**UNITED STATES DISTRICT COURT**
**DISTRICT OF MINNESOTA**

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| BEST BUY STORES, L.P.,<br><br>Plaintiff,<br>vs.<br><br>DEVELOPERS DIVERSIFIED REALTY CORPORATION,<br>*et al.*,<br><br>Defendants. | Civil No. 05-2310 DSD/JJG<br><br>**DEFENDANTS' MEMORANDUM SUPPORTING MOTION FOR PROTECTIVE ORDER FOR COSTS OF DISCOVERY OF DATA FROM DISASTER RECOVERY TAPES**[1] |

## I. INTRODUCTION

Defendants have sought to efficiently and effectively resolve what plaintiff describes as the central issue in this case: whether defendants charged appropriate amounts for First Dollar coverage under sixteen different lease agreements. In other words, how charges under the First Dollar Program were calculated. To that end, defendants produced all reasonably accessible paper and electronic documents responsive to plaintiff's seven discovery requests; offered the deposition of a corporate witness who could explain how First Dollar charges were calculated; and proposed a stipulation

[1] Defendants file this Memorandum today in order to comply with the Court's briefing rules but respectfully request that the Court defer consideration of this Motion until after reviewing the request also filed today by defendants pursuant to L.R. 7.1 (g). Defendants' L.R. 7.1 (g) request seeks permission to move for reconsideration of the Court's January 4, 2007 Order as it relates to electronic information stored on disaster recovery tapes. In order to allow this Court to consider that request, defendants ask that the Court defer consideration of their Motion for Protective Order until such time as it has determined whether it will allow defendants to submit new evidence in a conference or a Motion for Reconsideration.

describing how First Dollar charges were calculated. Defendants do not believe that any additional documents exist that reflect how First Dollar charges were calculated.

Despite these efforts, plaintiff continues to demand the production of data that exists only on disaster recovery back-up tapes. Neither party knows whether any responsive data exists on these tapes. Even if they did exist, they would merely reflect duplicate information available from other less costly sources. In these circumstances, plaintiff should be required to pay for the unduly burdensome cost of restoring the tapes. As is set out more fully below, the cost to restore the disaster recovery tapes is as much as $597,000, before attorney review for responsiveness and privilege. On the other hand, the total maximum amount possibly charged to plaintiff for the First Dollar Program is just over $1 million.[2] Plaintiff has not, to date, identified the alleged amount of First Dollar overcharge, but it is undisputed that it must be less than this amount.

Where, as here, defendants have offered conclusive evidence of the very issue about which plaintiff seeks discovery, and where there is no reason to believe that any responsive data exists on the disaster recovery tapes, the costs of any efforts to restore those tapes should be borne by the requesting party.

[2] It is undisputed that this number is overstated because it includes charges for items other than the First Dollar Program which cannot be broken out and which are not at issue in this case.

## II. FACTS AND PROCEDURAL HISTORY

### A. Plaintiff's Claims

#### 1. Plaintiff Contests Defendants' First Dollar Program

The central focus of plaintiff's case is that it was overcharged for insurance under defendants' First Dollar Program. Plaintiff's primary inquiry is how charges under the First Dollar Program were calculated. *See Plaintiff's Memorandum in Support of Plaintiff's Motion to Compel and for Sanctions*, at 6, (Docket at 171) ("the obvious question is: how did DDR calculate the First Dollar premium?"); *Plaintiff's Opp. to Objection to Order of Magistrate Graham*, at 2, (Docket at 226) ("Best Buy is primarily seeking a single document (or type of documents), which would explain how Defendants went from a single-page letter provided indirectly to it by its insurance carriers (the "indication letter"), to its "First Dollar" premium....).

#### 2. Defendants' Proposed Cost-Saving Offer of Deposition and Stipulation of Facts

Defendants have made a concerted effort to work with plaintiff to address its questions about calculation of First Dollar costs without Court intervention. Defendants offered to produce a witness on February 2, 2007, or on some other mutually convenient date, who would explain how First Dollar charges were calculated. Plaintiff declined to take such a deposition at this point in the case. *See* 02/02/07 Letter from D. Kobasic to R. Machson (attached as Ex. 2) In further response to plaintiff's purported need to develop this primary issue, on February 8, 2007, defendants contacted plaintiff and proposed that the parties sign a stipulation of facts regarding how First Dollar charges

were calculated. *See* 2/08/07 Letter from D. Kobasic to R. Machson (attached as Ex. 3) The proposed stipulation provides the information that plaintiff seeks regarding how charges for the First Dollar program are calculated. The stipulation costs the parties nothing. Plaintiff has yet to respond to this proposal.

