UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 10-62411-CIV-DIMITROULEAS

WYNMOOR COMMUNITY COUNCIL, INC., *et al*.

Plaintiffs

v.

QBE INSURANCE CORPORATION,

Defendant.
_____/

PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION TO COMPEL PRODUCTION AND FORENSIC EXAMINATION

Plaintiffs, Wynmoor Community Council, Inc., et al., (collectively "Wynmoor"), by and through their attorneys, Childress Duffy, Ltd., respond and submit the following Memorandum of Law in Opposition to Defendant's, QBE Insurance Corporation ("QBE"), Motion to Compel Production and Forensic Examination; and in further support thereof, state as follows:

INTRODUCTION

Defendant's present motion seeks to compel the production of the Plaintiffs' electronically stored information ("ESI"). While Defendant argues vigorously that ESI should be produced and a procedure to capture and review it immediately set in motion, it offers absolutely no justification or need for such discovery—in the third brief it has written on these same issues, it has offered no evidence or even speculation of what information probative of simple breach of contract issues might be contained in electronic format. Since mountains of paper have already been produced in this case, there is nothing in the Court's record on this Motion supporting any basis for ESI to also be produced. The cart is clearly before the horse under these circumstances, and the motion should be denied in light of the irrefutable burden and

costs associated with the production of ESI. The burdens of managing ESI far outweigh any speculative benefit from any discoverable information that might exist only in electronic form – especially since Defendant offers no evidence that any discoverable ESI exists. *See Thompson v. Jiffy Lube International, Inc.*, 2006 WL 1174040, 3 (D.Kan. 2006) ("The mere suspicion that a document containing relevant evidence might be located in defendant's computer files does not justify the production of all email communications or computer records.").

Wynmoor suffered covered loss of or damage to its insured property due to Hurricane Wilma on or about October 24, 2005. *See* Plaintiffs' Fourth Amended Complaint at ¶10 [Doc. No. 67]. Following Hurricane Wilma, Wynmoor promptly notified QBE of the damage. Thereafter, Wynmoor retained a public adjuster to assist it with the claim and QBE retained its experts to investigate the claim. (November 16, 2005 letter from NFA to Mr. Robert Sansone Interloss attached hereto as Exhibit "A"). From November 2005 to November 2006, QBE's experts investigated the claim and in November 2006 made a payment to Wynmoor of $5,989,242.20 and demanded that Wynmoor Community Council execute a release to obtain the funds.

Wynmoor began providing QBE's representatives unfettered access to all of its documents and data, as and when requested, in November 2005, shortly after its claims for damage from Hurricane Wilma were made, and continuing to the current time. QBE requested and received copies of extensive paper files during 2006.

Following the filing of this lawsuit, QBE requested largely the same documentation from Wynmoor. On June 1, 2011, the Plaintiffs provided responses to the Defendant's First Requests for Production. (Plaintiffs' Responses to Defendant's First Set of Requests for Production attached hereto as Exhibit "B"). Wynmoor objected to the production of ESI, since it would be

unreasonably duplicative of the hard copy documents to which Wynmoor was willing and had already provided access. (*See generally* Ex. B; *see also* Plaintiffs' Responses to Defendant's Second Request for Production attached hereto as Exhibit "C"). On October 14, 2011, QBE propounded substantially the same discovery requests in the form of its Second Requests for Production. (*See* Ex. B; Ex. C). The only notable difference between Defendant's two requests for production is the inclusion of the phrase "from January 1992 through the present" to identical requests for documents which were included in its First Set of Requests. (*See e.g.* Ex. C at ¶¶ 1, 2 and Ex. B at ¶ 1). Counsel for QBE was made aware that *all* documents in Wynmoor's possession would be made available for their inspection and arrangements were made for QBE's representatives to go to Wynmoor and inspect all of Wynmoor's documents.

Objections notwithstanding, by agreement of the parties, starting on or about October 27, 2011 and lasting for several weeks, QBE was allowed unrestricted access to every scrap of records maintained by the Plaintiffs – without any temporal limitation – and QBE has in fact copied tens of thousands of pages of documents.

When the issue of electronic discovery was again finally raised by QBE on or about October 15, 2011, Plaintiffs' counsel again made clear that it was unnecessary and inappropriate for Plaintiffs to be forced to undertake the burden of producing, and inspecting ESI for privilege. (*See* Emails dated October 26, 2011 attached as Exhibit D). QBE was made aware of the fact that Wynmoor suffered a massive loss of information as a result of Hurricane Wilma. (Ex. D; *See also*, Affidavit of John D. Holthausen attached hereto as Exhibit "E" at ¶ 8). Also, Wynmoor does not maintain on its servers the e-mail correspondence for its employees. (Ex. E at ¶ 7).

