UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Best Buy Stores, L.P., **Civil No. 05-2310 (DSD-JJG)**

Plaintiff,

v. **ORDER**

Developers Diversified Realty Corp., et al.,

Defendants.

The above matter came before the undersigned on August 16, 2007 on the parties' motions to compel discovery (Doc. Nos. 389, 392, 395). Joel A. Mintzer, Esq., and Mpatanishi S.T. Garrett, Esq., appeared on behalf of plaintiff Best Buy Stores (Best Buy). Steven S. Kaufman, Esq., Dena M. Kobasic, Esq., and Marc J. Zwillinger, Esq., appeared on behalf of the defendants. Being duly advised of all the files, records, and proceedings herein, **IT IS HEREBY ORDERED THAT:**

1. The defendants' motions to compel discovery (Doc. Nos. 389, 392) are **GRANTED IN PART AND DENIED IN PART.**

2. Best Buy's motion to compel discovery (Doc. No. 395) is **GRANTED.**

3. The following memorandum, and a separately filed order and memorandum which has been filed under seal on this same date, are incorporated by reference.

4. Regarding the defendants' second, fourth, and fifth sets of requests for production, their requests for admissions, and their second set of interrogatories; regarding Best Buy's fourth set of requests for production; and regarding any notices of deposition discussed in this order or the accompanying order under seal:

a. For any remaining matters not addressed by this order, either the parties have not brought a motion to compel or they have lodged appropriate objections, and therefore, further motions to compel shall not be permitted.

b. Document discovery, as required under the directions and limitations of the following memorandum, shall be produced on or before October 5, 2007.

5. Consistent with this Court's order of June 29, 2006, the parties' discovery obligations shall be limited to the lease years at issue in this matter.

6. On or before September 14, 2007, the defendants shall file "Document 614" through an affidavit.

7. A party that fails to comply with the instructions in this order shall be subject to any sanctions this Court deems appropriate.

Dated this 5th day of September, 2007.

s/Jeanne J. Graham

JEANNE J. GRAHAM
United States Magistrate Judge

MEMORANDUM

I. Introduction

Although details about this complex commercial lease dispute have been discussed in prior orders, it is useful to review them once again here. Best Buy brings action against its landlords, the seventeen defendants, alleging that they overcharged insurance and maintenance costs for common areas. Based on these allegations, Best Buy raises claims for fraud, breach of contract, breach of fiduciary duty, and declaratory judgment.

The leases generally provide that the defendants are liable for certain property damage and personal injury claims. To help cover these costs, the leases require Best Buy to pay a proportionate share of the defendants' insurance coverage. Best Buy alleges the defendants only obtained coverage for claims over $100,000, and that they paid lesser amounts out of pocket, under what the parties have sometimes called the "first dollar program."

Best Buy contends that this program was not actually insurance. For this reason, Best Buy argues that it was improper under the leases to charge them insurance premiums for the program, or alternatively that the premiums charged were excessive.

So in the context of the fraud claim, Best Buy asserts that the defendants misrepresented the first dollar program as insurance. In the fiduciary duty claims, Best Buy asserts that its payments for insurance were received in trust, but were not appropriated to insurance. And in the contract claims, Best Buy asserts that the first dollar program was not insurance as that term was intended under the leases.

The defendants counter that, even though they did not retain an outside insurer, they handled the first dollar program in a manner that was consistent with insurance coverage. They characterize the first dollar program as "self-insurance" or "captive insurance," and so they contend that the costs of the program may appropriately be charged as premiums under the leases.

The parties now have three pending motions to compel discovery. The defendants have two motions, which for the purposes of this analysis, may be handled as a single motion. Best Buy brings its own motion as well. The issues presented by these motions are as follows.

II. Defendants' Motion to Compel

A. General Considerations

Although the defendants raise several issues in their motion, the underlying analysis is guided by two essential concerns: whether the discovery sought is relevant, and if so, whether it is unduly burdensome. Before reaching the issues, it is useful to review these principles here.

1. Relevancy

Rule 26(b)(1) permits discovery as to any matter "that is relevant to the claim or defense of any party," including information "that is not admissible at trial if the discovery seems reasonably calculated to lead to the discovery of admissible evidence." As this Court has previously noted, this standard is liberally applied in a manner that advances the discovery of useful evidence and promotes the efficiency of litigation. *See Credit Lyonnais, S.A. v. SGC Int'l, Inc.*, 160 F.3d 428, 430 (8th Cir. 1998). The basic theories of action are fraud, breach of contract, and breach of fiduciary duty, and so an analysis of relevancy is necessarily guided by these claims.

a. Breach of Fiduciary Duty

Discussing relevancy in the context of breach of fiduciary duty, this Court previously stated the following in an order on January 5, 2007.