**3. The Total Amount in Controversy**

The total amount charged to Best Buy for the First Dollar program[3] since 1998 is $1,119,867.30.[4] *See* 02/09/07 Letter for D. Kobasic to R. Machson (attached as Ex. 1) Best Buy has not identified what portion of the amount is truly at issue, but it is undisputed that it must be something less than the total charged. As demonstrated, this amount pales in comparison to the costs of the extraordinary measures that plaintiff seeks with respect to disaster recovery tapes described below.

**B. Defendants' Electronic Data**

Defendant Developers Diversified Realty Corporation ("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 disaster recovery 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.*

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[3] This figure includes charges not at issue here that cannot be separated out based on historical records.

[4] Defendants do not concede that plaintiff's alleged damages satisfy the amount in controversy requirement for subject matter jurisdiction over each defendant. The amount described here is an aggregated member of all damages.

Because the disaster recovery tapes are only maintained for dire and unlikely circumstances, for cost economy, the information copied onto them 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 disaster recovery 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 disaster recovery tape. *Id.*[5] Each one contains all the unsorted and unorganized data for the entire computer system on the day that it was created. Carmody Aff., at ¶6. Before information can be extracted from the disaster recovery 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.

The cost of having data from disaster recovery tapes restored, and then processed and filtered so that it can be searched, entails considerable expense, which varies based on factors such as the amount of data contained on a tape, the number of persons who authored the emails and documents ("custodians") searched for, and the number of keywords searched for in those email and documents. *See* Kroll OnTrack January 21,

[5] In June 2002, a new network server was installed. Affidavit of Loraine 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

2007 Estimates, (attached as Exs. 4, 5, and 6)[6]. With these necessary steps, the total cost to retrieve information from the approximately 379 disaster recovery tapes that cover the entire nine-year period allegedly at issue in this case ranges from $400,550 to $597,100. *See* Kroll OnTrack January 21, 2007 Estimates, (attached as Exs. 4, 5, and 6). Moreover, there is no way to ascertain whether there are any responsive emails or documents on the disaster recovery tapes prior to incurring the expense of restoring, processing, filtering, and searching them. Carmody Aff., at ¶7.

### C. Procedural History

#### 1. Defendants' Compliance With This Court's June 28, 2006 Order

Pursuant to Rule 26(f), on February 26, 2006, the parties met and conferred about discovery issues. The parties did not discuss the production of electronically stored information that is not reasonably accessible and included no provisions related to the same in their Rule 26(f) Report. *See* Docket, at 24.

On June 28, 2006, this Court Ordered defendants to respond to certain of plaintiff's pending discovery requests on or before July 31, 2006. Docket, at 131. Although this Court held that defendants had waived objections, it did not find that defendants were required to produce items or information beyond that required by Rule 26. *Id.*

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proficiency and data storage space required to convert or restore the data and make it searchable. McGlone Aff., at ¶6.

[6] The Kroll estimate attached as Exhibit 4 shows cost estimates for restoration of emails to or from 16 custodians on disaster recovery tapes covering the period January 1998 until April 2005. The Kroll estimate attached as Exhibit 5 shows the cost estimates for restoration of emails to or from 16 custodians on disaster recovery tapes covering May

Revised Rule 26 (b)(2)(B) makes clear that "*a party need not provide discovery of electronically stored information from sources that are not reasonably accessible* because of undue burden or cost." *See* Fed.R.Civ.P 26 (2)(b) (emphasis added). Further, the Civil Rules Advisory Committee specifically noted that information on disaster recovery tapes is not reasonably accessible. *See 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 for disaster recovery purposes that are often not indexed, organized, or susceptible to electronic searching"), (excerpts attached as Ex. 7).

Accordingly, on or before July 31, 2006, after a diligent search of defendants' paper files and current computer system, defendants produced all reasonably accessible and responsive documents, including printed copies of electronically stored information, that were located. Defendants similarly continued to produce printed copies of documents and emails in response to plaintiff's additional discovery requests through November of 2006. During this period, plaintiff never raised any issues related to the production of electronically stored information that is not reasonably accessible.

**2. Defendants' Compliance With Revised Rule 26**

The Advisory Committee Notes to revised Rule 26, which became effective December 1, 2006, provide:

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2005 until the present. The Kroll estimate attached as Exhibit 6 shows cost estimates for

> a responding party should produce electronically stored information that is relevant, not privileged, and reasonably accessible... *[t]he responding party must also identify by category or type, the sources containing potentially responsive information that it is neither searching or producing.*"

As explained, there is no way to ascertain whether responsive emails or documents exist on any of the disaster recovery tapes without incurring the expense of restoring, processing, filtering, and searching the back-up tapes. Carmody Aff., at ¶7. Thus, it is unknown if they are a source of potentially responsive information.

