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MARK HART, Plaintiff, v. LINDGREN-PITMAN, INC., Defendant.

Case No. 06-60285-Civ-ZLOCH/SNOW

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

2008 U.S. Dist. LEXIS 114426

July 17, 2008, Decided
July 17, 2008, Entered

SUBSEQUENT HISTORY: Magistrate's recommendation at, Costs and fees proceeding at *Hart v. Lindgren-Pitman, Inc., 2008 U.S. Dist. LEXIS 77998 (S.D. Fla., July 31, 2008)*

PRIOR HISTORY: *Hart v. Lindgren-Pitman, Inc., 576 F. Supp. 2d 1349, 2007 U.S. Dist. LEXIS 98653 (S.D. Fla., 2007)*

COUNSEL: [*1] For Mark Hart, Plaintiff: Richard Bernard Celler, LEAD ATTORNEY, Morgan & Morgan, Davie, FL.

For Lindgren-Pitman, Inc., Defendant: Sergio R. Casiano, Jr., LEAD ATTORNEY, Miller Kagan Rodriguez & Silver, Coral Gables, FL.

JUDGES: LURANA S. SNOW, UNITED STATES MAGISTRATE JUDGE.

OPINION BY: LURANA S. SNOW

OPINION

ORDER

THIS CAUSE is before the Court on the Defendant's Motion to Compel Production of Documents (Docket Entry 84), which was referred to United States Magistrate Judge Lurana S. Snow. The defendant seeks the full daily time sheet for each attorney or other law office employee who worked on this case, for each day the person worked on this case, with the names of the other cases worked on that day redacted, citing the Standard Pretrial Order in *Rich v. Cod and Capers Seafood,* Case No. 06-80516-Civ-PAINE, Docket Entry 6. The defendant also requests every motion for attorney's fees, with complete exhibits, filed by Richard Celler and Kelly Amritt since March 7, 2006.

The plaintiff's response correctly states that the motion does not include the certificate that counsel has conferred with opposing counsel prior to filing the motion, as required by *S.D.Fla.R. 7.1.a.3*. The record reveals that the defendant's counsel [*2] failed to comply with this rule throughout the litigation. [1]

1 The plaintiff provided an e-mail exchange which took place immediately after the discovery request was served, which discussed the procedure for locating the requested documents. But there is no evidence that the required pre-motion conferral took place.

The plaintiff also contends that the motion does not contain any memorandum of law, as required by *S.D.Fla.R. 7.1.a.1*. The Court notes that the motion does contain one legal citation, related to the issue of attorney/client privilege and work product privilege. However, the plaintiff's response to the motion withdraws the objections based on privilege.

The defendant has provided no legal authority for the broad scope of the discovery sought. "A request for attorney's fees should not result in a second major litigation." *Hensley v. Eckerhart, 461 U.S. 424, 437, 103 S. Ct. 1933, 76 L. Ed. 2d 40 (1983).* Broad discovery related to attorney's fees is not necessary or usual in federal court. *In re Thirteen Appeals Arising out of the San Juan Dupont Plaza Hotel Fire Litigation, 56 F.3d 295, 303 (1st Cir. 1995).*

Nor has the defendant provided any legal citation regarding the burden of producing the requested documents. [*3] He asserts that the requested categories of billing documents can be generated directly from the billing software used by the plaintiff. However, the defendant makes an incorrect assumption about the type of billing software used by plaintiff's counsel, which was refuted by the response to the motion. The plaintiff states that the material sought does not exist in the requested form in plaintiff's counsel's records. *Rule 34* does not require a party "to create responsive materials, only to produce those in its possession, custody or control." *Marchese v. Dep't of the Interior, 2004 U.S. Dist. LEXIS 20680, 2004 WL 2297465 at *4 (E.D.La. Oct 12, 2004)*. Moreover, the plaintiff states that printing reams of billing records for a manual search for the requested information would be unduly burdensome. *Fed.R.Civ.P. 26(b)(2)(C)(iii)* permits the Court to limit the extent of discovery if the burden or expense of the proposed discovery outweighs its likely benefit. The plaintiff has already produced the time records for the instant case, as part of the motion for attorney's fees. The Court finds that production of documents responsive to the defendant's requests is unduly burdensome. The Court being advised, it is hereby

ORDERED [*4] AND ADJUDGED that the Defendant's Motion to Compel Production of Documents (Docket Entry 84) is DENIED.

DONE AND ORDERED at Fort Lauderdale, Florida, this 17th day of July, 2008.

/s/ Lurana S. Snow

LURANA S. SNOW

UNITED STATES MAGISTRATE JUDGE

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THE HARTFORD INSURANCE COMPANY, Plaintiff, vs. BELLSOUTH TELECOMMUNICATIONS, INC., Defendant/Third Party Plaintiff vs. HORIZON SECURITY SYSTEMS, Third Party Defendant

Case No. 04-20532-CIV

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

2005 U.S. Dist. LEXIS 45884

November 12, 2005, Decided
November 14, 2005, Docket

SUBSEQUENT HISTORY: Later proceeding at *Hartford Ins. Co. v. Bellsouth Telcoms., Inc., 206 Fed. Appx. 952, 2006 U.S. App. LEXIS 29120 (11th Cir. Fla., 2006)*

PRIOR HISTORY: *Hartford Ins. Co. v. Bellsouth Telcoms., Inc., 2005 U.S. Dist. LEXIS 46356 (S.D. Fla., Sept. 16, 2005)*

COUNSEL: [*1] For Hartford Insurance Company, Fragrance Mart, Inc., Plaintiff: Denise Marie Anderson, LEAD ATTORNEY, Butler Pappas Weihmuller Katz Craig, Tampa, FL; Kristina Lynn Marsh, LEAD ATTORNEY, Butler Pappas Weihmuller Katz Craig, Tampa, FL; Scott Jeffrey Frank, LEAD ATTORNEY, Butler Pappas Weihmuller Katz Craig, Tampa, FL; Scott Steward Katz, LEAD ATTORNEY, Butler Pappas Weihmuller Katz Craig, Tampa, FL.

For Bellsouth Telecommunications, Inc, Defendant: Marlin Kareem Green, LEAD ATTORNEY, Gordon Hargrove & James, Fort Lauderdale, FL; Richard G. Gordon, LEAD ATTORNEY, Gordon Hargrove & James, Fort Lauderdale, FL; Scott Allen Markowitz, LEAD ATTORNEY, Gordon Hargrove & James, Fort Lauderdale, FL.

For Bellsouth Telecommunications, Inc., Third Party Plaintiff: Marlin Kareem Green, LEAD ATTORNEY, Gordon Hargrove & James, Fort Lauderdale, FL; Richard G. Gordon, LEAD ATTORNEY, Gordon Hargrove & James, Fort Lauderdale, FL; Scott Allen Markowitz, LEAD ATTORNEY, Gordon Hargrove & James, Fort Lauderdale, FL.

For Horizon Security Systems, Third Party Defendant: Gregory Thomas Anderson, LEAD ATTORNEY, Billing Cochran Heath Lyles & Mauro, West Palm Beach, FL; Janis Brustares Keyser, LEAD ATTORNEY, Billing [*2] Cochran Heath Lyles & Mauro, West Palm Beach, FL; Krista Kay Mayfield, LEAD ATTORNEY, Billing Cochran Heath Lyles & Mauro, West Palm Beach, FL.

For Bellsouth Telecommunications, Inc., Third Party Plaintiff: Marlin Kareem Green, LEAD ATTORNEY, Gordon Hargrove & James, Fort Lauderdale, FL; Richard G. Gordon, LEAD ATTORNEY, Gordon Hargrove & James, Fort Lauderdale, FL; Scott Allen Markowitz, LEAD ATTORNEY, Gordon Hargrove & James, Fort Lauderdale, FL.

JUDGES: URSULA UNGARO-BENAGES, UNITED STATES DISTRICT JUDGE.

OPINION BY: URSULA UNGARO-BENAGES

OPINION

ORDER GRANTING IN PART HARTFORD'S MOTION TO EXCLUDE TESTIMONY OF BELLSOUTH'S EXPERT AND ORDER GRANTING HARTFORD'S MOTION TO QUASH SUBPOENA

THIS CAUSE is before the Court upon Hartford's Motion in Limine to Exclude or Limit the Testimony of Bellsouth's Expert, John Donovan, filed September 2, 2005. Bellsouth filed its Response on September 9, 2005. Also before the Court is Hartford's Amended Motion to Quash Subpoena of Richard Sanford or, in the Alternative, Motion for Protective Order, filed September 9, 2005. The matters are ripe for disposition.

THE COURT has considered the motions and the pertinent portions of the record and is otherwise fully advised in the premises.

Hartford's [*3] Motion to Exclude Bellsouth's Expert

Hartford moves this Court to exclude Donovan on three grounds. First, Hartford claims that Donovan is unqualified to testify as an expert in this case. Next, Hartford claims that, even if Donovan is qualified as an expert, his methodology and opinions are unreliable as a matter of law. Finally, Hartford claims that part of Donovan's testimony will take the form of a legal conclusion and therefore should be excluded.