> As a general proposition, an action for breach of fiduciary duty requires the plaintiff to show that it had some reason to repose its trust and confidence in the defendant. *See Murphy v. Country House, Inc.*, 240 N.W.2d 507, 512 (Minn. 1976); *see generally* 27 Am.Jur.2d *Fraud and Deceit* § 33 (2001).
>
> Assuming that Best Buy reposed its trust and confidence in the defendants, its reasons may have arisen out of its experience in the context of other insurance and lease arrangements. And it appears that Best Buy

> suspected the defendants, and had reason to believe there was a breach of this trust, after comparing its leases with the defendants with other leases. These matters may relate to its claim for breach of fiduciary duty, and so they are reasonably calculated to lead to the discovery of relevant evidence.

Much of the discovery at stake in the defendants' current motion involves further attempts to acquire information about leases between Best Buy and third party landlords, or policies between Best Buy and third party insurers. As the January 5 order indicates, these matters are relevant to the claim for breach of fiduciary duty.

b. Fraud

The analysis on fraud resembles that for breach of fiduciary duty. To bring a claim for fraud under Minnesota law, a plaintiff must show that it justifiably relied on misleading statements by the defendant. *Trustees of Twin City Bricklayers Fringe Benefit Funds v. Superior Waterproofing, Inc.*, 450 F.3d 324, 331 (8th Cir. 2006); *Midland Nat'l Bank v. Perranoski*, 299 N.W.2d 404, 412 (Minn. 1980). To determine whether a plaintiff's reliance is justifiable, there is a specific inquiry into the knowledge and experience of that plaintiff. *Children's Broad. Corp. v. Walt Disney Co.*, 245 F.3d 1008, 1020 (8th Cir. 2001); *Murphy v. Country House, Inc.*, 240 N.W.2d 507, 512 (Minn. 1976).

In breach of fiduciary duty, the issue of trust partly depends on whether a plaintiff had reason to place confidence in the defendant. In fraud, the issue of reliance depends on whether a plaintiff had knowledge or experience that justifies such reliance. The same evidence is likely to be relevant to both questions. Consistent with the January 5 order, this evidence may include information about how Best Buy

handled its commercial leases; its insurance obligations under those leases; and its other insurance obligations.[1]

c. Breach of Contract

On the claim for breach of contract, the most important concern here is usage of trade. Such usage, meaning the ordinary practice of those in a particular field of commerce, may be relevant to determining the interpretation of a contract. *See Anderson v. Kammeier*, 262 N.W.2d 366, 370 n. 2 (Minn. 1977); *cf. Ralph's Distributing Co. v. AMF, Inc.*, 667 F.2d 670, 673-74 (8th Cir. 1981). To the extent that the defendants seek information about leases between Best Buy and third parties, or about the insurance practices of Best Buy regarding leased properties, such information potentially reflects usage of trade in the commercial property market.

2. Burdensomeness

Having determined the appropriate bounds of relevancy, burdensomeness is the other main concern. Rule 26(b)(2) provides in material part that discovery "shall be limited by the court if it determines that the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive."

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[1] The defendants suggest these matters may be relevant to estoppel, which they characterize as a defense to fraud. There do not appear to be authorities that recognize such a defense. Evidence showing that Best Buy had insurance comparable to the defendants' first dollar program, or that it permitted other landlords to employ a comparable program, does not necessarily estop it from making claims to the contrary in this litigation. But such evidence is still relevant to whether Best Buy had reason to rely upon or repose trust in the defendants.

Addressing this topic in the context of the January 5 order, this Court ruled,

> In the two categories [of document requests] proposed by the defendants. they arguably seek *all* leases and insurance policies that have been negotiated or executed by Best buy. Given the broad sweep of these requests, not all matters are likely to lead to the discovery of relevant evidence. But some of these documents . . . may explain why Best Buy suspected a breach of trust. This Court concludes that these documents, or any related analysis of these documents, are relevant and discoverable.

(Emphasis in text.) Based on this determination, the January 5 order directed Best Buy to disclose "leases and insurance policies, as well as analyses and other documents relating to costs paid under them, that provided the basis for its decision to proceed with the current litigation."

As previously noted, nearly any commercial lease or insurance policy has some potential to be relevant and discoverable. But this Court has ruled that disclosure of all such matters, particularly when discovery is not narrowly crafted, is burdensome and inappropriate. These concerns are just as compelling in the context of the defendants' current motion to compel.