Nonetheless, in an abundance of caution, and in an attempt to comply with the process described in the Advisory Committee Notes, shortly before revised Rule 26 became effective, defendants sent plaintiff a letter on November 30, 2006, and stated that although all reasonably available responsive documents already had been produced, defendants had not searched for "archived"[7] emails (i.e., emails on disaster recovery tapes). *See* 11/30/06 Letter from D. Kobasic to R. Machson (attached as Ex. 8). Defendants invited plaintiff to contact defendants to discuss this issue. *Id.*

### 3. Plaintiff's Concessions That Defendants Were Not Required to Produce Information That Is Not Reasonably Accessible

Plaintiff wrote to defendants on December 1, 2006 and *conceded* that "the rules in force today... simply clarify pre-existing rules," including, revised Rule 26 (b)(2)(B), which makes clear that "a party need not provide discovery of electronically stored

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restoration of documents on all disaster recovery tapes from 1998 to present.

[7] Use of the term "archived" emails is not intended to imply that the emails are in any way sorted or organized. As explained, these emails exist only on the disaster recovery tapes described above.

information from sources *that are not reasonably accessible* because of undue burden or cost." *See*12/01/06 Email from R. Machson to D. Kobasic (attached as Ex. 9). In fact, *plaintiff* specifically noted that Rule 26(b)(2)(B) "permits the responding party to 'identify' sources of data 'not reasonably accessible.' " *Id.* Plaintiff stated that defendants should discuss this further. *Id.*

By letter dated December 12, 2006, defendants explained that any deleted emails related to the First Dollar program, if there were any, were "not reasonably accessible" as they would only exist on approximately 300 plus of the disaster recovery tapes described above, and that preliminary estimates for restoring and processing these tapes were considerable, even before accounting for attorney review for responsiveness and privilege. *See* 12/12/06 Letter from D. Kobasic to R. Machson (attached as Ex. 10). Provision of more precise information about costs was not possible without more input from plaintiff, including identification of date ranges, document and email custodians, and search terms.

On December 13, 2006, plaintiff wrote again and erroneously asserted that defendants were on notice of this suit from September 28, 2004, and accordingly, defendants were required to ensure that all materials from that date forward were "reasonably accessible" to plaintiffs. *See* 12/13/06 Letter from R. Machson to D. Kobasic (attached as Ex. 11). Plaintiff also, for the first time, proposed that defendants obtain an estimate for discovery of emails from a list of thirteen custodians and for the discovery of documents related to the First Dollar Program, from January 1, 1998

through September 28, 2004, that were not reasonably accessible, and a second estimate for costs of discovery of the same from September 28, 2004 to present that were, according to plaintiff, "reasonably accessible." *Id.* In requesting two such estimates, plaintiff was understood to have been indicating that the responsibility for the cost of restoring disaster recovery tapes would be split if the parties proceeded with restoration, and that plaintiff believed that defendants would only be responsible for the cost of restoring and retrieving documents created after September 28, 2004. *See id.*

Notably, in that letter, and even though plaintiff had already filed a motion to compel, *plaintiff specifically conceded that such a motion may have been premature:* plaintiff stated that it needed additional information from defendants "[i]n order for Plaintiff to evaluate [the information provided by defendants on December 12, 2006] and determine whether a motion to compel is necessary and appropriate." *Id.* Plaintiff also asked for names of people with knowledge related to defendants' computer systems so that plaintiff could depose him or her if necessary. *Id.* Plaintiff's stated need for such a deposition: "to evaluate the burdens and costs of producing the discovery and the likelihood of finding responsive information," presumably so plaintiff could determine whether information on the disaster recovery tapes was not reasonably accessible, and therefore, not required to be produced. *See id.*

Plaintiff's December 13, 2006 letter was mistaken in several respects. First, all reasonably accessible documents already had been produced. Second, the September 28, 2004 date selected by plaintiff as the date that defendants were on notice that litigation

was imminent is inaccurate: defendant DDR had no notice that a suit might be filed until April 8, 2005, at the absolute earliest.[8]