LEGAL STANDARD

Federal Rule of Evidence 702 states:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

The party seeking to introduce the expert has the burden of establishing that the requirements of *Rule 702* are met by a preponderance of the evidence. *Fed. R. Evid. 104(a)*: *Bourjaily v. United States, 483 U.S. 171, 175-76, 107 S. Ct. 2775, 97 L. Ed. 2d 144 (1987).* [*4] Whether a witness is qualified to testify on a given subject is left to the discretion of the court. *Toole v. Baxter Healthcare Corp., 235 F.3d 1307, 1312-13 (11th Cir. 2000)*. If a witness is qualified as an expert, the court must then determine if the expert's opinion is grounded in a reliable methodology. In *Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993),* the Supreme Court set out a non-exclusive list of factors for courts to use in evaluating the reliability of an expert's testimony. The factors include whether the expert's method can be tested, whether the method has been subjected to peer review, the known or potential rate of error, the existence and maintenance of standards and controls, and whether the method is generally accepted in the scientific community. *Id. at 593-94*. It is recognized that not all the *Daubert* factors can be applied to every type of expert testimony, especially when the court is reviewing nonscientific expert testimony. *Kumho Tire Co. v. Carmichael, 526 U.S. 137, 150, 119 S. Ct. 1167, 143 L. Ed. 2d 238 (1999).* It is also accepted that more specific factors may play a role depending on the testimony at issue. *Id. at 149-50*; *See Maiz v. Virani, 253 F.3d 641. 665 (11th Cir. 2001)*. [*5] The overarching consideration for the Court is to determine whether the testimony has "a reliable basis in the knowledge and experience of [the expert's] discipline." *Daubert, 509 U.S. at 592*. It need not be proven that the expert's opinion is correct. only that it is reliable. *In re Paoli R.R. Yard PCB Litigation, 35 F.3d 717, 744 (3d Cir. 1994).*

ANALYSIS

Donovan is the president of a telecommunications consulting firm and is also an electrical engineer. (Dep. of John Donovan at 8.) He appears to have knowledge and experience in the area of general telecommunications systems. However, by his own admission. Donovan is not an expert in alarms, alarm science or Watch Alert. *Id.* at 60, 66. Despite this, Bellsouth claims that Donovan is qualified to testify because the central issue in this case is whether Bellsouth maintained its telecommunications network and whether it had the proper procedures in place to maintain that network. (Resp. at 5.) The Court disagrees. It is an incomplete statement to say that the central issue in this case is the maintenance of Bellsouth's network. The central issue is the maintenance and procedures relating to *Watch Alert* on Bellsouth's network. A knowledge [*6] of the procedures and maintenance on a telecommunications network does not qualify one as an expert on the procedures and maintenance necessary to properly monitor a backup for alarm systems on that network. Maintenance and procedures considered reasonable for a general telecommunications network may be completely inadequate when implemented over Watch Alert. Donovan appears to lack the knowledge, training and experience to reliably make that distinction to the jury. Therefore, the Court concludes that Donovan is qualified to testify on the general concepts of a telecommunications network, however, he is excluded from testifying in any way about Watch Alert or alarm systems. [1]

1 The Court notes that Bellsouth, in its written response, did not proffer Donovan's expert report (which, in any event, is not in the Court file) nor did Bellsouth proffer any additional testimony of Donovan that might have cured the noted deficiencies. Therefore, the Court denies Bellsouth's oral request made minutes prior to jury selection for an opportunity to proffer Donovan's testimony outside the presence of the jury or to reconsider Donovan's exclusion based on this expert report.

Even if the Court found [*7] Donovan qualified as an expert in alarm systems and Watch Alert, the Court would exclude his opinion because it fails to assist the trier of fact. During his deposition, Donovan stated:

> Q. Do you believe that your qualified to render opinions on the responsibilities of alarms contractors?
>
> A. I believe I'm qualified to render an opinion on some of the responsibilities of alarm contractors.
>
> Q. Which ones are you qualified to render an opinion on?
>
> A. Any responsibilities that would be in the category of just common logic and anything that pertains to telecommunications and the connections of the circuits involved-involving Bellsouth in this case.
>
> Q. Common logic. Do you think that expert testimony is warranted as to common logic?
>
> A. Is-
>
> Q. You said you were qualified to give opinions as to common logic. Is that not what you said?
>
> A. Yes. If something makes sense, then certainly I'm qualified to render-to offer my opinion as to what makes common sense or not.
>
> ...
>
> A. I think my point is that some things just make sense, and I certainly can offer my opinions on things that make sense to the common and prudent man.
>
> ...
>
> Q. Tell me what areas that you would not be qualified to render opinions as to the responsibilities [*8] of alarm contractors'?
>
> A. It's an awfully open-ended question. I think I have explained what I am qualified to do. I think along the lines of common logic that would mean that everything else falls in the other category of being not qualified.

Id. at 13-16. Additionally, Donovan seeks to render an opinion on Bellsouth's responsibilities set out in the Watch Alert Tariff. Donovan's opinion however, fails to go beyond paraphrasing of the tariff. (Dep. of John Donovan at 56-59.)

Donovan's own testimony demonstrates that his opinion on the responsibilities of alarm contractors will not assist the trier of fact to understand evidence or determine a fact in issue as required by *Rule 702*. Expert testimony "must be directed to matters within the witness' scientific, technical or specialized knowledge and not to lay matters which a jury is capable of understanding without the expert's help." *Andrews v. Metro North Commuter R. Co., 882 F.2d 705, 708 (2d. Cir. 1989)* (citing *McGowan v. Cooper Indus., Inc., 863 F.2d 1266. 1272 (6th Cir. 1988)*; *Scott v. Sears, Roebuck & Co., 789 F.2d 1052, 1055-56 (4th Cir. 1986)*. Clearly. Donovan's testimony is not based on a specialized knowledge. The jury is more [*9] than capable of applying the same common logic as Donovan proposes to testify. Therefore even if the Court found him qualified as an expert in Watch Alert and alarm systems, the Court would exclude his opinion in this area because it fails to assist the jury as required by *Rule 702*. [2]

2 Because the Court excludes Donovan's testimony under *Rule 702* it does not address Hartford's claim that his opinion takes the form of a legal conclusion.

Hartford's Motion to Quash Bellsouth's Subpoena

Hartford claims that Bellsouth's subpoena of Richard Sanford. Hartford's special investigator, should be quashed under *Federal Rule of Civil Procedure 45*. *Rule 45(c)(3)(A)* states

> On timely motion, the court by which a subpoena was issued shall quash or modify the subpoena if it
>
> (i) fails to allow a reasonable time for compliance;
>
> (ii) requires a person who is not a party or an officer of a party to travel to a place more than 100 miles from the place

> where that person resides, is employed or regularly transacts business in person.

Sanford lives in Washington state. Travel to Miami would clearly exceed the 100 mile limit under *Rule 45(c)(3)(A)*. Also, it appears that Blaine Miller, not Sanford, is Hartford's corporate [*10] representative and therefore Sanford is not Hartford's officer rd for purposes of *Rule 45(c)(3)(A)*. Finally, the Court finds that because Bellsouth has taken Sanford's deposition it will not be under any "undue hardship" to present his testimony to the jury. Therefore, the Court concludes that Bellsouth's subpoena of Richard Sanford must be quashed. Accordingly, it is hereby

ORDERED AND ADJUDGED that the Hartford's Motion to Exclude the Testimony of Donovan is GRANTED IN PART under the terms stated above. It is further

ORDERED AND ADJUDGED that Hartford's Motion to Quash is GRANTED.

DONE AND ORDERED in Chambers at Miami, Florida, this 12 day of September. 2005.

/s/ Ursula Ungaro-Benages

UNITED STATES DISTRICT JUDGE

ISOLA CONDOMINIUM ASSOCIATION, INC., a Nonprofit Corporation, Plaintiff, vs. QBE INSURANCE CORPORATION, a corporation authorized and doing business in Florida, Defendant.

Case No. 08-21592-CIV-GRAHAM/TORRES

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA, MIAMI DIVISION

2009 U.S. Dist. LEXIS 130752

June 19, 2009, Decided
June 19, 2009, Entered

PRIOR HISTORY: *Isola Condo. Ass'n v. QBE Ins. Corp., 2008 U.S. Dist. LEXIS 101049 (S.D. Fla., Dec. 5, 2008)*

COUNSEL: [*1] For Isola Condominium Association, Inc., a Non-Profit Corporation, Plaintiff: Keith Jeffrey Lambdin, LEAD ATTORNEY, Katzman Garfinkel Rosenbaum, Maitland, FL; Daniel S. Rosenbaum, John Marcus Siracusa, Laurel Ruthanne Wiley, Tatiana B. Yaques, Rosenbaum Mollengarden Janssen & Siracusa, PLLC, West Palm Beach, FL; Richard Chambers Valuntas, Florida Attorney General's Office, West Palm Beach, FL.

For QBE Insurance Corporation, a corporation authorized and doing business in Florida, Defendant: James Joseph Wicker, II., LEAD ATTORNEY, Wicker Smith O'Hara McCoy & Ford, West Palm Beach, FL; Patrick Edward Betar, William S. Berk, LEAD ATTORNEYS, Evelyn Maureen Merchant, Berk Merchant & Sims PLC, Coral Gables, FL; Rachel Studley, LEAD ATTORNEY, Michael Lawrence Schwebel, Jr., Wicker Smith Tutan O'Hara McCoy Graham & Ford, West Palm Beach, FL; Amy Millan DeMartino, Wicker Smith O'Hara McCoy Graham & Ford, West Palm Beach, FL; Catherine Deborah Bain, North Palm Beach, FL; Melissa M. Sims, Berk, Merchant & Sims, PLC, Coral Gables, FL.