B. Requests for Production

1. General Analysis

Armed with these principles, this Court now begins its analysis of the discovery at issue. In the area of document discovery, the defendants seek to compel production of matters in their second, fourth, and fifth sets of requests for production. The matters sought through these requests may be framed as follows.

From the second set, Request for Production No. 21 seeks all communications between Best Buy and *any* person about insurance. Two other requests may be treated as subsets of this discovery. Request for Production No. 11 seeks all communications between Best Buy and its insurers, as well as its insurance

brokers and agents. Request for Production No. 15 asks for all documents showing payment for insurance, whether to insurers or landlords.

Among other reasons, Best Buy objects to these requests as burdensome. This objection has merit. The defendants do little more than request every document relating to insurance. Discovery on these matters will not be compelled.

Potentially related to the previous requests is Request for Production No. 12, which asks for all documents "reflecting losses incurred and claims made under the insurance policies referenced in Document 614." The defendants' memorandum does not cite to this document or supply further explanation, except to indicate that it involves insurance claims and losses. At the motion hearing, Best Buy explained that this document lists several insurance policies.

Best Buy objected to this request as burdensome and irrelevant. Because the defendants do not meaningfully explain the document at issue, it is not possible to assess its relevance or to decide whether discovery in this area is burdensome. This Court shall defer its ruling on this request until this document is made part of the record.

Request for Production No. 16 seeks all documents about how Best Buy's landlords calculate insurance charges under their leases. Best Buy objects to this request as irrelevant and burdensome.

The information sought by this request is plainly relevant. It may show, for instance, the usage of trade regarding insurance provisions in commercial leases. It may also show whether Best Buy agreed to insurance charges comparable to those in the first dollar program. If so, then it may not have had reason to be surprised by such charges from the defendants, which rebut its claims of trust and reliance.

Given the large number of stores operated by Best Buy, its objection as to burdensomeness has some support. The record also shows that Best Buy maintains its lease records on a by-location basis, and that it evidently does not organize topical files regarding insurance under its commercial leases. So to some degree, Best Buy has created its own obstacles to this discovery.

This evidence, however, has the potential to be particularly relevant. And the defendants also focus on communications regarding *how* insurance charges are calculated. This Court concludes that discovery in this area should go forward, albeit with some appropriate limits on scope.

To ensure some equivalence between the properties at issue in this litigation, and insurance practices under other leases with other landlords, this Court shall limit discovery to Best Buy stores in the same states as the properties at issue here: Arizona, Arkansas, Colorado, Georgia, Kentucky, Massachusetts, Maryland, Minnesota, New Jersey, New York, Ohio, Tennessee, and Texas. In this area, Best Buy shall only be required to disclose documents that substantively explain how insurance charges are calculated.

Request for Production No. 17 asks for all documents showing that Best Buy made lower insurance payments to other landlords. Best Buy once again objects to this request as irrelevant and burdensome.

Unlike the preceding request, this request does not inquire into how insurance charges are calculated. So it cannot show some basis for trust or reliance. Although methods of pricing may be relevant to usage of trade, the prices themselves are not. This request is denied as irrelevant.

The remaining request at issue in the second set, Request for Production No. 19, is similar to another request from the fourth set, Request for Production No. 1. The second set request seeks

documents regarding self-funded escrows or self-funded insurance, purportedly like the defendants' first dollar program, maintained by *any* person. The fourth set request seeks all documents about self-insurance or captive insurance programs maintained by Best Buy.[2]

The other requests from the fourth set may all be viewed as subsets of the documents sought through Request for Production No. 1. Nos. 2 and 5 seek all documents about creation of a captive insurance program; No. 3 seeks documents showing the profits from such programs; No. 4 seeks information about litigation involving such programs; No. 6 seeks documents about the rationale for such programs.

Best Buy objects to this discovery as irrelevant and overbroad. It also objects to some of this discovery as vague, based on the fact that terms such as "self-funded escrow" are not appropriately defined. On the vagueness objection, the defendants counter that because Best Buy uses these terms, it cannot claim that it does not understand their meaning.

All of the discovery sought through these requests is plainly relevant. As noted beforehand, the knowledge and sophistication of Best Buy may show whether it had cause to rely upon, or repose confidence in, the defendants. So evidence showing that Best Buy had its own version of the first dollar program, notwithstanding the precise shape of that program, is relevant.