### 4. The Parties' Pre- and Post Hearing Discussions Regarding Information on Disaster Recovery Tapes

On December 19, 2006, this Court Ordered counsel for the parties to confer for several hours before a hearing on several discovery motions. The Court directed the parties to determine what, if any, discovery issues could be resolved prior to the hearing. During that conference, the parties continued the discussion initiated in the attached correspondence about discovery of emails from disaster recovery tapes. Both parties agreed that this issue needed more analysis and discussion.[9]

On January 3, 2007, as part of the parties' continued efforts to work through these issues, plaintiff contacted defendants by telephone. During that telephone call, plaintiff indicated that it wished to depose a person or persons from defendant DDR's IT department so that plaintiff could assess costs and other issues associated with discovery of data from the disaster recovery tapes. Defendants' asked that such a deposition be

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[8] Prior to April 8, 2005, plaintiff's counsel had sent requests to defendant DDR's counsel seeking information related to charges at thirteen locations where it leases space. Nonetheless, on April 8, 2005, when plaintiff first threatened suit, plaintiff's counsel had never sought information regarding the location at Wrangleboro Consumer Square, in Mays Landing, New Jersey where plaintiff leases space from Benderson-Wainberg Associates, L.P.; the location at The Commons, in Salisbury Maryland, where plaintiff leases space from DDR PDK Salisbury LLC; or the location at La Plaza Del Norte, in San Antonio, Texas, where plaintiff previously leased space from defendant DDRA Community Centers Four, L.P.

formally noticed pursuant to Rule 30(b)(6) so that a person with the proper technical information could be identified. Plaintiff indicated that a notice would be forthcoming. The parties also discussed the "trigger date" on which defendants were on notice that this lawsuit was imminent, and the date after which defendants would be responsible for the costs of producing data from disaster recovery tapes, if there was any. Although the parties did not agree on the appropriate "trigger date", both agreed that there would be one.

### 5. The Court's January 4, 2007 Order and Defendants' Good-Faith Effort to Comply

On January 4, 2007, this Court Ordered defendants to produce "documents that show *how* charges under the first dollar program are calculated," including electronic versions of the same. January 4, 2007 Order, at 11, Docket at 199. Reasonably accessible copies of such documents already had been produced in paper. Reasonably accessible electronic versions of the same, housed on current computer systems or on CDs, were also produced on February 2, 2007. The Order made no provision for the costs of producing other items from disaster recovery tapes that are not reasonably accessible.

Using the information provided by plaintiff, defendants had already been working diligently to obtain more precise cost estimates of recovering items from the disaster recovery tapes. Counsel retained the services of Kroll On Track ("Kroll"), a vendor with

[9] The parties also discussed a series of Excel spreadsheets. Electronic versions of these are reasonably accessible as they exist on current computer systems and CDs. Electronic

extensive experience in restoring and processing disaster recovery tapes. After discussing with Kroll how to best accomplish the restoration process, defendants also obtained additional information from defendant DDR for Kroll regarding the configuration and server use relating to DDR's computer systems and disaster recovery 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 disaster recovery tapes. Such information is important because costs are driven, in part, by the amount of data on tapes that must be processed.

Defendants also re-interviewed members of defendant DDR's accounting and risk management departments to ascertain the propriety of searching for emails from or to the list of people identified by plaintiff in its December 13, 2006 letter and surveyed and interviewed email custodians and others about their practices with regard to the creation and saving of documents. This enabled defendants to define which shared network drives were used historically to create or save documents. Defendants additionally analyzed and discussed the efficacy and costs of using the search terms plaintiff identified in its December 13, 2006 letter with people possessing technical knowledge about searching the computer systems after they were restored from the disaster recovery tapes and with people possessing substantive knowledge of the matters at issue in this case.

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versions of these spreadsheets were produced on February 2, 2006.

### 6. The Parties' Post-Order Communications Regarding the Costs of Restoration of Data from Disaster Recovery Tapes

On January 22, 2007, defendants shared the additional information it had learned about discovery of emails and documents from disaster recovery tapes that were not reasonably accessible. *See* 01/22/07 Letter from D. Kobasic to R. Machson (attached as Ex. 12). Defendants again informed plaintiff that the September 28, 2004 date selected by plaintiff was not the correct cut-off date for cost sharing, as April 8, 2005, was the first date that any of the defendants, including defendant DDR, had notice that a lawsuit was contemplated. *Id.* Additionally, defendants informed plaintiff that the estimated cost to 1) restore and process 246 disaster recovery tapes for January 1998 to April 2005; and 2) filter and search the processed data from the 246 tapes for emails to or from the thirteen custodians listed in plaintiff's December 13, 2006 letter, is $150,850 to $167,600. Id. The additional estimated cost to search the disaster recovery tapes for documents is $165,950 to $329,000. The estimated costs for both measures totals $316,800 to $469,600. Defendants asked plaintiff to indicate whether it was willing to pay any portion of these costs. *Id.*