For Hunter R Contracting, Defendant: Andrew T. Lavin, Navon Kopelman & Lavin, Fort Lauderdale, FL.

JUDGES: DONALD L. GRAHAM, UNITED STATES DISTRICT JUDGE.

OPINION BY: DONALD L. GRAHAM

OPINION

OMNIBUS [*2] **ORDER**

THIS CAUSE comes before the Court upon the following pending motions: (i) Plaintiff's Motion in Limine to Preclude Evidence of Gerald Zadikoff's Prior Bankruptcy Filing and His Personal and/or Business Finances [D.E. 65]; (ii) Defendant's Motion in Limine to Preclude Certain Testimony of Expert Lee M. Branscome or, alternatively, a Motion for a Daubert Hearing [D.E. 67, 72]; (iii) Plaintiff's Motion in Limine to Preclude Evidence at Trial Regarding Business Dealings Between Hunter R. Contracting and /or Certain individuals [D.E. 123]; (iv) Defendant's Motion in Limine or Motion to Strike, in the alternative, and/or Motion for Daubert Hearing Regarding Gerald Zadikoff, P.E. [D.E. 124]; (v) Defendant's Motion in Limine to Preclude Evidence of, or Reference to, Isola's Historical Payment of Premiums to QBE [D.E. 125]; (vi) Defendant's Motion in Limine to Preclude Evidence of Alleged Non-Compliance with *Fla. Stat. § 627.701* or, in the alternative, to Preclude Proposed Deposition Testimony of Timothy Butler [D.E. 126]; (vii) Defendant's Motion in Limine to Preclude Evidence and References to Other Claims Against QBE, Including Affirmative Defenses Used by QBE in Other Lawsuits [D.E. [*3] 128]; (viii) Defendant's Motion in Limine to Preclude Testimony of

Craig Kugler or, in the alternative, Motion for Daubert Hearing [D.E. 129]; (ix) Defendant's Motion to Compel Testimony From Kenneth Romain, Motion for Appointment of Special Master and for Sanctions [D.E. 148, 153]; (x) Defendant's Motion to Compel Plaintiff and/or Plaintiff's Counsel to Produce Records of TSSA Storm Safe, Inc., Relating to Its Inspection of Isola Condominium [D.E. 155]; (xi) Defendant's Motion for Continuance of Trial, To Reopen Discovery for Limited Purpose and Motion to Amend Witness List [D.E. 157]; (xii) Non-party, Needham Roofing, Inc.'s Motion to Quash Subpoena [D.E. 163] and (xiii) Defendant's Unopposed Motion to Bring Electronic Equipment Into Courthouse [D.E. 156].

I. BACKGROUND

This case is one of several actions in this District related to damages resulting from Hurricane Wilma, which occurred in October 2005. The instant action was filed by Isola Condominium Association against QBE Insurance Corporation for property damage to Plaintiff's condominium complex located at Brickell Key in Miami, Florida. This Omnibus Order addresses certain pending matters. The case is scheduled for the two-week [*4] trial period starting on August 3, 2009. A separate amended scheduling order will follow.

II. LAW AND DISCUSSION

For ease of discussion, this Order will first address the motions concerning the challenges to party's respective experts. The Order will then address the pending motions in relative chronological order.

A. Defendant's Motion in Limine to Preclude Certain Testimony of Expert Lee Branscome or, alternatively, a Motion for a Daubert Hearing [D.E. 67]

Defendant filed a motion in limine to preclude certain testimony of Lee M. Branscome, one of Plaintiff's proposed experts. Dr. Branscome is expected to testify about the wind speeds and gusts and the duration of storm force winds at the Isola property, among other things. [See D.E. 76.] Defendant specifically wants to preclude testimony by Mr. Branscome regarding damages to the building resulting from Hurricane Wilma. [See D.E. 67 at 3.] Plaintiff submits that "it does not intend to question Dr. Branscome about expected damages to structures and has already offered to stipulate to this provided QBE agrees that it will also not question Dr. Branscome on these same matters." [See D.E. 76 at 2.] In its reply, Defendant maintains that "[it] [*5] agrees that it will not question Dr. Branscome on cross-examination concerning the Enhanced Fujita Scale and its application to any damages at Isola Condominium, provided that Plaintiff not raise these issues [at trial]." [See D.E. 82 at 1-2.] In a prior Order [D.E. 87], the Court initially reserved ruling on this issue. Since that time, the Court has held hearings and further considered the matter and advised the parties of its preliminary ruling.

Consistent with the Court's ore tenus ruling at the hearing held on June 8, 2009, this motion is denied as moot. The parties have mutually agreed to the general parameters of the evidence. To the extent that any party opens the door to testimony by Mr. Branscome concerning damage to the building, the Court may revisit the issue at trial upon an appropriate motion.

B. Plaintiff's Motion in Limine to Preclude Evidence of Gerald Zadikoff's Prior Bankruptcy Filing [D.E. 65]

Gerald Zadikoff is one of Plaintiff's experts who is expected to testify at trial concerning damages to the Isola property. Plaintiff, in the instant motion, seeks to preclude Defendant from presenting evidence at trial concerning Mr. Zadikoff's prior bankruptcy proceeding as [*6] well as his personal and/or business finances. [See D.E. 65] Plaintiff argues that Mr. Zadikoff's bankruptcy filing is irrelevant and, in support of the motion, alludes to a ruling by the Magistrate Judge in the case of Buckley Towers Condo. Association, Inc. v. QBE Insurance, Case No. 07-22988-CIV-GOLDBERG, which granted a similar motion concerning Mr. Zadikoff. Id.

In opposition, Defendant argues that the bankruptcy is highly-relevant because, inter alia, Mr. Zadikoff's financial hardship provides motivation for him to testify in a certain manner. Defendant also maintains that Mr. Zadikoff's bankruptcy resulted from his alleged use of personal loans to fund the firm of G.M. Shelby & Associates, his engineering firm with corporate finances apparently closely intertwined to his personal finances. [See D.E. 104.] Essentially, Defendant argues that the undersigned should rule differently than the Magistrate Judge in Buckley Towers because, according to Defendant, there is evidence of a link between Mr. Zadikoff's prior bankruptcy filing and his current financial situation. Id.

At the pretrial conference held on May 6, 2009, the Court inquired as to the underlying facts and chronology of [*7] events concerning Mr. Zadikoff's bankruptcy filing. The parties advised that the bankruptcy filing occurred in approximately 2006 and Plaintiff first engaged Mr. Zadikoff in 2007 as an expert in a separate matter. However, the issue of Mr. Zadikoff's bankruptcy was apparently not raised until 2008.

Generally, a bankruptcy filing in no way demonstrates that the defendant had particular need for money and may have the purpose of relieving the pressure which might compel him to a certain act. See *United*

States v. Reed, 700 F.2d 638, 642 (11th Cir. 1983). That said, the undersigned concurs with the Magistrate Judge in Buckley Towers and finds that a bankruptcy filing is not per se irrelevant for impeachment purposes insofar as a financial hardships may create a possible motive for a witness to testify in a certain fashion. In this case, however, based on the totality of the evidence in the record, the Court finds that Mr. Zadikoff's prior bankruptcy filing should be excluded at trial. To the extent that Plaintiff opens the door to the issue on direct examination, the Court may revisit the matter. Based thereon, Plaintiff's motion to exclude evidence of Mr. Zadikoff's prior bankrupcy proceeding [*8] and personal finances is granted.

C. Defendant's Motion in Limine or Motion to Strike, in the alternative, and/or Motion for Daubert Hearing Regarding Gerald Zadikoff [D.E. 124]

As noted above, Mr. Zadikoff is a professional engineer who is expected to testify about the various areas of damage to the Isola property sustained as a result of Hurricane Wilma. [See D.E. 52.] Defendant seeks to preclude the expert testimony challenging, inter alia, Mr. Zadikoff's competence and the methodology he used in assessing property damage. Defendant also specifically challenges Mr. Zadikoff's use of extrapolation to determine an overall damage assessment without a full and complete inspection of the entire building. Plaintiff counters that Mr. Zadikoff is qualified in the field of coastal structural engineer and points to Mr. Zadikoff's numerous visits and use of various tests during inspection.

Admission of expert testimony is governed by *Federal Rule of Evidence 702*, which provides, in pertinent part,

> [i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, [*9] experience, training, or education may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods and (3) the witness has applied the principles and methods reliably to the facts of the case.

Fed. R. Evid. 702; *United States v. Frazier, 387 F.3d 1244, 1259 (11th Cir. 2004)*. Moreover, a trial judge has considerable leeway in deciding how to determine when a particular expert's testimony is reliable and how to establish reliability. *Id. at 1262* (internal quotations and citations omitted).

In this case, the Court considers the evidence submitted in the pleadings together with the matters presented at the hearing held on June 10, 2009. Based on a review of all of the evidence, the Court finds that Mr. Zadikoff should be allowed to testify at trial. In concluding that his testimony should be allowed, the Court considers, for instance, the evidence that Mr. Zadikoff visited the property on at least five occasions, performed testing with ground penetrating radar and took and reviewed thermal imaging photographs of exterior areas of the property demonstrating water retention [*10] in the walls that corresponded to the exterior cracks observed by Mr. Zadikoff and his team. Also in inspecting the exterior of the building, Mr. Zadikoff testified to using a mobile scaffold that allowed the inspection team to move up and down the building exterior to photograph cracks and visible damage. Interior inspection involved testing window and slider frames with laser testing to confirm window and frame alignment as well as a visual inspection of numerous units.