The requests at issue here, however, are incredibly broad in scope. In the case of Request for Production No. 19, the defendants ask about programs maintained by third parties. The other requests

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[2] Though there are distinctions between self-funded escrows and captive insurance programs, it is sufficient to note that both involve internal programs operated in lieu of private insurance from a third party.

contemplate every potential detail of any self-funded escrow or captive insurance program operated by Best Buy.

Once again, this Court deems it appropriate to craft limits on the scope of this discovery. To the extent that Best Buy has documents that explain the policies underlying its self-funded escrow or captive insurance programs, those documents shall be disclosed. It shall also supply documents that substantively explain how internal escrow or captive insurance programs are funded, including any documents that supply guidance about appropriate funding levels.

Turning to the fifth set discovery, the sole request at issue is Request for Production No. 8, which asks for the following:

> All documents constituting, evidencing, pertaining, referring or relating to communications with any person other than [the defendants] that pertain in any way to [the defendants], any "first dollar," self-insurance or similar program, or the present litigation, including any of the facts, events, or circumstances alleged in [Best Buy's] Fourth Amended Complaint.

This request combines so many areas of subject matter that it defies meaningful analysis. Best Buy has objected to this request as burdensome, and this objection is also sustained.

2. Electronic Discovery

a. Introduction

The defendants raise several concerns about electronic discovery. Although the defendants do not always connect these concerns to their documentary discovery, this issue is best addressed in this context, for reasons that will be explored further below.

It is useful to begin this discussion with an overview of the general principles controlling e-discovery. Following the recent amendment to the Civil rules in December 2006, the procedure for e-

discovery is now supplied by Rule 26(b)(2)(B), which provides in relevant part,

> A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C).

Further explanation of this procedure was provided by the District of the District of Columbia in *Peskoff v. Faber*. 240 F.R.D. 26 (D.D.C. 2007). When a party seeks documentary discovery, the responding party has an obligation to review both tangible documents and electronic sources. But the responding party may object to discovery from electronic sources, by indicating that such sources are not reasonably accessible and by specifying the sources at issue. *Id.* at 30.

The *Peskoff* court further instructs that, when the party seeking discovery brings a motion to compel, the responding party has the burden to show that the sources are not reasonably accessible. If this burden is met, then the party seeking discovery must show good cause to compel discovery from those sources. *Id.* at 30-31.

The *Peskoff* decision supplies a general outline for issues raised in this litigation. The initial questions are the obligation to provide e-discovery and whether an appropriate objection was raised against it. The analysis then turns to motion practice. On a motion to compel, the party resisting discovery must show that electronic sources are not reasonably accessible. If this showing is made, the party seeking discovery must establish good cause for discovery. This Court will examine each of these issues in turn.

b. Obligation

i. Generally

A primary principle of e-discovery is that, when a party is served a request for production of documents, the responding party is obligated to produce from both tangible and electronic sources. *See Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309, 316-17 (S.D.N.Y. 2003) ("Zubulake I"); Fed. R. Civ. P. 34, Advisory Committee Note (2006).

Consistent with this principle, the obligations of e-discovery do not exist independently from other forms of discovery. For instance, where a party is served with a request for production, that party must examine both its tangible and electronic sources for responsive evidence. In the absence of such a request, no obligation arises. The obligation to provide e-discovery is necessarily informed by what discovery requests are served.

The defendants express concern that Best Buy has not met its e-discovery obligations. They argue that the defendants have not adequately searched electronic sources. But they do not establish a relationship between this obligation and their discovery requests. To the extent that the defendants raise arguments about e-discovery, they are necessarily limited to their requests for production. But as this Court has ruled beforehand, the defendants are only entitled to limited discovery on certain matters. Best Buy's current obligation to supply e-discovery is conscribed accordingly.

ii. Term Searches

The defendants specifically argue that Best Buy has not met its discovery obligations because it has not conducted term searches across its systems for responsive documents. At least with respect to its

online systems, Best Buy counters that its system software is unable to process such searches in a reasonable time and so these systems are not reasonably accessible.

This issue, however, is not about reasonable accessibility. In the context of an e-discovery analysis, a party may object that a source is not reasonably accessible, in order to be relieved of its obligation to conduct discovery from that source.

By comparison, the record here shows that Best Buy actually did conduct discovery from its online systems. After the defendants served their discovery, Best Buy instructed relevant employees to search their systems and retrieve documents that may be discoverable. Because the online systems were actually searched, Best Buy cannot claim that the systems were not reasonably accessible. The real question in this context is whether the defendants can require Best Buy to conduct term searches, which is best framed as part of the e-discovery obligation.