Defendants also informed plaintiff that its internal investigation suggested that plaintiff might want to add three people to the list of names in plaintiff's December 13, 2006 letter, and that even though that would increase the estimated cost of searching for emails approximately by approximately $8,000 to $10,000, and would increase the estimated total cost to $324,300 to $506,800, it would be more efficient and cost effective to add these people to the previously described process than to do a second restoration

project at a later date. *Id.* Defendants also informed plaintiff that using the term "First Dollar" to search for emails and documents would capture the same documents that would be captured if using the search terms suggested in plaintiff's December 13, 2006 letter. *Id.* Defendants also suggested, however, that its internal investigation revealed that plaintiff might want to consider using two additional search terms, and that although this also might add to costs, it was not possible to quantify that increase. *Id.* Defendants asked plaintiff to indicate its willingness to pay for these additional measures. Importantly, defendants noted that they had no reason to believe that these searches would result in the discovery of any documents reflecting how First Dollar charges were calculated. *Id.* On January 26, 2007, plaintiff informed defendants that it would not agree to pay any of the costs described in defendants' January 22, 2007 letter. *See.* 01/26/07 Email from R. Machson to J. Burke (attached as Ex. 13).

**7. Defendants' Cost-Saving Proposal for More Focused Discovery**

On January 30, 2007, the parties once again discussed these issues. Plaintiff proposed a focused search that would begin with the period of September 28, 2004, or January 1, 2005, though it offered no reasoning for the selection of these start dates. Plaintiff still refused to shoulder any costs for discovering information from disaster recovery tapes.

Defendants continued their ongoing internal investigations to determine what parameters might make retrieving information from disaster recovery tapes more manageable, more likely to capture responsive data, if any existed, and less costly. That

internal analysis re-confirmed that although there is no way to determine whether any responsive information exist on the disaster recovery tapes, if it did, it most likely would be found on tapes containing information from July, August, September and December of the relevant years.[10]

There are approximately 105 disaster recovery tapes that cover these time frames. *See* Declaration of Stuart Hanley, at ¶18 ("Hanley Dec."). The process of restoring, processing, filtering, and searching these 105 tapes for emails and documents regarding how First Dollar charges are calculated, that were sent to or from sixteen key people in defendants' employ, will cost approximately $238,900 to $419,300. *See* Kroll OnTrack, February 2, 2007 and January 21, 2007 estimates (attached as Exs. 14 and 15)

On February 2, 2007, defendants asked if plaintiff would agree to this focused proposal. Although plaintiff did not specifically object to this more focused approach, and although plaintiff agreed that it would not insist on a complete production prior to the end of March 2007, plaintiff refused to bear any costs to restore disaster recovery tapes. See 02/02/07 Letter from R. Machson to D. Kobasic (attached as Ex. 16).

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[10] 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 most likely have been created. Declaration of Diane Goodrich at ¶¶4, 5 ("Goodrich Dec."). During December, DDR historically made adjustments to actual expenses, and during this time, documents reflecting those adjustments may have been created. To the extent that such adjustments may have included first dollar charges, they are most likely to be reflected in December back-up tapes. Goodrich Dec., at ¶ 7.

## II. LAW AND ARGUMENT

Plaintiff claims that the central issue in this case is how charges under the First Dollar Program were calculated. Defendants have offered both deposition testimony and a stipulation addressing that exact issue. Most importantly, there is no reason to believe that the disaster recovery tapes at issue contain data that would reflect how First Dollar charges were calculated or add anything to what has already been offered by defendants via deposition and stipulation. In these circumstances, if plaintiff insists on a search for emails and documents that are not reasonably accessible, with little or no likelihood of recovering any relevant information, such a search should be at plaintiff's expense.

Courts routinely find, and the Civil Rules Advisory Committee to the Federal Rules of Civil procedure specifically notes: information on disaster recovery tapes is not reasonably accessible. Moreover, factors considered by courts when determining whether a requesting party should bear the cost of producing information that is not reasonably accessible weighs in favor of shifting these costs to plaintiff, including the fact that the cost of discovering information from disaster recovery tapes is overwhelmingly disproportionate to the maximum amount potentially at issue in this matter, and the fact that defendants have proposed a measure that will provide plaintiff with the information it seeks, at no cost to the parties.