QBE is now attempting to move to compel document production over objections made back in June 2011. While indeed QBE did propound identical discovery, with the addition of specific statements of date ranges, as a second set of requests in October 2011, Plaintiffs had already by that time agreed and started the process of allowing unrestricted access to their documents maintained in paper form. Literally, every request in the Second Request to Produce was redundant with the production already allowed in response to the First Request to Produce and it does not contain one single unique request for the production of documents electronic or otherwise. (*See* Ex. C and Ex. B).

Among other grounds for objection, Plaintiffs advised QBE on June 1, 2011 that any ESI requested would merely be duplicative of the documents that QBE had already had ample opportunity to inspect and copy and to which it was being provided further access in response to the First Request for Production, and that production of ESI would impose unfair and undue burden on these not-for-profit condominium associations. (*See* Ex. B). Wynmoor maintains the position represented in its objections, and respectfully request that based upon those grounds the Court deny Defendant's motion to compel.

LEGAL ARGUMENT AND AUTHORITY

The production of ESI is unnecessary and overly burdensome under the circumstances. Rule 26(b)(2)(C) provides limitations to the extent and frequency of discovery requests. Fed.R.Civ.P. 26(b)(2)(C); *see Morris v. Sequa Corp.*, 275 F.R.D. 562, 565 (N.D.Ala. 2011) ("All discovery is subject to the limitations of Rule 26(b)(2)(C)"); *see also Jeld-Wen, Inc. v. Nebula Glasslam Intern., Inc.*, 248 F.R.D. 632, 640 (S.D.Fla. 2008). The rules direct the court to weigh certain factors in determining the excessiveness of discovery requests:

> (i) "the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive;
> (ii) the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or
> (iii) the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues." Fed.R.Civ.P. 26(b)(2)(C).

Additionally, where the production of requested ESI would be unduly burdensome or costly, a party's motion to compel the discovery of ESI should be denied. Fed.R.Civ.P. 26(b)(2)(B); *see U & I Corp. v. Advanced Medical Design, Inc.*, 251 F.R.D. 667, 674 (M.D.Fla. 2008); *see also Thompson v. Jiffy Lube International, Inc.*, 2006 WL 1174040, 3 (D.Kan. 2006) ("The mere suspicion that a document containing relevant evidence might be located in defendant's computer files does not justify the production of all email communications or computer records.").

The Federal Rules are "not meant to create a routine right of direct access to a party's electronic information system" and that the "[c]ourts should guard against undue intrusiveness resulting from testing or inspecting such systems." *See Diepenhorst v. City of Battle Creek*, 2006 WL 1851243, 3 (W.D.Mich. 2006) (citing Fed.R.Civ.P. 34 adv. comm. notes (2006)). "Courts have been cautious in requiring the mirror imaging of computers where the request is extremely broad in nature and the connections between computers and claims in the lawsuit are unduly vague or unsubstantiated in nature." *Balboa Threadworks , Inc. v. Stucky*, 2006 WL 763668 *3 (D.Kan. 2006); *See, e.g. McCurdy Group v. Am. Biomedical Group, Inc.*, 9 Fed Appx. 822, 831 (10th Cir. 2001) (holding that skepticism concerning whether a party has produced all responsive, non-privileged documents from certain hard drives is insufficient reason standing alone to warrant production of the hard drives).

Defendant's reliance on *Bank of Mongolia v. M & P Global Financial Services, Inc.*, 258 F.R.D. 514 (S.D.Fla. 2009) is misplaced. In *Mongolia*, not only was the issue exacerbated by the responding party failing to respond to the court's order compelling the production of documents, but the matter was being reviewed under the court's order to show cause, not a motion to compel. *Mongolia*, at 516. Further and unlike the voluminous amount of documents produced by Wynmoor, the responding party in *Mongolia* failed to produce any documents which may have provided the information sought. *Id.* at 516-17. Finally, the requested ESI in *Mongolia* was extremely pertinent to the allegations relevant to RICO violations, including the fraudulent inducement to issue financial instruments. *Id.* at 516. Presently, the condition of the Wynmoor properties has no substantial connection to its computer system or ESI and there is no claim in this case as to which ESI is likely to lead to relevant information. Defendant's motion seeks an unduly burdensome and intrusive discovery process; therefore, pursuant to the guidelines set forth in the Federal Rules, its motion should be denied.

1) The Requested ESI is Duplicative and Has Already Been Obtained through Wynmoor's Hard Copy Documents