As a general principle, a party responding to discovery has the right to determine how best to respond. *In re Ford Motor Co.*, a decision from the Eleventh Circuit, examined this principle in the context of e-discovery. 345 F.3d 1315 (11th Cir. 2003). The court concluded that, even if it is possible to conduct term searches of electronic sources, the responding party is not obligated to use this method or to search for particular terms. *Id.* at 1317. This rule has found favor in e-discovery decisions of other courts. *See Scotts Co. v. Liberty Mut. Ins. Co.*, No. 06-899, 2007 WL 1723509 at *3 (S.D.Ohio June 12, 2007); *Balfour Beatty Rail, Inc. v. Vaccarello*, No. 06-551, 2007 WL 169628 at *3 (S.D.Fla. Jan. 18, 2007).

The same reasoning is equally applicable here. So long as Best Buy makes good faith efforts to comply with discovery, it has no particular obligation to employ term searches of its systems.

The defendants argue that the use of term searches is encouraged by the *Sedona Principles*, a leading authority on e-discovery. The sixth and eleventh principles are applicable here, and they respectively provide,

> Responding parties are best situated to evaluate the procedures, methodologies, and technologies for preserving and producing their own electronically stored information.
>
> A responding party may satisfy its good faith obligation to preserve and produce relevant electronically stored information by using electronic tools and processes, such as data sampling, searching, or the use of selection criteria, to identify data reasonably likely to contain relevant information.

The Sedona Conference, *The Sedona Principles* 38, 57 (2d ed. 2007).

These principles do not alter the outcome here. The sixth principle restates the rule from *In re Ford Motor Co.*, and the accompanying commentary favorably cites that case. That commentary then goes on to note the discovery obligation of a party may be satisfied by "collecting electronically stored information from repositories used by key individuals rather than generally searching through the entire organization's electronic information systems." *Id.* at 38.

The eleventh principle suggests a party *may* meet its e-discovery obligations through the use of term searches. Even though the defendants argue to the contrary, this principle plainly shows that term searches are not necessarily required. The decision to employ a particular search method when responding to discovery ultimately turns on reasonableness and the particular circumstances of the case. *See id.* at 57.

Without evidence that Best Buy is withholding discoverable information,[3] this Court need not require a particular search method here.

c. Objection

The next issue is whether Best Buy has properly objected. A party may refuse to conduct discovery out of electronic sources, but if it does so, it must indicate that particular sources are not reasonably accessible. *Peskoff*, 240 F.R.D. at 30. An advisory committee note accompanying the 2006 amendments further explains the level of detail required to make this objection:

> The responding party must . . . 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(b), Advisory Committee Note (2006).

The record shows that, in its responses to the defendants' second, fourth, and fifth sets of requests for production, Best Buy lodged a general objection stating that certain electronic sources are not reasonably accessible. It provided few details about the sources at issue, which made it difficult for the defendants to prepare an informed response. The parties' subsequent discovery correspondence,

[3] Based on two documents they obtained through subpoena, the defendants allege that Best Buy had custody of those documents yet they did not produce them as required. This issue is given greater scrutiny later in this order. *See infra* at 19-20. It is enough to note here that the defendants' implicit accusation—that Best Buy has withheld discoverable documents—is not adequately supported by the record.

moreover, indicates that Best Buy was not forthcoming about these sources.[4] There is ample cause for concern regarding the conduct of Best Buy on these matters.

Because the parties have adequately framed the issues for decision, this Court will allow Best Buy's objection to stand, in order to reach the merits of the objection. Best Buy is warned, however, that future inadequacies may have more severe consequences.[5]

d. Reasonable Accessibility

Turning to the motion practice issues, the next question is whether a party resisting discovery has met its burden to show that certain electronic sources are not reasonably accessible. The parties' disputes may be framed into two areas.

i. Litigation Databases

The defendants generally demand access to databases Best Buy prepared in connection with other litigation. One of the databases is for *Holloway v. Best Buy*, an employment discrimination case before the Northern District of California. The other is for *Odom v. Microsoft Corp.*, an action before a Washington state district court.

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[4] The defendants separately argue that Best Buy was obligated to disclose any potential sources of electronically stored information under Rule 26(a)(1)(B). But this rule only requires a party to disclose evidence that a party will use to support its claims or defenses, not necessarily the sources of all potentially discoverable evidence. *See DE Techs., Inc. v. Dell Inc.*, 238 F.R.D. 561, 565-66 (W.D.Va. 2006); *3M Co. v. Kanbar*, No. 06-1225, 2007 WL 1725448 at *1 (N.D.Cal. June 14, 2007).

