably accessible, courts analyzing the process of producing e-discovery from sources such as back-up tapes have permitted parties to engage in "sampling" in order to determine whether responsive documents exist and whether continued e-discovery is warranted. *See e.g., Zubalake v. UBS Warburg LLC*, 217 F.R.D. 309, 324 (S.D.N.Y. 2003); *McPeek v. Ashcoft*, 202 F.R.D. 202 F.R.D. 31, 34-35 (D.D.C. 2001).

For example, in *Zubalake*, as part of a cost-shifting analysis, the court held that a responding parties would need to restore data from a sample set of five out of 94 back-up tapes that contained emails, and would be required to document the time and money spent doing so. 217 F.R.D. at 324. In so doing, the court reasoned that because it could

not know what data might exist on inaccessible media, requiring restoration and production from a small sample would be "sensible approach in most cases." *Id.* Similarly, in *McPeek*, the court found that a responding party would be required to perform back-up restoration of emails from a particular date range that could be attributed to a computer used by a person whose emails were allegedly germane to the case. 202 F.R.D. 34-35. The court decided it would use do a "test run" in this manner in order to obtain information that would allow it to better analyze whether continued discovery was warranted in light of the resources expended and the results received from the sample. *Id.*

Such targeted discovery is also specifically contemplated by revised Rule 26. The advisory committee notes state:

> the court and parties may know little about what information the sources identified as not reasonably accessible might contain, whether it is relevant, or how valuable it may be to the litigation. In such cases, the parties may need some focused discovery, which may include sampling of the sources, to learn more about what burdens and costs are involved in accessing the information, what the information consists of, and how valuable it is for the litigation in light of information that can be obtained by exhausting other opportunities for discovery.

Fed. R. Civ. P. 26 advisory committee notes.

2. Defendants Propose Focused Discovery Keyed to the Most Likely Sources of Information, If Any Exists

As is often the case with back-up tapes, in this case, there is no way to determine whether any of the tapes at issue contain responsive materials prior to restoring,

processing, filtering and searching them. As explained, this process will take time, and even after such time is expended, may not produce any results.

For that reason, defendants propose that they be permitted to perform e-discovery by restoring back-up tapes that are most likely to contain responsive information, if any exists. Defendants have identified particular months during the years at issue in this case when issues relating to calculation of first dollar charges would have been addressed. There are approximately 105 tapes that cover these months.

Defendants will begin a rolling production as soon as information from the first of these 105 tapes is processed by Kroll (processing has already started) and reviewed for responsiveness and privilege. The last of these 105 tapes can be made ready for attorney review in 38-46 business days. Defendants propose that they be permitted 30 days after that last tape is processed to produce responsive materials from these 105 tapes.

Plaintiff's counsel now objects to a focused production, although he earlier this week he suggested January 2005 as an appropriate starting point for a focused review. Thus, even though the parties have not agreed to the parameters of a focused review and production, both parties recognize that such an approach might be advantageous. Plaintiff does not object to an enlargement of time for production so long as it could be completed by March 31, 2007. Despite defendants' best efforts, it cannot.

IV. CONCLUSION

Despite defendants' efforts, technological constraints make it impossible to comply with the February 2, 2007 deadline for e-discovery. For that reason, defendants respectfully request additional time to perform a focused e-discovery project which will be most likely to produce responsive materials from disaster recovery tapes, if any materials exist on that media. Specifically, defendants respectfully seek to be allowed 30 days after the last of 105 tapes that are most likely to contain such items is processed, to produce responsive materials, if there are any.

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