Wynmoor has provided complete access to all the information that QBE seeks in its redundant request for ESI. Defendant argues that it is entitled to the discovery of documents on issues related to "prior maintenance and repair of the property, estimates related to damages, payments made on damages, previous damage, previous insurance claims, and the condition, maintenance, repair or replacement of any components of the buildings." (Defendant's Motion to Compel at pp. 2-3). Wynmoor already provided complete access to all of the hard copies of records that it maintains, these documents include: "records that would involve a history of the [association] building[s]" (Transcript of Deposition of John "Jack" Andrew Kubasek dated November 16, 2011 attached hereto as Exhibit "F" at p. 63); maintenance requests and work

orders (Ex. F at p. 63); certain utility records (Ex. F at p. 63); all documents related to repair or replacement of the property, including estimates, proposals, bids, invoices, contracts, many of which date well before 2005 (Ex. F at pp. 63-65); accounts receivable (Transcript of Depositions of William Keith Arnold, Jr. dated November 18, 2011 attached hereto as Exhibit "G" at p. 9); association minutes (Ex. G at pp. 9-10); bank statements (Ex. G at pp. 9-10); payroll records (Ex. G at p. 10); documents relative to the sale or lease of condo units (Ex. F at pp. 15-16); security incident reports (Ex. G at pp. 19-20); insurance policies, claim and related documents (Ex. G at p. 20); association declarations, management agreements and bylaws (Ex. G at p. 35); association financial statements (Ex. G at p. 42). Thus, it would be needlessly duplicative and burdensome on all the parties to require the production of ESI which may or may not contain any further information on the issues.

2) QBE has had Multiple Opportunities to Obtain all the Information It Seeks

QBE seeks information that has already been provided. Wynmoor provided requested claim documents to QBE during the claim investigation undertaken in 2005 through 2006. Additionally, in response to QBE's first and second requests for production, Wynmoor made all the documents in its possession available to QBE. Further, QBE has failed to articulate what information it believes to be contained specific to the ESI which is not also available from the responsive hard copy documents already in its possession.[1] And due to the ESI loss associated with Hurricane Wilma, the availability of any potentially unique and pertinent ESI is severely restricted. (Ex. E at ¶ 8). Moreover, deposition testimony already reveals that the documents which are responsive to condition of the Plaintiffs' property were generally maintained by Jack Kubasek in the Maintenance Department, and have been produced. (*See generally* Ex. F, at pp.

[1] Wynmoor does not maintain the e-mail correspondence of its employees on any of its servers. (Ex. E at ¶ 7).

62 - 64). Thus, QBE has already been provided access or already has in its possession all the information that it is currently seeking.

3) Cost and Burden of Producing ESI

The cost and burden of producing the requested ESI for Wynmoor greatly outweighs any speculative chance that potentially relevant and unique documents might be discovered. The present issues, as acknowledged by the Defendant, are all relative to the physical condition of the Plaintiffs' properties, and in no way relate to the operation of the Wynmoor computer system. Further, as testified by Jack Kubasek and Keith Arnold, the records which would reflect the maintenance, condition, and upkeep of the Plaintiffs' properties were maintained in hard copy. (Ex. F at pp. 62-64; Ex. G at pp. 10-13; *see also* Ex. E at ¶ 8). Despite the total absence of any connection between ESI in the Wynmoor computer system and the claims or affirmative defenses in the present case, QBE demands that the Court and parties expend judicial and other resources in overseeing an ambitious forensic examination of the Wynmoor system for potentially deleted files.

Further, Defendant suggests that the Court order a mirror image of the Wynmoor system be made, forcing the Plaintiff to comb through its databases with counsel for responsive documents, weeding out any privileged or confidential items. Any ESI production will necessarily involve the inspection and reproduction of the hard drives of all the Wynmoor employees, as their individual computers will have documents and drafts (of dubious relevance to the current issues) that are not necessarily located on the Wynmoor servers. (Ex. E at ¶ 5). As there are approximately 50 individual computers for the Wynmoor employees, the interruption in business to Wynmoor by the intrusion of Defendant's consultants in copying each of the hard drives would be substantial. (*See* Ex. E at ¶ 5). Further, counsel with the assistance of the

Wynmoor employees will be forced to comb through all the hard drives for potentially privileged, responsive and confidential information. The inherent costs associated with such a procedure are unwarranted given the mass of responsive documents already provided and lack of any predicate that production of ESI will advance any aspect of the litigation.

CONCLUSION

Defendant's motion would force Wynmoor, a non-profit corporation, to incur unnecessary and very substantial expenses to an electronic data storage system which has little to no bearing on the present litigation. QBE has been provided access to every record maintained by Wynmoor on more than one occasion, and all pertinent information to the claims and defenses of this litigation are represented in the documents provided. The production and inspection of the Wynmoor computer system through mirror imaging and forensic examination is unnecessary and its expenses and burden outweighs the potential benefits to QBE. Therefore, the Court should deny the Defendant's motion.

WHEREFORE, based on the above, Plaintiffs, Wynmoor Community Council, Inc., *et al.*, request that this Court deny Defendant, QBE Insurance Corporation, Motion to Compel Production and Forensic Examination; and grant all other and further relief which the Court finds reasonable and appropriate.

Dated: January 11, 2012.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on January 11, 2012, I electronically filed the foregoing document with the clerk of the Court using CM/ECF filing system. I also certify that the foregoing document is being served this date on all counsel of record or pro se parties on the attached Service List in the manner specified, either via transmission of Notices of Electronic Filing generated by the CM/ECF system or in some authorized manner for those counsel or parties who are authorized to receive electronically Notices of Electronic Filing.

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