[5] This Court previously ordered the defendants to produce discovery due to their failure to lodge any objections. By comparison, Best Buy's objections here were not fully developed but were properly made. In the future, all objections shall be duly served, and they shall state the grounds with sufficient detail to permit an informed response by the adverse party.

It may be inferred, from the record presented by Best Buy, that there are no substantial costs associated with searches of the *Holloway* database. Best Buy instead asserts that this database lacks any information that would be relevant to the litigation here. The record shows that the database has information from servers in customer service, retail operations, and human resources.

Assuming that Best Buy has conceded the issue of reasonable accessibility, the defendants have not meaningfully responded to the underlying concerns about relevancy. This Court agrees that the information in the *Holloway* database is not relevant to the litigation here, and so there is no good reason to compel discovery from this source.

Regarding the *Odom* litigation, the record does not disclose the claims at issue, nor does it indicate what corporate information was placed in the database. Best Buy has not contested whether this information may be relevant. Because discovery in the *Odom* case is complete, the database has since been archived by an e-discovery vendor. The estimate to restore this data to usable form is at least $124,000.

Best Buy contends that the amount in controversy in this litigation is $800,000. Because the cost to restore the *Odom* database is a substantial fraction of this amount, Best Buy argues, the source is not reasonably accessible. The defendants counter that the amount in controversy may be far more than $800,000 and that, given the scope of this litigation, this cost is not enough to make the source inaccessible.

Best Buy controls the scope of this litigation, which it has expanded to sixteen properties in thirteen states. Though it suggests that its damages for breach of contract may amount to $800,000, its tort claims may significantly increase the potential damages. And this litigation may have more substantial long-term economic impacts upon all the parties. Considering these costs together, the cost to restore the *Odom*

database is not excessive. This source is reasonably accessible. Best Buy's objection is overruled and its subsequent discovery obligations shall reach this source.[6]

ii. Backup Tapes

The defendants are also pursuing discovery from Best Buy's backup tapes. Regarding these sources, Best Buy has shown that the tapes are an emergency system that provides disaster coverage for all corporate computer systems. The tapes record system data using a sequential access protocol. For this reason, it is not possible to search or retrieve individual files from the backup tapes without reconstructing the entire system.

According to estimates by e-discovery vendors, the cost to recover data the current backup files would be at least $2.6 million. When documents from these tapes were sought in connection with the *Holloway* litigation, the estimate to recover data from older backup tapes was from $16 to $52 million. These costs are excessive under the circumstances,[7] and for this reason, the backup tapes are not reasonably accessible.

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[6] The defendants represent that they are interested in this source chiefly because it may provide access to e-mails that are otherwise unavailable. They have also suggested that e-mail only makes up four percent of the database. This Court offers no opinion on whether a less expensive search, limited to this portion of the database, would be feasible. The parties are nevertheless urged to cooperate in this discovery and to consider less expensive options where possible.

[7] Whether discovery from a particular source is unnecessarily burdensome, such that the source is not reasonably accessible, it is often useful to compare the cost to recover data against the purported amount in controversy. But this analysis is not mechanistic and the question of reasonable accessibility will vary according to the particular circumstances of each case.

e. Good Cause

Because Best Buy has shown that its backup tapes are not reasonably accessible, the analysis turns to whether the defendants have good cause to compel production from these sources.

Another advisory committee note supplies seven factors for determining good cause.[8] These are (1) the specificity of the discovery request; (2) whether the information is more accessible from other sources; (3) whether the responding party has failed to produce information that was but is no longer available from more accessible sources; (4) the likelihood of finding information from more accessible sources; (5) predictions as to the usefulness of further information; (6) the importance of the issues at stake in the litigation; and (7) the parties' resources. Fed. R. Civ. P. 26(b), Advisory Committee Note (2006). These factors have found favor in case law since the rules were amended. *See, e.g., Disability Rights Council v. Washington Metropolitan Transit Authority*, 242 F.R.D. 139, 147-48 (D.D.C. 2007); *W.E. Aubuchon Co. v. Benefirst, LLC*, — F.R.D. —, 2007 WL 1765610 at *5 (D.Mass. 2007).

Aside from arguing that the electronic sources of Best Buy contain relevant information, the defendants have not made a meaningful effort to show good cause. An analysis of the seven-factor standard also militates against good cause here.