Mr. Zadikoff also testified to using the approach set forth in the American Society of Testing Materials guide ("ASTM 21-28"), which includes a seven-factor analysis. Specifically, according to the testimony, Mr. Zadikoff reached his conclusions after considering, without limitation, the following factors: (i) reviewing the property's project documents; (ii) evaluating the property's design concept; (iii) reviewing maintenance records and, in this case, interviewing maintenance staff; (iv) inspecting the property; (v) conducting investigative testing; (vi) analyzing the various data, and (vii) preparing a written report.

Mr. Zadikoff did concede that, within the seven-factor analysis, he extrapolated from data obtained [*11] from an inspection of certain parts of the property to what the estimated damage assessment would be for the entire property. Nevertheless, he credibly explained that the method of extrapolation is used to allow flexibility when analyzing various projects.

Defendant attempted to undermine Mr. Zadikoff's testimony with its own expert, Mr. Adam Locke. Mr. Locke testified that he does not use extrapolation, but conceded that he also failed to inspect every unit in the building.[1] Indeed, both experts testified that they would have preferred to have more time to conduct the property inspections and, it appears, may have been limited in terms of the scope of what they could accomplish in the time permitted.[2] Based on the totality of the circumstances, the undersigned cannot find that the use of extrapolation per se warrants exclusion of Mr. Zadikoff's tes-

timony. Ultimately, Mr. Zadikoff's opinion is sufficient to survive a Daubert[3] challenge. This may be best described as a battle of the experts whose opinion should be considered by a trier of fact.[4] Accordingly, Defendant's motion to preclude the testimony of Mr. Zadikoff is denied.

1 He also testified that he could not extrapolate based on [*12] the number of units he and his team inspected.

2 It is also evident that while Hurricane Wilma occurred in 2005, the property inspections at issue did not occur until several years later. The parties did not explain why the passage of time between the Hurricane and the inspections, but that fact is inconsequential to the issue before the Court concerning admissibility of expert testimony.

3 *Daubert v. Merrell Dow Pharms. Inc., 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993).*

4 Other Courts in this District appear to have reached similar conclusions when they permitted Mr. Zadikoff to testify as an expert at trial. See, e.g., Chalfonte Condo. Apt. Ass'n v. QBE Ins. Corp., 06-81046-CIV-MIDDLEBROOKS/JOHNSON.

D. Defendant's Motion in Limine to Preclude Testimony of Craig Kugler or, in the alternative, Motion for Daubert Hearing [D.E. 129]

Similar to the challenges discussed above concerning Mr. Zadikoff, Defendant has filed a motion to preclude the testimony of Plaintiff's expert Craig Kugler.[5] [See D.E. 129.] Mr. Kugler is a licensed independent adjuster who is expected to testify on behalf of Plaintiff on the amount of damages to the Isola property including, providing an opinion on the actual cash value versus replacement [*13] cash value of certain items. [See D.E. 145-4.]

5 Mr. Kugler appeared for the hearing scheduled on June 10, 2009, but the parties expended the totality of their time examining Messrs. Zadikoff and Locke. Consequently, the Court did not hear live testimony from Mr. Kugler. That said, the matter can be disposed of on the pleadings as set forth herein.

Defendant maintains that Mr. Kugler is not qualified to testify as an expert and that his methodology is unreliable. [See D.E. 129.]. Defendant also submits that any testimony of Mr. Kugler would be cumulative to that of other professionals in the case. Plaintiff opposes the motion emphasizing Mr. Kugler's experience and attaching, among other things, an affidavit in support of its opposition to the motion. [See D.E. 145-4.] The relevant case law governing expert testimony is referenced above in the discussion concerning Mr. Zadikoff.

Based on a review of the pleadings and the relevant standards, the Court finds that there is sufficient evidence in the record to permit Mr. Kugler to testify at trial. Specifically, the Court notes that Mr. Kugler affirms he personally inspected 95 units in the Isola property, his team inspected 225 units and [*14] took approximately 1190 photographs of the interiors and cracking exterior. [See D.E. 145-4.] He also admits to relying on several sources of information, including his own personal observations, observations of his team members and reports prepared by other professionals, including Mr. Zadikoff's firm. Id. Based on his analysis, Mr. Kugler concludes that the replacement cost value of the hurricane damaged items is approximately $7.1 million and the actual cash value is approximately $5.6 million. Id. at 5.

Given such a record, the Court is not persuaded that Mr. Kugler's testimony should be excluded under Daubert. While it appears that Mr. Kugler may have relied on the opinion and observations of others to reach his damage assessment, such reliance is an insufficient basis to exclude his testimony. Additionally, while there appears to be some potential for overlap in the areas inspected by Mr. Kugler and Mr. Zadikoff, the Court finds significant that their anticipated testimony is different in scope and relates to different areas of damage such that, although related, the testimony is not so cumulative as to warrant exclusion. To the extent that Mr. Kugler has relied on other professionals, [*15] Defendant is free to examine the witness on those matters and present such evidence to the jury. At this juncture, however, Mr. Kugler will be permitted to testify at trial. Accordingly, Defendant's motion to preclude the testimony of Mr. Kugler is denied.

E. Plaintiff's Motion in Limine to Preclude Evidence at Trial Regarding Business Dealings Between Hunter R. Contracting and Certain Individuals [D.E. 123]

By its motion in limine [D.E. 123], Plaintiff seeks to exclude evidence of business dealings between, on the one hand, Hunter R. Contracting ("Hunter") and certain of Hunter's representatives and, on the other hand, the Garfunkel Trial Group, and Affiliates, ("GTG"). [See D.E. 123] According to the pleadings, GTG has filed a separate suit against Hunter and its representatives asserting, inter alia, claims for fraudulent representation and RICO violations. [See D.E. 146-9]. Plaintiff does not dispute the existence of the litigation. Rather, Plaintiff argues that the business relationships between Hunter and GTG have little probative value and would "turn [this] trial into a sideshow about the truth or falsity of the

allegations made by the Hunter representatives." [*16] [D.E. 123 at 3.]

Defendant opposes the motion asserting inter alia, that Hunter prepared a report upon which Plaintiff relied in filing an insurance claim and, as such, Defendant is entitled to present evidence that Plaintiff's claim for damages has been misrepresented, inflated or fraudulently presented. [See D.E. 146 at 3, 6.]

The Court finds that, to the extent that Plaintiff intends to rely on any report prepared by Hunter and its professionals, Defendant is entitled to challenge the basis of any such report, including its accuracy and reliability. Furthermore, Defendant will be allowed to present witnesses who have direct knowledge concerning Plaintiff's claim for damages. That said, Defendant shall not be allowed to raise the existence of a separate litigation or contract dispute which is not relevant to the claims at hand. With these parameters in mind, the Court will carefully consider the evidence at trial and may reconsider the matter as necessary and appropriate. Accordingly, Plaintiff's motion in limine to preclude evidence concerning Hunter and its professionals is granted, in part, and denied, in part, as noted herein.

F. Defendant's Motion in Limine to Preclude Reference [*17] **to Isola's Historical Payment of Premiums [D.E. 125]**

Defendant seeks to preclude reference to Plaintiff's history of premium payments for years that are not at issue. [See D.E. 125.] Plaintiff opposes the motion asserting, among other things, that any history of premium payments before 2005 is moot because the insurance policy issued in 2005 and that was the same year Hurricane Wilma occurred. Plaintiff further argues that, to the extent Defendant wants to preclude evidence of premium payments after Hurricane Wilma, the motion should be denied. The Court agrees.

Plaintiff may present evidence of premium payments for the relevant years, including the year the policy was issued (*i.e.*, 2005) and any subsequent years as are relevant to defend against allegations of potential fraud. Based thereon, Defendant's motion is denied.

G. Defendant's Motion in Limine to Preclude Evidence of Alleged Non-Compliance with *Fla. Stat. § 627.701*, or in the alternative, to Preclude Proposed Deposition Testimony of Timothy Butler [D.E. 126]

In pertinent part, Count I of the Amended Complaint [D.E. 37-2], seeks, inter alia, "a declaration that the Insurance Contract fails to comply with *Section 627.701(1) (a-b), Florida Statutes* [*18] and *627.701(4) (a), Florida Statutes*; therefore, the provisions concerning coinsurance and a separate hurricane deductible are void and unenforceable." [See D.E. 37-2 ¶ 20.] Defendant argues that, as found by two other Courts in this District, there is no remedy for an alleged violation of *§ 627.701*. See Chalfonte Condo. Apt. Ass'n v. QBE Ins. Corp., Case No. 06-81046 and Buckley Towers Condo. Inc., v. QBE Ins. Corp., Case No. 07-22988. Plaintiff maintains that the issue has been previously addressed by this Court in the ruling on the motion to dismiss [D.E. 87]. Significantly, however, while Count I remained for trial, the issue concerning *§ 627.701* is only part of the relief requested in Count I. Therefore, contrary to Plaintiff's argument, the preclusion of evidence regarding *§ 627.701* was not specifically before the Court prior to the instant motion.