### A. Information on Disaster Recovery Tapes, If It Even Exists, Is Not Reasonably Accessible

In this case, printed copies of reasonably available responsive documents have been produced.[11] However, if any emails and documents were deleted as part of defendants' ordinary course of business prior to the time defendants had notice of this suit, they may exist only on disaster recovery tapes.

Such emails and documents, if they even exist, are not reasonably accessible because of technological limitations. Disaster 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). When addressing revisions to Rule 26 in its 2005 Report, the Civil Rules Advisory Committee specifically noted the difficulty of obtaining information from disaster recovery tapes. *See 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 for disaster recovery purposes that are often not indexed, organized, or susceptible to electronic searching"), (excerpts attached as Ex.7).

[11] As previously noted, electronic versions of certain Excel spreadsheets are reasonably accessible and were produced on February 2, 2007.

Similarly, courts recognize that documents on back-up tapes maintained solely for disaster-recovery purposes are not reasonably accessible. *See e.g., Zubalake v. UBS Warburg LLC*, 217 F.R.D. 309, 319-320 (S.D.N.Y. 2003) (explaining that data stored on disaster recovery back-up tapes is not reasonably accessible because it is not reasonably usable and must be restored or manipulated to be used); *Rowe*, 205 F.R.D. at 430-31 (holding that vestigial data maintained on back-up tapes for emergencies is different than electronic data maintained in connection with current activities, and shifting cost of producing such information to requesting party); *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) (shifting cost of production to requesting party where emails existed on back-up tapes and responding party had no means of retrieving data from those tapes).

### B. Because Information on Disaster Recovery Tapes, If It Exists, Is Not Reasonably Accessible, Rule 26 Did Not Require Its Previous Production

Revised Rule 26 (b)(2)(B) makes clear that "a party need not provide discovery of electronically stored information from sources that are *not* reasonably accessible because of undue burden or cost." *See* Fed.R.Civ.P 26 (2)(b) (emphasis added). As plaintiff has conceded, this revision "simply [clarifies] pre-existing rules." *See* Ex. 9. Accordingly, at all times prior to the date this revision became effective, defendants diligently produced

all *reasonably accessible* responsive documents and information, including paper copies of electronically stored information, that could be located after a diligent search of defendants' paper files and current computer system.

The Advisory Committee Notes to revised Rule 26, which became effective December 1, 2006, provide:

> a responding party should produce electronically stored information that is relevant, not privileged, and reasonably accessible... *[t]he responding party must also identify by category or type, the sources containing potentially responsive information that it is neither searching or producing.*"

In light of this Note, and immediately prior to the date that revised Rule 26 became effective, defendants fulfilled their discovery obligations by identifying the disaster recovery tapes as a source of potentially responsive information that was not searched or produced. Ex. 8. Notably, defendants did this even though they have no reason to believe that the disaster recovery tapes are in fact a source of potentially responsive information: there is no way to know whether the disaster recovery tapes contain information related to how charges for the First Dollar program were calculated.

### C. Because Information on Disaster Recovery Tapes Is Not Reasonably Accessible, Defendants Initiated and Participated In the Process Contemplated by Rule 26

Because the information on the disaster recovery tapes was not reasonably accessible, defendants diligently endeavored to comply with pertinent provisions of revised Rule 26. Specifically, the committee notes to revised Rule 26 state:

> a responding party should produce electronically stored information that is relevant, not privileged, and reasonably accessible, subject to the (b)(2)(C)

> limitations that apply to all discovery. The responding party must also identify, by category or type, the sources containing potentially responsive information that it is neither searching nor producing. The identification should, to the extent possible, provide enough detail to enable the requesting party to evaluate the burdens and costs of providing the discovery and the likelihood of finding responsive information on the identified sources.

Fed. R. Civ. P. 26 advisory committee notes. Defendants engaged in this exact procedure.

Defendants produced hard copies of all reasonably accessible emails and documents. Shortly before revised Rule 26 became effective, defendants raised the issue of emails on disaster recovery tapes that were not reasonably accessible, and invited further discussions with plaintiff. Ex. 8. On December 1, 2006, plaintiff sought clarification from defendants regarding "sources of data ' not reasonably accessible.' " Ex. 9. Defendants responded by providing additional information about the disaster recovery tapes, an estimate of how many tapes would need to be processed, and noted that it was uncertain whether the tapes contained any relevant information. Ex. 10. Defendants also noted the substantial processing cost. *Id.* In sum, defendants' response identified, "to the extent possible" details that would enable plaintiff to evaluate the burdens and costs of providing the discovery and the likelihood of finding responsive information on the identified sources. *See* Fed. R. Civ. P. 26 advisory committee notes.