In their arguments regarding e-discovery, the defendants do not make reference to specific discovery requests. And as this Court's preceding analysis indicates, their requests are not narrowly tailored to obtain specific discovery. Nor do the defendants show that relevant information is not available

[8] This seven-factor standard should not be confused with the seven-factor standard used to determine whether to shift e-discovery costs. *See In re Veeco Instruments, Inc. Securities Litigation*, No. 05-1695, 2007 WL 983987 at *1-*2 (S.D.N.Y. Apr. 2, 2007).

from more accessible sources. There is no good cause, therefore, to compel discovery from the backup tapes and this discovery will not be compelled.

To show the need for discovery from electronic sources, the defendants chiefly rely on two documents. These documents were allegedly in the possession of Best Buy yet were not produced in response to discovery as requested. One document is a fax that inside counsel for the defendants sent to outside counsel for Best Buy on April 13, 1999. The other is a letter that inside counsel for the defendants sent to Best Buy on August 1, 2003. Both documents purportedly show that Best Buy had notice of the first dollar program.

The discovery in this matter is complex. Though the documents may be potentially damaging to Best Buy's case, it is not necessarily suspect that Best Buy failed to produce them. And at least one document, the August 1 letter, likely originated as a hard copy. It is not clear that expansive e-discovery would have resulted in production of these documents. So even if these documents signal failures of production by Best Buy, this conclusion does not materially affect the preceding analysis of good cause.

C. Requests for Admissions

The defendants argue that Best Buy has not made a sufficient response to their Request for Admission No. 22, which states,

> Admit that none of the lease agreements at issue in this case prohibits the respective Landlord Defendants from providing insurance coverage through a captive insurance company.

Best Buy answers that the term "captive insurance company" is vague. The defendants respond that Best Buy uses the term itself, and so it should be expected to answer.

But these arguments are inapposite here. It is well established that a request for admission cannot seek a conclusion of law. *See, e.g.*, *Henry v. Champlain Enters., Inc.*, 212 F.R.D. 73, 79 (N.D.N.Y. 2003); *Tulip Computers Int'l, B.V. v. Dell Computer Corp.*, 210 F.R.D. 100, 107-08 (D.Del. 2002). The request at issue here plainly asks Best Buy to state a conclusion of law about the meaning of the parties' leases. The defendants cannot seek this admission and no response will be compelled.

D. Interrogatories

The defendants also challenge Best Buy's response to Interrogatory No. 3 in their second set of interrogatories. The interrogatory, referring to a fraudulent representation alleged in paragraph 62 of Best Buy's fourth amended complaint,[9] asks Best Buy to identify "to whom the representation was made."

Best Buy responded that the recipient was Best Buy itself. The defendants argue that this response is insufficient, and they ask that Best Buy identify the particular employees or officers of Best Buy to whom the representation is made. Best Buy counters that such a recitation would not be useful, and that it is entitled to treat itself as a singular person for purposes of determining fraud.

A response to an interrogatory should be full, unevasive, and complete. *In re RBA, Inc.*, 60 B.R. 953, 964 (Bankr. D.Minn. 1986). Where there is substantial compliance with an interrogatory, the answer is sufficient, and a court need not compel an answer. *Spearmon v. Southwestern Bell Telephone Co.*, 662 F.2d 509, 511 (8th Cir. 1981).

[9] Since the interrogatory was served, the fourth amended complaint has been superseded by the fifth amended complaint. The parties do not dispute that paragraph 62 is identical in both pleadings and that this paragraph remains controlling here.

Paragraph 62 refers to an invoice that one of the defendants sent to Best Buy, which purports to itemize certain insurance charges. The record does not show whether the invoice was addressed to any recipient other than Best Buy itself. But this Court thinks it reasonable to assume that several agents or employees of Best Buy have handled the invoice and relied on its contents.

In its actions for fraud and breach of fiduciary duty, the decisions of Best Buy as to trust and reliance are corporate decisions, not those of its agents or employees. For this reason, its answer to the interrogatory is truthful, and further response will not be compelled.

E. Depositions

1. Rule 30(b)(6) Designee

The defendants also raise some concerns about depositions. One issue involves a notice of deposition, under Rule 30(b)(6), that the defendants served on June 8, 2007. Through this notice, the defendants ask that Best Buy provide a corporate representative with knowledge about any of its self-insurance or captive insurance programs.

Regarding these topics, the record shows the defendants deposed Kevin Deegan, director of risk management for Best Buy. The defendants intensively questioned Deegan about self-insurance and captive insurance programs at the deposition. Best Buy also represents that Deegan is the person with the most knowledge of these matters. Additional deposition on these topics is cumulative and will not be compelled.