Having reviewed the record and the relevant case law, this Court concurs with the Courts in Chalfonte and Buckley Towers who concluded that *§ 627.701* does not provide a private right of action to Plaintiff. The undersigned recognizes that the issue is currently on appeal to the Eleventh Circuit and has been certified to the Florida [*19] Supreme Court, see *Chalfonte Condo. Ap't Ass'n v. QBE Ins. Corp., 561 F.3d 1267 (11th Cir. March 9, 2009)*. In the absence of controlling precedent requiring a different conclusion, however, Defendant's motion in limine on this issue is granted.

H. Defendant's Motion in Limine to Preclude Evidence and References to Other Claims Against QBE [D.E. 128]

Defendant seeks to preclude evidence or references to other claims or lawsuits filed against it arguing that such evidence would have a prejudicial effect. [See D.E. 128.] Plaintiff counters that this evidence is relevant when, for example, it demonstrates a financial link between an expert witness and the Defendant. [See D.E. 141.] The Court finds that Plaintiff may be permitted to present evidence concerning when Defendant and witnesses have previously worked together on other matters, including examining witnesses on (i) the number of cases worked on together with Defendant and (ii) the percentage of the witness' income derived from working with Defendant. That said, Plaintiff will not be allowed to reference a specific case by name, caption or case number.[6] The parties are hereby on notice to closely adhere to the Court's parameters on [*20] this issue and, to the extent necessary, the Court may revisit the issue at trial. Accordingly, Defendant's motion is granted, in part and denied, in part.

6 For example, the questions may be generally framed as "Do you recall testifying in another matter?" without reference to the case name.

I. Defendant's Motion to Compel Testimony From Kenneth Romain, Motion for Appointment of Special Master and for Sanctions [D.E. 148]

After a motion to compel, Defendant commenced the deposition of Kenneth Romain on May 22, 2009. According to the motion, "Mr. Romain unilaterally terminated the deposition prior to answering any questions regarding his company's involvement with Isola's claim without invoking any privilege or grounds for termination." [D.E. 148.] Therefore, Defendant seeks to compel the testimony of Mr. Romain and the appointment of a special master to preside over the deposition at a cost to Mr. Romain. Id. Defendant submits that Plaintiff does not oppose the motion and the record reflects no opposition brief.

During the hearing held on June 3, 2009, the Court granted this motion ore tenus directing that the parties select a mutually agreed upon special master and conduct the deposition [*21] in accordance with the Federal Rules of Civil Procedure. To the extent that the parties have not yet conducted the continued deposition of Mr. Romain, the deposition shall be conducted by no later than **June 29, 2009.** There will be no extensions. This order also clarifies that each party shall bear their own fees and costs related to deposing Mr. Romain. Accordingly, this motion is granted, in part, and denied, in part, as set forth herein.

J. Defendant's Motion to Compel Plaintiff and/or Plaintiff's Counsel to Produce Records of TSSA Storm Safe, Inc, Relating to Its Inspection of Isola [D.E. 155]

According to the motion, Defendant deposed Jeff Dobbins, president of TSSA Storm Safe, Inc. ("TSSA"), concerning a separate proceeding. During the examination, Defendant discovered that TSSA, as a subvendor of Hunter R. Contracting, also performed an inspection of windows and sliding glass doors on the Isola property. [D.E. 155]. Apparently, TSSA provided documents concerning the inspection to Plaintiff's attorneys. Defendant claims that those TSSA documents were never produced to Defendant in this case.

During the hearing held on June 3, 2009, the undersigned permitted Defendant to depose Mr. [*22] Dobbins and expressly gave the parties until June 10, 2009. It is unclear from the record if the deposition of Mr. Dobbins actually went forward. Nevertheless, having granted Defendant the right to depose Mr. Dobbins on this matter, Defendant should also obtain documents related to TSSA's inspection of Isola. Therefore, to the extent that Plaintiff possesses documents related to TSSA's inspection of Isola, Defendant's motion is granted. Accordingly, within ten (10) days from the date of the entry of this Order, Plaintiff shall produce any and all relevant documents related to TSSA's inspection of the Isola property. Such production shall be in accordance with the Federal Rules of Civil Procedure.

K. Defendant's Motion for Continuance of Trial, To Reopen Discovery for Limited Purpose and Motion to Amend Witness List [D.E. 157][7]

> 7 Although Defendant certifies that Plaintiff opposes this motion, Plaintiff did not file a brief in opposition.

Defendant argues that it has recently discovered evidence that supports its affirmative defense of potential fraudulent concealment by Plaintiff. This case was initially scheduled for the trial period to commence on June 8, 2009. As the parties were previously [*23] advised, the case is specially set to proceed to trial on **August 3, 2009.** Therefore, the motion is granted to the extent of a continuance of the trial date. The motion is denied in all other respects.[8]

> 8 As a related matter, unless expressly stated herein, discovery is not re-opened. The parties are, of course, free to mutually agree to discovery. In the absence of an agreement, however, the Court is not inclined to entertain discovery disputes or further burden the Magistrate Judge with discovery matters in this case. The case is effectively trial ready and the parties should proceed accordingly.

L. Non-party, Needham Roofing, Inc.'s Motion to Quash Subpoena [D.E. 163]

Pursuant to *Federal Rule of Civil Procedure 45*, Needham Roofing, Inc. ("Needham") filed a motion quash a trial subpoena arguing, inter alia, that it is a foreign corporation located in Colorado and it would be unduly burdened by the cost of appearing on short notice for a trial date that was initially scheduled for the two-week trial period starting on June 8, 2009.[9]

> 9 Although the pleading states that a copy of the subpoena is attached as Exhibit A, no such exhibit is contained within the record. Nevertheless, the Court [*24] rules on the motion based on the pleading and considering the posture of the case.

Rule 45 provides that "a party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to subpoena." *Fed. R. Civ. P. 45(c)(1)*. Moreover, a court may quash a subpoena that requires a person who is neither a party nor a party's officer to tra-

vel more than 100 miles from where that person resides, is employed, or regularly transacts business in person." *Fed. R. Civ. P. 45(c)(3)(A)(ii)*.

In this case, based on the pleadings [D.E. 163], the Court finds that the subpoena should be quashed. The Court's ruling is without prejudice and rests largely on the issue of timing as the trial date has been continued. Significantly, however, in seeking any trial subpoena, all parties are reminded to closely adhere to the Federal Rules of Civil Procedure. Here, it may be that Needham is outside the subpoena parameters of *Rule 45*. The Court, however, need not now decide that issue and grants the motion without prejudice.

M. Defendant's Unopposed Motion to Bring Electronic Equipment Into Courthouse [D.E. 156]

Defendant seeks to bring six [*25] laptop computers as well as a cellular telephone for use by the Defendant's legal assistant. The parties are directed to raise the issue at the calendar call of the case, including advising the Court why the need for so many laptops and why the use of a cellular phone by a non-attorney. In this regard, the Court recognizes that a prior order permitting Plaintiff the use of similar electronic devices was entered [D.E. 152]. Upon reconsideration, however, the Court may limit the electronic devices and would like to address the matter further at the calendar call. The Local Rules of this District and any relevant administrative Orders will be used as guidance. Therefore, the Court reserves ruling on this issue.

III. CONCLUSION

Based on the foregoing, it is hereby

ORDERED AND ADJUDGED that Plaintiff's Motion in Limine to Preclude Evidence of Gerald Zadikoff's Prior Bankruptcy Filing and his Personal and/or Business Finances [D.E. 65] is **GRANTED**. It is further

ORDERED AND ADJUDGED that Defendant's Motion in Limine to Preclude Certain Testimony of Expert Lee Branscome or, alternatively, a Motion for a Daubert Hearing [D.E. 67, 72] is **DENIED AS MOOT**. It is further

ORDERED AND ADJUDGED that Plaintiff's [*26] Motion in Limine to Preclude Evidence at Trial Regarding Business Dealings Between Hunter R. Contracting and Certain Individuals [D.E. 123] is **GRANTED, IN PART AND DENIED, IN PART**. It is further

ORDERED AND ADJUDGED that Defendants Motion in Limine or Motion to Strike, in the alternative, and/or motion for Daubert Hearing Regarding Gerald Zadikoff [D.E. 124] is **GRANTED, IN PART AND DENIED, IN PART**. The motion is granted to the extent that the Court held a Daubert hearing on June 10, 2009. The motion is denied in all other respects. It is further

ORDERED AND ADJUDGED that Defendant's Motion in Limine to Preclude Reference to Isola's Historical Payment of Premiums [D.E. 125] is **DENIED**. It is further

ORDERED AND ADJUDGED that Defendant's Motion in Limine to Preclude Evidence of Alleged Non-Compliance with *Fla. Stat. § 627.701* [D.E. 126] is **GRANTED**. It is further

ORDERED AND ADJUDGED that Defendant's Motion in Limine to Preclude Evidence and References to Other Claims Against QBE [D.E. 128] is **GRANTED, IN PART AND DENIED, IN PART** as set forth herein. It is further

ORDERED AND ADJUDGED that Defendant's Motion in Limine to Preclude Testimony of Craig Kugler or, in the alternative, Motion for [*27] Daubert Hearing [D.E. 129] is **DENIED**. It is further

ORDERED AND ADJUDGED that Defendant's Motion to Compel Testimony From Kenneth Romain, Motion for Appointment of Special Master and for Sanctions [D.E. 148] is **GRANTED** as set forth herein. It is further

ORDERED AND ADJUDGED that Defendant's Motion to Compel Plaintiff and/or Plaintiff's Counsel to Produce Records of TSSA Storm Safe, Inc, Relating to Its Inspection of Isola [D.E. 155] is **GRANTED** as set forth herein. It is further

ORDERED AND ADJUDGED that Defendant's Motion for Continuance of Trial, To Reopen Discovery for Limited Purpose and Motion to Amend Witness List [D.E. 157] is **GRANTED, IN PART AND DENIED, IN PART**. It is further

ORDERED AND ADJUDGED that Non-party, Needham Roofing, Inc.'s Motion to Quash Subpoena [D.E. 163] is **GRANTED WITHOUT PREJUDICE**. It is further

ORDERED AND ADJUDGED that the Court reserves ruling on Defendant's Unopposed Motion to Bring Electronic Equipment Into Courthouse [D.E. 156]. It is further

ORDERED AND ADJUDGED that Defendant's Corrected Motion for Extension of Time to Rile Rebuttal Expert Witness Reports [D.E. 54] is **DENIED AS MOOT**.