By letter dated December 13, 2006, plaintiff asked defendant for additional information so that it could evaluate this response and determine whether a motion to compel was appropriate, even though it had already filed such a motion. Ex. 11. Plaintiff sought cost estimates for particular items, and indicated in that letter, and in

subsequent telephone communications, that it might want to depose people with knowledge about the burdens of obtaining information from disaster recovery tapes. Such targeted discovery is also part of the process 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. Defendants continued to exhaustively investigate the issues raised by plaintiff and provided the requested information.

In sum, before, during, and after the filing of plaintiff's motion to compel, the parties were engaged in the process contemplated by the Rule. Defendants have diligently participated in this proces, and were, in fact, the party that first initiated the process in good-faith compliance with revisions to Rule 26.

**D. Plaintiff Should be Assessed Costs to Restore Disaster Recovery Tapes**

Pursuant to Rule 26(c), a Court may issue an order protecting a responding party from undue burden or expense by "conditioning discovery on the requesting party's payment of the costs of discovery." *Oppenheimer Fund v. Sanders*, 437 U.S. 340, 358 (1978). The advisory committee notes to Revised Rule 26 further provide that Courts may impose conditions on discovery, including "payment by the requesting party of part

or all of the reasonable costs of obtaining information from sources that are not reasonably accessible." Fed. R. Civ. P. 26(b)(2) advisory committee notes.

When deciding whether to impose upon a requesting party some or all of the costs of production of information from sources that are not reasonably accessible, courts have applied various balancing tests.[12] Courts following the "*Zubalake I*" test consider: 1) the extent to which the request is specifically tailored to discover relevant information; 2) the availability of such information from other sources; 3) the total cost of production, compared to the amount in controversy; 4) the total cost of production, compared to the resources available to each party; 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; and 7) the relative benefits to the parties of obtaining the information. *Zubalake*, 217 F.R.D. at 322. These Courts also weight the first two factors most heavily, and afford the seventh factor the least weight. *Id.* Regardless of how they are weighted, these factors all favor shifting the cost of production to plaintiff in accordance with this Motion.

[12] Courts following the "*Rowe*" test balance the following eight factors, many of which overlap with the seven *Zubalake* factors: 1) specificity of the discovery request; 2) likelihood of discovering critical information; 3) availability of such information from other sources; 4) purposes for which responding party maintains requested data; 5) relative benefit to the parties of obtaining the information; 6) total cost associated with production; 7) relative ability of each party to control costs and its incentive to do so; and 8) resources available to each party. *Rowe*, 205 F.R.D. at 429. Based on these factors, the *Rowe* Court shifted production costs to the requesting party.

**1. The extent to which the request is specifically tailored to discover relevant information**

The less specific a discovery request is the more appropriate it is to shift the cost of production to the requesting party. *Rowe*, 205 F.R.D. at 429-30. This is because a party that drives up costs with expansive rather than targeted discovery should bear that additional expense. *Id.*

In this case, the Court already appropriately has narrowed the broad scope of plaintiff's discovery to documents showing how charges were calculated under the First Dollar Program. Accordingly, this factor is neutral.

**2. The availability of the information from other sources**

The less likely it is that a disaster recovery tape contains relevant information the more unjust it is to make that party search for information on it at its own expense. *Zubalake*, 217 F.R.D. at 323; *Rowe*, 205 F.R.D. at 430-31. This is particularly true when the same information can be obtained from other sources.

Here, the information is available from other sources. To begin with, defendants offered to produce a corporate witness for deposition on February 2, 2007 regarding how First Dollar changes were calculated. Ex. 2. Secondly, on February 8, 2007, defendants contacted plaintiff and proposed that the parties sign a stipulation of facts regarding how First Dollar charges were calculated. Ex. 3. Both measures provide the exact information that plaintiff seeks from disaster recovery tapes, which may not contain the information. Moreover, the proposed stipulation costs both parties nothing. Plaintiff

refused the deposition for the time being, and has yet to respond to the proposed stipulation.

Additionally, at least some of the items sought in plaintiff's December 13, 2006 letter are available from other sources. Specifically, plaintiff seeks to discover "email communications to or from any employee of DDR and [the insurance broker] Mesirow or DDR's underwriters concerning First Dollar coverage, premiums, or costs." Ex. 11. Plaintiff has, however, subpoenaed such emails from Mesirow. This category of discovery is thus also reasonably available from other sources. This factor significantly weighs in favor of shifting the cost to plaintiff.