2. Fact Depositions of Corporate Officers

The defendants separately seek to depose certain corporate officers of Best Buy: Bradbury Anderson, chief executive officer; Brian Dunn, chief operations officer; and Darren Jackson, chief financial officer. Arguing that their testimony is relevant, the defendants note that Anderson signed four of the

disputed leases. They add that all three serve on the "Yellowbook Committee," which makes the final decision whether to approve commercial leases.

Best Buy counters that Anderson only has perfunctory signing authority. It further asserts that the Yellowbook Committee does not examine individual lease terms, and so its members cannot testify about the insurance terms of those leases.

The record supports this position. According to a deposition of Patrick Matre, vice president of real estate for Best Buy, the committee typically dealt with issues such as the store plan, sales potential, and demographics. Specific lease terms were not discussed, so the officers would not have particular knowledge of insurance issues or the first dollar program. Furthermore, the record lacks other evidence, such as correspondence with the officers about the insurance terms, that would show such knowledge.

High corporate officers are not immune from fact depositions. *New Medium Techs., LLC v. Barco N.V.*, 242 F.R.D. 460, — (N.D.Ill. 2007). But if a corporate officer lacks personal knowledge about the issues in the litigation, or only has some information of marginal relevance, a court should not compel a fact deposition of the officer. *See, e.g., Patterson v. Avery Dennison Corp.*, 281 F.3d 676, 681-82 (7th Cir. 2002); *Thomas v. Int'l Business Machines*, 48 F.3d 478, 483 (10th Cir. 1995); *Lewelling v. Farmers Ins. of Columbus, Inc.*, 879 F.2d 212, 218 (6th Cir. 1989).

The record shows that Anderson, Dunn, and Jackson did not examine particular lease terms and so they have little, if any, knowledge about the first dollar program. Under these circumstances, they are unlikely to have relevant testimony, and so their depositions will not be compelled.[10]

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[10] Should the defendants acquire information showing that the officers do have knowledge about the insurance terms, they may renew their motion to compel these depositions.

F. Spoliation

The only remaining issue posed by the defendants' motion is spoliation. They contend that, because Best Buy did not properly institute a litigation hold, discoverable evidence was destroyed.

Assuming for the sake of argument that the defendants have properly moved for sanctions, they must show that relevant, discoverable evidence was destroyed, and that the loss of this evidence resulted in prejudice. *Stevenson v. Union Pacific R.R. Co.*, 354 F.3d 739, 745 (8th Cir. 2004); *Dillon v. Nissan Motor Co.*, 986 F.2d 263, 267 (8th Cir. 1993); *Lexis-Nexis v. Beer*, 41 F.Supp.2d 950, 954 (D.Minn. 1999).

The record does not indicate that Best Buy destroyed any particular evidence or that the loss of this evidence caused prejudice to the defendants. As a result, the defendants are not entitled to any sort of sanctions against Best Buy for spoliation.

III. Best Buy's Motion to Compel

Best Buy brings its own motion to compel and raises two issues. One of these issues relies on evidence filed under seal, and therefore, this Court is setting out that analysis is a separate order and memorandum filed under seal.

On the other issue, Best Buy seeks a response to a single request for production. That request seeks communications by the defendants to their other tenants about the first dollar program.

The defendants object to this discovery as irrelevant and overbroad. They contend that other tenants have different leases, so the framework for calculating insurance charges may be different. They also note that they have hundreds of properties with dozens of tenants, which means a response will pose

considerable burdens. Best Buy responds that it offered to limit the scope of production to the "scorecard," a list of twenty-four major tenants of the defendants.

If the defendants made representations to other tenants about the first dollar program, such evidence may help prove whether they made misrepresentations to Best Buy. So evidence on this question is potentially relevant. This Court agrees, however, that the request may involve tenants and leases that only bear a remote connection to the scenario at issue here.

Under these circumstances, it is again appropriate to limit the scope of discovery. Because the first dollar program allegedly prorates insurance costs of tenants according to square footage, it is reasonable to suggest the other tenants on a single mall property have leases with similar insurance obligations. And Best Buy has also proposed that this discovery be limited to the scorecard tenants, who arguably are major tenants in a position comparable to Best Buy.

This Court accordingly limits Best Buy's request as follows. For the mall properties where Best Buy has a store on site, the defendants shall disclose their representations about the first dollar program to other scorecard tenants on those sites. As the request states, however, the defendants need not supply invoices that were originally produced for billing purposes.

JJG