DONE AND ORDERED [*28] in Chambers at Miami, Florida, this 19th day June, 2009.

/s/ Donald L. Graham UNITED STATES DISTRICT JUDGE

DONALD L. GRAHAM

SHERRI LYNN JOHNSON, Plaintiff, -vs- PETSMART, INC., Defendant.

Case No. 6:06-cv-1716-Orl-31UAM

UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA, ORLANDO DIVISION

2007 U.S. Dist. LEXIS 73567

October 2, 2007, Decided
October 2, 2007, Filed

SUBSEQUENT HISTORY: Motion to strike denied by *Johnson v. Petsmart, 2007 U.S. Dist. LEXIS 77033 (M.D. Fla., Oct. 15, 2007)*

COUNSEL: [*1] For Sherri Lynn Johnson, Plaintiff: James N. Nance, LEAD ATTORNEY, Nance Cacciatore, Melbourne, FL.

For Petsmart, Inc., a foreign corporation, Defendant: Edward F. Gagain, LEAD ATTORNEY, Marshall, Dennehey, Warner, Coleman & Goggin, Tampa, FL; Laurie D. Beechner, LEAD ATTORNEY, Marshall, Dennehey, Warner, Coleman & Goggin, Orlando, FL.

JUDGES: Donald P. Dietrich, UNITED STATES MAGISTRATE JUDGE.

OPINION BY: Donald P. Dietrich

OPINION

ORDER

This cause came on for consideration without oral argument on the following motions:

> **MOTION: AMENDED MOTION TO COMPEL DISCOVERY (Doc. No. 42)**
>
> **FILED: September 26, 2007**
>
> **THEREON** it is **ORDERED** that the motion is **DENIED.**

> **MOTION: AMENDED MOTION TO COMPEL DISCOVERY (Doc. No. 43)**
>
> **FILED: September 26, 2007**
>
> **THEREON** it is **ORDERED** that the motion is **DENIED.**

Plaintiff moves to compel two non-parties to comply with subpoenas for production of documents. Plaintiff has failed to establish that the subpoenas were issued or served in compliance with *Fed. R. Civ. P. 45*. Therefore, there is no basis to issue an order compelling compliance.

I. FACTS

Plaintiff states that it "dispatched" a subpoena duces tecum without deposition to "Diversified Maintenance Systems, Inc." on March 15, 2007. Doc. 42 at P 1. In [*2] response to an inquiry by Plaintiff's counsel's office on May 28, 2007, a person named "Teresa" (whom Plaintiff believes was the records custodian for Diversified Maintenance) informed counsel's office that she did not have a copy of the subpoena in her possession. Doc. 42 at P 2. On June 1, 2007, Plaintiff's counsel sent a copy of the subpoena by facsimile to Teresa's attention. Doc. 42 at P 3. On June 20, 2007, Plaintiff's counsel received a facsimile from Diversified Maintenance with certain documents and a cover letter stating, "Here is all the information I can provide." Doc. 42 at P 5. The motion does not state who, if anyone, signed the cover letter. Plaintiff contends that Diversified Maintenance's produc-

tion failed to respond completely to the subpoena. Doc. 42 at P 6.

Similarly with respect to Sunkey Janitorial, Plaintiff states that a subpoena duces tecum without deposition was "dispatched" on or about July 11, 2007. Doc. 43 at P 1. Plaintiff's counsel alleges that on July 25, 2007, his investigator spoke by telephone to the owner of Sunkey and the owner purportedly said that he would "send whatever records he had." Doc. 43 at P 2. No records were produced, and subsequent [*3] efforts to contact Sunkey were unsuccessful. Doc. 43 at PP 3-6. Plaintiff's counsel learned that at some point that Sunkey was "no longer in service." Doc. 43 at P 5.

Plaintiff's motions failed to attach copies of the subpoenas at issue and fail to provide any evidence that service upon the two non-parties was effected. Plaintiff also failed to serve the motions to compel on the non-parties.

II. ANALYSIS

Contempt is the only sanction available against a non-party witness for failure to comply with a subpoena. *Fed. R. Civ. P. 45(e)*. Before the Court will order enforcement of a subpoena, the party seeking the order must show that it has complied with *Rule 45*. "A party may only be compelled to comply with a properly issued and served subpoena." *Smith v. Midland Brake, Inc., 162 F.R.D. 683, 686 (D. Kan. 1995). See also, Holloman v. Mail-Well Corp., 443 F.3d 832, 843-44 (11th Cir. 2006)* (finding no basis to reverse district court for denying motion to compel compliance with deposition subpoena when moving party failed to prove subpoena ever issued); *Cincinnati Ins. Co. v. Cochran, 2004 U.S. Dist. LEXIS 30367, 2004 WL 5246993 *2 (N.D. Fla. December 9, 2004)* (failure of moving party to show service of the subpoena alone [*4] supports denial of a motion to compel). Only after the moving party establishes *prima facie* compliance with *Rule 45* does the burden shift to the subpoenaed party if it raises any objections. *Cf. Wiwa v. Royal Dutch Petroleum Co., 392 F.3d 812, 818 (5th Cir. 2004)* ("moving party has the burden of proof to demonstrate that compliance with the subpoena would be unreasonable and oppressive") (internal quotation marks omitted); *U.S. v. Armada Petroleum Corp., 562 F.Supp. 43, 50 (S.D. Tex. 1982)* ("Once the government has made out a *prima facie* case for enforcement of an administrative subpoena, the burden is upon the respondents to prove that judicial enforcement of the administrative subpoena would be an abuse of the court's process.").

Plaintiff fails to establish *prima facie* compliance with *Rule 45*. Initially, *Rule 45* requires that the subpoena be in a specific form, including, *inter alia*, text advising the subpoenaed person of his or her rights and responsibilities. *Fed. R. Civ. P. 45(a)*. As Plaintiff fails to attach the subpoenas in question, the Court cannot verify the form or content of the subpoenas. [1]

> 1 The Court notes that deposition subpoenas issued to other non-parties failed to [*5] comply with the form required by *Fed. R. Civ. P. 45(a)*. Doc. 36-2.

Plaintiff also fails to establish that the subpoenas were properly served. A statement that the subpoenas "were dispatched" falls far short of establishing effective service. To the extent that Plaintiff states that the subpoena to Diversified Maintenance was sent by facsimile to the purported records custodian, there is no showing that the subpoena was directed to the "records custodian" as opposed to "Diversified Maintenance Systems, Inc." Doc. 42 at P 1. Further, service of a subpoena by facsimile does not satisfy *Rule 45*'s requirement that the subpoena be "delivered" to the subpoenaed person. *See, Firefighters' Inst. for Racial Equal. v. City of St. Louis, 220 F.3d 898, 903 (8th Cir. 2000)* (service of subpoena to non-party by facsimile and regular mail was ineffective).

DONE and **ORDERED** in Orlando, Florida on October 2, 2007.

Donald P. Dietrich

UNITED STATES MAGISTRATE JUDGE

RIFKIN/MIAMI MANAGEMENT CORP., et al., Plaintiffs, v. METROPOLITAN DADE COUNTY, and BELLSOUTH INTERACTIVE MEDIA SERVICES, INC., Defendants.

CASE NO. 4:98mc24

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA, TALLAHASSEE DIVISION

1998 U.S. Dist. LEXIS 8949*; *11 Fla. L. Weekly Fed. D 739

April 24, 1998, Decided
April 27, 1998, Filed; April 28, 1998, Entered on Docket

DISPOSITION: [*1] Motion to quash (document 1) GRANTED. Subpoenas served in this district under this court's case style QUASHED. Remaining motions DENIED AS MOOT.

COUNSEL: For plaintiff: TERRY S. BIENSTOCK, Terry S. Bienstock, P.A., Bienstock & Clark, Miami, Florida.

For defendant Dade County: THOMAS W. LOGUE, Assistant County Attorney, Office of the Dade County Attorney, Miami, Florida. For Attorneys for BellSouth Telecommunications, Inc., defendant: Elizabeth Bevington, Tallahassee, Florida.

JUDGES: Robert L. Hinkle, United States District Judge.

OPINION BY: Robert L. Hinkle

OPINION

ORDER QUASHING SUBPOENAS

This proceeding arises from an action pending in the Southern District of Florida. Plaintiffs are cable operators licensed to provide cable television service to residents of Dade County, Florida. Plaintiffs assert in their Southern District action that Dade County has unlawfully granted a cable license to defendant BellSouth Interactive Media Services, Inc. on terms more favorable than the terms of plaintiffs' licenses.