**3. The total cost of production, compared to the amount in controversy**

If the total cost of the requested discovery is not substantial, then there is no reason to engage in cost-shifting. *Rowe*, 205 F.R.D. at 431. Here, however, the estimated costs are substantial. To retrieve information from the approximately 379 tapes that cover the entire nine-year period allegedly at issue in this case ranges from $400,550 to $597,100. *See* Exs. 4, 5 and 6. The cost to perform these tasks on the tapes that contain information from July, August, September and December equals approximately $238,900 to $419,300. *See* Exs. 14 and 15.

On the other hand, under the most liberal interpretation of the total amount possible charged to plaintiff for the First Dollar program by each defendant (and the number is over inclusive because it includes amounts for other types of common area maintenance costs not related to First Dollar charges), the absolute maximum damages

that could be claimed by plaintiff are $1,119,867.30. Ex. 1. Assuming *arguendo*, that every penny of this over inclusive figure could be claimed as a damage by plaintiff, it demonstrates that the cost of disaster recovery tape restoration is not warranted. This estimated expense constitutes as much as half of the total amount of First Dollar charges that *could* be in controversy here. The magnitude of these expenses, when compared to the amount in controversy, thus militates in favor of imposing costs on plaintiff.

**4. The total cost of production, compared to the resources available to each party**

In a given case, one party's lack of resources may justify the allocation of costs to the other party. *Rowe*, 205 F.R.D. at 432. Here, however, plaintiff is a large limited partnership that operates retail stores throughout the United States. *See* Third Amended Complaint, ¶3, Docket at 205. Plaintiff has sufficient resources to conduct this litigation and to shoulder the cost of the discovering information it purportedly needs (though that the same information is available from other sources).

**5. The relative ability of each party to control costs and its incentive to do so**

In this case, plaintiff has an almost unfettered ability to control costs by limiting the scope of its discovery requests. Defendants, conversely, cannot do so at all. This is because the disaster recovery tape restoration must be performed by an outside vendor: defendants cannot access the information on the tapes at all. Carmody Aff., ¶5; McGlone Aff., ¶¶ 5-6.

Nonetheless, defendants have taken all measures to minimize costs. Defendants offered, and Plaintiff refused, a corporate deposition regarding how First Dollar charges are calculated. On February 8, 2007, defendants contacted plaintiff and proposed that the parties sign a stipulation of facts regarding how First Dollar charges were calculated. The proposed stipulation provides the information that plaintiff seeks regarding how charges for the First Dollar program are calculated. The stipulation costs both parties nothing. Plaintiff has yet to respond to this proposal.

In addition, to the extent that plaintiff seeks the identical information from disaster recovery tapes, even though it may not exist on those tapes, defendants suggested a focused project of restoring only those tapes that are most likely to result in the discovery of information related to how First Dollar Program charges are calculated, to the extent any exist. Yet even this proposal results in estimated costs of approximately $238,900 to $419,300. *See* Exs. 14 and 15. For these reasons, this factor weighs in favor of cost shifting.

**6. The importance of the issues at stake in the litigation**

This case essentially involves a landlord-tenant dispute between sophisticated commercial entities. For that reason it does not raise the kind of public policy issues that militate in favor of broad discovery and against cost shifting.

**7. The relative benefits to the parties of obtaining the information**

Where the responding party benefits from the production, there is less reason to shift the cost of production. *Rowe*, 205 F.R.D. at 431. A benefit can come in the form of

a business benefit, such as when a search might result in something useful to a business' regular activities, or in the form of litigation benefit, such as the retrieval of information upon which the responding party might rely. *Id.* Neither type of benefit is present here. Defendants do not use the deleted documents that are sought. Consequently, restoring and searching them would have no business value. Moreover, it is plaintiff that has requested these materials. The lack of a benefit to the defendants makes cost shifting appropriate.

## III. CONCLUSION

Defendants have made considerable efforts to resolve this dispute without Court intervention. They have proposed a variety of inexpensive methods to provide information about the central issue – how charges under the First Dollar Program were calculated. Plaintiff has declined each such proposal.

Information located on disaster recovery tapes are not readily accessible. Where, as here: 1) there is no indication that documents at issue exist on the back-up tapes; 2) the cost of recovery is a disproportionate burden as compared to the amount in controversy; and 3) duplicate information is available from less costly sources, this Court should order that plaintiff pay all costs associated with recovery of data from defendants' disaster recovery tapes, including the cost of attorney review for responsiveness and privilege.

Dated: February 13, 2007

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