Plaintiffs have served subpoenas on non-party BellSouth Telecommunications, Inc., seeking to require production of voluminous documents and, apparently, seeking testimony of the corporation under *Federal Rule of Civil Procedure 30(b)(6)*. Plaintiffs served the subpoenas in this district under this court's case style. Plaintiffs designated Tallahassee as the location of the deposition and document production.

BellSouth Telecommunications moved to quash the subpoena on various grounds including the proposed location [*2] of the deposition and document production and absence of authority to compel the company to respond to such a subpoena in this district. In response, plaintiffs redesignated the location of the deposition and document production as Atlanta, but plaintiffs apparently did not issue or serve a subpoena styled in the Northern District of Georgia.

Tallahassee is approximately 500 miles from Dade County, Florida. Tallahassee is approximately 275 miles from Atlanta, Georgia. None of the documents at issue are maintained in the Northern District of Florida or within 100 miles of Tallahassee; none of the corporate representatives who would be designated to testify on the company's behalf reside or regularly do business in Tallahassee or within 100 miles hereof; none of the activities at issue in the case occurred in Tallahassee or within 100 miles hereof; and, for all that appears in this record, the Southern District case and the information plaintiffs seek from BellSouth Telecommunications have absolutely no connection to this district.

The sole basis on which plaintiffs claim an ability to require BellSouth Telecommunications to respond to a Northern District of Florida subpoena is that [*3] the company's registered agent, Prentice-Hall Corporation System, Inc., maintains its address in Tallahassee, thus allowing plaintiffs to effect service of the subpoena here. This will not do.

First, *Federal Rule of Civil Procedure 45(c)(3)(A)* provides:

> On timely motion, the court by which a subpoena was issued *shall* quash or modify the subpoena if it . . . requires a person who is not a party or an officer of a party to travel to a place more than 100 miles from the place where that person resides, is employed or regularly transacts business in person, except that . . . such a person may in order to attend trial be commanded to travel from any such place within the state in which the trial is held.

Here the "persons" whom plaintiffs would require to testify are BellSouth Telecommunications' designated representatives, none of whom reside, are employed or regularly transact business in this district or within 100 miles of Tallahassee.

More generally, *Federal Rule of Civil Procedure 45(c)(1)* provides:

> A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject [*4] to that subpoena.

If plaintiffs' tactics here are not a violation of this provision, they are surely close.

There may be circumstances in which a non-party corporation can be required to transport voluminous documents more than 100 miles into a district where it does not maintain them in the ordinary course of its business or may be required to present corporate representatives in a district more than 100 miles from where the representatives reside or do business. There may even be circumstances in which a non-party corporation can be required to transport documents more than 100 miles to a district other than the district where the action is pending or the events at issue occurred or may be required to present corporate representatives in such a district. Here, however, plaintiffs are attempting to require a non-party corporation to transport voluminous documents and present corporate representatives in a district having no connection with the lawsuit or events at issue, in which the corporation does little if any business, and which is some 500 miles removed from the site of the lawsuit and events at issue. If the simple fact of physical service of a subpoena in the district [*5] allowed this, a party's capacity to inflict undue burden on non-party corporations would be considerable. [1] This is precisely what *Rule 45* was designed to avoid.

> 1 Most national corporations have registered agents in every state. Thus, for example, if (as plaintiffs apparently contend) service of a subpoena on a registered agent were sufficient to require a non-party corporation to transport documents or present witnesses wherever service was effected, any national corporation would be subject to subpoena in California or New York or Alaska or even Hawaii in connection with any Florida lawsuit, for no reason other than the whim of the party serving the subpoena. This is nonsense.

It is no answer that plaintiffs now have relented and agreed to the production of documents and presentation of designated witnesses in Atlanta. Under *Rule 45*, this court's subpoena does not reach Atlanta. Plaintiffs will have to issue a proper subpoena in a proper district.

Accordingly,

IT IS ORDERED:

The motion to quash (document [*6] 1) is GRANTED. The subpoenas served in this district under this court's case style are QUASHED. The remaining motions are DENIED AS MOOT. The clerk shall close the file.

SO ORDERED this 24th day of April, 1998.

Robert L. Hinkle

United States District Judge

1 of 1 DOCUMENT

UNITED STATES OF AMERICA, Plaintiff, vs. CRISTOBAL SANDOVAL, Defendant.

CASE NO. 10-20243-CR-ALTONAGA/Brown

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA, MIAMI DIVISION

2010 U.S. Dist. LEXIS 78726

July 13, 2010, Decided
July 13, 2010, Filed

COUNSEL: [*1] For Cristobal Sandoval, Defendant (2): Kashyap Pramod Patel, LEAD ATTORNEY, Federal Public Defender's Office, Miami, FL.

For USA, Plaintiff: Aurora Fagan, United States Attorney's Office, Miami, FL.

JUDGES: CECILIA M. ALTONAGA, UNITED STATES DISTRICT JUDGE.

OPINION BY: CECILIA M. ALTONAGA

OPINION

ORDER

THIS CAUSE came before the Court on Third Party, Amazon.com, Inc.'s ("Amazon['s]") Motion to Quash Subpoena Duces Tecum ("Motion") [ECF No. 49], filed on June 4, 2010. The Court has carefully considered the Motion, the file, and applicable law.

I. BACKGROUND

On or about November 28, 2009, a tractor trailer loaded with 12,000 Amazon Kindle 2 ("Kindle") electronic reading devices was stolen from a truck stop in Troy, Illinois. (*See* Compl. 3 [ECF No. 1]). On March 22, 2010, Defendant, Cristobal Sandoval ("Sandoval"), and another defendant were found in Miami-Dade County with approximately 6,000 Kindles. [1] (*See id.* 2). Subsequently, Sandoval was indicted and pleaded guilty to possessing stolen cargo in interstate commerce, a violation of *18 U.S.C. § 659*. (*See* Indictment 1 [ECF No. 23]; Change of Plea Hr'g [ECF No. 51]). Sandoval's sentence for this violation will be based, in part, on the value of the stolen property. (*See* [*2] Resp. 6 [ECF No. 56]).

1 Amazon's inventory indicates 6,098 Kindles were stolen. (*See* Decl. of Lonnie Anderson ("Anderson") P 4 [ECF No. 48-1]).

In anticipation of his sentencing hearing, Sandoval subpoenaed certain records from Amazon, the owner of the stolen Kindles. (*See* Subpoena Duces Tecum ("Subpoena") [ECF No. 48-3]). The Subpoena read in pertinent part:

> Amazon must provide [1] the unit cost of production per Amazon Kindle . . . . [2] Provide any and all insurance claims made based upon this incident, including all payments received by Amazon from said insurer and all settlement agreements. [3] Also, provide details for any pending Civil Litigation regarding this matter, that is any disputed amount between Amazon and the insurance provider that has not been settled. [4] The Bill of Lading for this shipment must also be provided. [5] An exact quantity of Kindles being shipped and whether they were refurbished or brand new Kindles. [6] Lastly, whether these Kindles were intended for wholesale in bulk or individual retail sale by Amazon.

(*Id.* 2) (numeration added).

Amazon now seeks to quash the Subpoena.

II. LEGAL STANDARD

Rule 17(c) of the Federal Rules of Criminal Procedure governs the [*3] use of subpoenas duces tecum in federal criminal proceedings. *See United States v. Silverman, 745 F.2d 1386, 1397 (11th Cir. 1984).* "The court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive." *FED. R. CRIM. P. 17(c).* A party seeking production of documents under *Federal Rule of Criminal Procedure 17(c)* "must clear three hurdles: (1) relevancy; (2) admissibility; and (3) specificity." *United States v. Nixon, 418 U.S. 683, 700, 94 S. Ct. 3090, 41 L. Ed. 2d 1039 (1974)*; *see also United States v. Marshall, No. 07-20569-CR, 2008 U.S. Dist. LEXIS 48806, 2008 WL 2474662, at *1 (S.D. Fla. Jun. 17, 2008)* (acknowledging *Nixon* as the legal standard). "Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of an action more . . . or less probable than it would be without the evidence." *FED. R. EVID. 401*. The application for such a subpoena must be made in good faith and "not [be] intended as a general 'fishing expedition'." *Nixon, 418 U.S. at 700* (quoting *United States v. Iozia, 13 F.R.D. 335, 338 (S.D.N.Y. 1952)).*

III. ANALYSIS

Amazon asserts the subpoena should be quashed in its entirety because Sandoval failed to comply with [*4] *Rules 17(c)(3)* and *17(d) of the Federal Rules of Criminal Procedure* as he did not obtain a court order prior to issuing the subpoena and he served the subpoena by facsimile. (*See* Mot. 5 n.5). Alternatively, Amazon maintains portions of the subpoena should be quashed because the subpoena "seeks confidential and irrelevant information, . . . [and] is overbroad and procedurally improper." [2] (*Id.* 2). Finally, Amazon discloses some of the subpoenaed information. (*See id.* 7; Decl. of Anderson; Pinkerton Investigative Rep. [ECF No. 48-2]; Bill of Lading [ECF No. 53-1]). Sandoval does not address the Rule 17 violations in his Response but maintains the subpoenaed documents are relevant as "necessary information for sentencing" because his "sentence [will be] based almost entirely on the value of the [stolen] property." (Resp. 3, 6).

> 2 Amazon also maintains the first three categories of documents (production costs, insurance claims, and pending disputes) should be protected from disclosure because the information is commercially sensitive and highly proprietary. (*See* Mot. 4). The Court does not address this issue because the subpoenaed information is quashed on other grounds. (*See infra* pp. 6-7).

In [*5] seeking to quash the subpoena in its entirety Amazon first relies on *Rule 17(c)(3) of the Federal Rules of Criminal Procedure*, a provision designed to implement the Crime Victims' Rights Act, *18 U.S.C. § 3771(a)(8).* (*See* Mot. 5). Amazon asserts Sandoval failed to comply with *Rule 17(c)(3)* because he did not obtain a court order prior to serving his subpoena on Amazon. (*See id.*). "[A] subpoena requiring the production of personal or confidential information about a victim may be served on a third party only by court order . . . ." *FED. R. CRIM. P. 17(c).* "The rule provides a protective mechanism when the defense subpoenas *a third party* to provide personal or confidential information *about* a victim." *Id.* at advisory committee's note 1, 2008 Amendments (emphasis added). The purpose of the court order is to put the victim on notice because "a third party may not assert the victim's interests, and the victim may be unaware of the subpoena." *Id.*

Amazon misunderstands the requirements of *Rule 17(c)*, as it interprets "third party" to mean a third party to the litigation rather than a party other than the victim and the defendant. Amazon is not a "third party" as comprehended by *Rule 17(c)(3)* [*6] because it is the victim in this matter. It was served with the subpoena directly; therefore, Amazon has notice of the proceedings and can protect its own interests as evidenced by the present Motion. Sandoval was not required to obtain a court order prior to service on Amazon.

In a footnote, Amazon also asserts the subpoena should be quashed because it was served by facsimile. (*See* Mot. 5 n.1). *Rule 17(d) of the Federal Rules of Criminal Procedure* provides "[a] subpoena may be served by the marshal, by a deputy marshal or by any other person who is not a party" and "[t]he server must deliver a copy of the subpoena to the witness . . . ." *FED. R. CRIM. P. 17(d).* The Advisory Committee Notes indicate *Rule 17(d)* is "substantially the same as *rule 45(c) of the Federal Rules of Civil Procedure*, 28 U.S.C., Appendix." *Id.* at advisory committee's note. "This means that '[p]ersonal service of subpoenas is required.'" *MAC Funding Corp. v. ASAP Graphics, Inc., No. 08-61785-MC, 2009 U.S. Dist. LEXIS 51685, 2009 WL 1564236, at *1 (S.D. Fla. Jun. 3, 2009)* (quoting 9A Charles A. Wright & Arthur R. Miller, FED. PRAC. & PROC.: CIVIL 3D § 2454 (2008)). *See also United States v. Grooms, 6 F. App'x 377, 381 (7th Cir. 2001)* (noting [*7] *Rule 17(d)* requires personal service of subpoenas); *United States v. Sabhnani, No. 07-cr-429 (ADS)(WDW), 2008 U.S. Dist. LEXIS 56204, 2008 WL 7842013, at *2 (E.D.N.Y. July 19, 2008)* (granting motion to quash where subpoenas were not personally served). One court has clearly stated *Rule 17(d)* does not

authorize service by facsimile. *See United States v. Venecia, 172 F.R.D. 438 (D. Or. 1997). Cf. Johnson v. Petsmart, Inc., No. 6:06-cv-1716-Orl-31UAM, 2007 U.S. Dist. LEXIS 73567, 2007 WL 2852363, at *2 (M.D. Fla. Oct. 2, 2007)* (finding service by facsimile does not satisfy *Rule 45 of the Federal Rules of Civil Procedure*).

Sandoval's service of the subpoena duces tecum by facsimile was defective and the subpoena must be quashed in its entirety on this ground. However, the Court assumes Sandoval will likely cure the improper service by effecting proper service of the same subpoena. Therefore, in the interests of justice and judicial economy, the substantive matters regarding the scope of the subpoena raised by Amazon in its Motion are addressed so as to forestall any further delay.

Amazon asserts the first three categories of subpoenaed information (production costs, insurance claims, and pending disputes) are irrelevant to Sandoval's sentencing [*8] as Amazon has revealed the retail market value of each Kindle to be $259.00. (*See* Mot. 2, 5; Decl. of Anderson [ECF No. 48-1] P 6). Amazon maintains the definition of "value" stated in *18 U.S.C. § 641*, which governs embezzlement and theft of public money, property or records, applies to violations of *18 U.S.C. § 659*. (*See* Mot. 5). *Section 641* defines value as "face, par, or market value, or cost price, either wholesale or retail, whichever is greater." *18 U.S.C. § 641*. Sandoval disagrees and asserts the definition of "value" in *section 641* applies only when government property is stolen. (*See* Resp. 6).

Sentencing guidelines require a determination of the amount of the loss of stolen property in calculating a defendant's base offense level. *See United States v. Machado, 333 F.3d 1225, 1227 (11th Cir. 2003)* (citing *U.S. SENTENCING GUIDELINES MANUAL § 2B1.1(b)(1)* (2000)). In determining the value of stolen property for sentencing purposes, the United States Court of Appeals for the Eleventh Circuit has adopted an "approach measuring loss within the factual circumstances presented, rather than a universal retail market value." *Id. at 1228*. Rejecting the definition of "value" in *section 641*, [*9] the Eleventh Circuit has determined "[t]he fair market value . . . does not refer to one uniform measure, . . . but rather the market in which the property was in at the time of the offense." *Id.*; *see also United States v. Galvez, 108 F. Supp. 2d 1369, 1372 (S.D. Fla. 2000)* (applying wholesale value because stolen goods were "packaged in wholesale lots and owned by a wholesale dealer at the time of the offense"). Identifying the market the property is in at the time of the offense is the equivalent of "looking at what a willing buyer would pay a willing seller." *United States v. Salvia, 164 F. App'x 829, 834-35 (11th Cir. 2006)* (finding invoices provided evidence of fair market value of stolen goods).

The first three categories of subpoenaed information are not relevant in determining the market value of the stolen Kindles. The unit cost of production of a Kindle will not aid Sandoval in establishing the value of the stolen cargo in either the retail or the wholesale markets. [3] Similarly, Sandoval's demand for information about "any and all insurance claims" and "any and all pending litigation" related to insurance is irrelevant in determining *market* value. (Subpoena 2). Sandoval asserts [*10] the insurance proceeds "paid out go[] directly to value . . . marking an agreed upon value per Kindle," but he fails to explain the nexus between an agreement between Amazon and its insurer, and the market value of the Kindles. (Resp. 7). Assuming, *arguendo*, an insurance settlement included an agreed upon value per Kindle between Amazon and its insurer, that measure only indicates the result of a negotiated agreement between Amazon and its insurer -- not the actual value of the Kindles in the marketplace. While a "court may measure loss in some other way," it does so only where "the market value is difficult to ascertain or inadequate to measure harm *to the victim*." *Machado, 333 F.3d at 1228*.

> 3 While most products are sold above their production costs, that is not always the case with newly-developed electronic devices like the Kindle. *See* Janusz A. Ordover, *Competition Policy for High-Tech Industries*, 24 Int'l Bus. Law 479, 480 (1996). Manufacturers of cutting-edge devices often employ penetration pricing, which involves pricing products below early production costs either to quickly establish market-share or with the expectation production costs will be significantly reduced once economies [*11] of scale are attained. *See generally* Joel Dean, *Pricing Pioneering Products*, J. of Indust. Econ., July 1969, at 175-76. Therefore, production cost may not serve as a "floor" for the wholesale market value.

Amazon has complied with Sandoval's fourth and fifth demands by providing the bill of lading, specifying exactly how many Kindles were shipped (*see* Bill of Lading), and indicating the devices were "brand new." (Decl. of Anderson P 4). However, Amazon's response to Sandoval's final demand is incomplete because Amazon failed to indicate whether the stolen Kindles were intended for wholesale or retail sale *by Amazon*. (*See* Subpoena 2) (emphasis added). Amazon indicates the stolen devices were "intended for retail sale to consumers," but it is unclear whether the devices were being shipped as products in wholesale commerce (sold to a retailer prior to their sale to consumers) or in retail commerce (Amazon, itself, intended to sell the Kindles directly to the consumer). (*See* Decl. of Anderson P 5).

Whether the Kindles were in the wholesale or retail market at the time of the theft is relevant to Sandoval's sentencing. *See Machado, 333 F.3d at 1227-28*; *Galvez, 108 F. Supp. 2d at 1372*. Therefore, [*12] in a properly-served subpoena, Sandoval may seek information regarding whether the stolen Kindles were intended for the wholesale market or for individual retail sale by Amazon. If intended for the wholesale market, Sandoval may also inquire of Amazon as to the wholesale value of the stolen goods.

IV. CONCLUSION

Consistent with the foregoing analysis, it is hereby

ORDERED AND ADJUDGED as follows:

1. Third Party, Amazon.com, Inc.'s Motion to Quash **[ECF No. 49]** is **GRANTED**.

2. Should Sandoval properly serve a subsequent subpoena duces tecum on Amazon.com, the scope of the subpoena shall be governed by this Order and it shall be served **no later than July 30, 2010**.

3. Amazon shall file its response to a properly-served subpoena **no later than seven days** following receipt of the subpoena.

DONE AND ORDERED in Chambers at Miami, Florida, this 13th day of July, 2010.

/s/ Cecilia M. Altonaga

CECILIA M. ALTONAGA

UNITED STATES DISTRICT JUDGE