

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION**

BRAY & GILLESPIE
MANAGEMENT, LLC, et al.,

CASE NO. 6:07-cv-222-Orl-35KRS

Plaintiffs,

vs.

LEXINGTON INSURANCE
COMPANY, et al.,

Defendants.

**PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO
DEFENDANT'S MOTION FOR RULE 37 DISCOVERY SANCTIONS
(TREASURE ISLAND ROOM FOLIOS)**

Plaintiffs, BRAY & GILLESPIE MANAGEMENT, LLC, BRAY & GILLESPIE, DELAWARE I, L.P., BRAY & GILLESPIE X, LLC, BRAY & GILLESPIE PLAZA, LLC, BRAY & GILLESPIE V, LLC, BRAY & GILLESPIE VIII, LLC, and BRAY & GILLESPIE LAPLAYA, LLC (collectively "B&G"), by and through their undersigned co-counsel, hereby oppose the Motion for Rule 37 Discovery Sanctions (Treasure Island Room Folios) (Doc. No. 526) (the "Motion") by Defendant, LEXINGTON INSURANCE COMPANY ("Lexington"):

I. INTRODUCTION

The following key facts give the background for Lexington's Motion, and they demonstrate that the requested sanctions are not only unwarranted but would also not serve the interests of justice:

1. Lexington asked B&G to produce room folios showing guest stays at the Treasure Island Resort ("Treasure Island"). Lexington believed that Treasure Island was not open to the general public before Hurricane Jeanne struck, and if that were true, Lexington argued, this fact

would undermine B&G's business interruption claim. B&G objected to Lexington's request, arguing (among other things) that the daily operating reports and financial records for Treasure Island would give a more accurate depiction of Treasure Island's business operations before and after each of the three hurricanes that impacted the area in August and September 2004.

2. Lexington persisted, and on January 9, 2009, B&G produced what it believed were all of the Treasure Island room folios that could be located.

3. On March 16, 2009, B&G's business interruption expert, Stan Johnson, tendered his expert report (Doc. No. 526-5). Mr. Johnson relied on a variety of B&G financial reports and records in determining that Treasure Island suffered more than \$4 million in business interruption losses due to Hurricane Jeanne. Mr. Johnson did not rely upon – or even review – any of the Treasure Island room folios in preparing his expert report.

4. On March 30, 2009, Lexington's business interruption expert, Peter Fogarty, tendered his expert report (Doc. No. 526-6). Mr. Fogarty observed that there was a large disparity between the number of rooms rented according to the room folios and the number of rooms rented according to B&G's financial records. Both Mr. Fogarty and Lexington knew that they were missing a large number of room folios but did not say anything about it until Mr. Fogarty's report. Based on the room folios that were produced, Mr. Fogarty found that only Florida Power & Light and Belfor workers stayed at Treasure Island after Hurricane Frances. Thus, according to Mr. Fogarty, the "fact" that "Treasure Island did not sell another room to transient guests (the public)" after Hurricane Frances "directly contradicts" the expert reports of Mr. Johnson and of CCA Consulting which stated that Treasure Island was shut down by Hurricane Jeanne. Doc. No. 526-6 (at Page 11 of 15).

5. Knowing that Treasure Island was in fact open to the general public before Jeanne, as evidenced by the voluminous other business records produced in this case and the consistent testimony of numerous witnesses, and realizing that its prior production of room folios must have been incomplete, B&G began to search for the missing room folios. The search initially turned up only some of the missing folios before Mr. Fogarty's deposition (taken on May 14, 2009). At the deposition, B&G's counsel informed Lexington that B&G had been able to locate some additional folios but that B&G's search was not finished. Mr. Camp asked B&G's counsel to produce the partial set of additional room folios as soon as possible, with the understanding that B&G would continue to search for other folios and produce the rest that could be found when the search was complete.

6. Pursuant to Mr. Camp's request, B&G produced the partial set of additional folios by FedEx on May 18, 2009. B&G subsequently completed its search and produced the remainder of the folios that could be found by FedEx on May 29, 2009. While B&G's search was not successful in locating all of the missing room folios, the total folios now come much closer to the number of occupied room nights at Treasure Island for September 2004 that are reflected in B&G's financial reports and records.

7. The additional room folios that B&G more recently located reveal dozens of transient guests who stayed at Treasure Island from September 8 through September 23, 2004, just before Hurricane Jeanne struck the area. Mr. Fogarty (and Lexington) can no longer maintain, consistent with the additional folios, that Treasure Island was closed before Jeanne.

8. Among other things, the instant Motion asks this Court to preclude B&G's use of the additional room folios "for any purpose." In this way, Lexington would be able to maintain to the jury that Treasure Island was not open to the public before Hurricane Jeanne, according to

the partial set of folios that was produced on January 9, 2009. In other words, Lexington asks this Court to enable it to tell the jury a “fact” that it now knows is an utter falsehood, based on a production that Lexington has known was incomplete since receiving it. Lexington’s Motion should be rejected, as no sanction should be allowed to distort the truth or prevent a fair trial.

II. ARGUMENT

A. Sanctions Are Not Warranted for B&G’s Productions of Treasure Island Room Folios

1. Lexington’s Reliance on the April 11, 2008 Order is Misleading.

Lexington’s Motion seeks sanctions for B&G’s alleged violation of a discovery order, namely an Order dated April 11, 2008, that granted a motion to compel by Lexington (the “April 11 Order”). However, the issue presented by the Motion is not whether B&G committed a discovery violation by producing Treasure Island room folios on January 9, 2009, a production whose timing was never contested or challenged by Lexington. Rather, the issue is whether B&G should be sanctioned for fulfilling a duty to supplement that production when it learned in April 2009 that it was incomplete, as required by Rule 26(e)(1), Fed.R.Civ.P.

Lexington’s Motion acknowledges that B&G’s production of the room folios in January 2009 was done by agreement of counsel and that Lexington did not contend at the time that B&G had violated the April 11 Order by not producing the folios earlier. Specifically, in an email that Lexington’s counsel, John Camp, sent B&G’s counsel on December 15, 2008, Mr. Camp wrote:

Additionally, we have not been able to find in either of the August 2008 productions by B&G the room folios for Treasure Island (and possibly other properties). Lexington specifically requested the production of these documents via its document request to B&G, but it appears that they have never been produced. We would like to confirm whether these documents exist and have been produced, and, alternatively, if they exist but have not been produced to date, when we can expect to receive them.

Exhibit “C” to Motion (Doc. No. 526-4).

As quoted above, Lexington's counsel made reference to its previous request for production of the Treasure Island room folios, and Mr. Camp did not invoke the April 11 Order to complain about the status of the production. Similarly, the April 11 Order was not mentioned by Lexington's counsel in any of the conferences that both sides' counsel engaged in throughout December 2008 and January 2009 regarding this and other pending discovery matters.

Likewise, the timing of B&G's production of the Treasure Island room folios was never raised or discussed at the Discovery Conferences held by the Court on December 30, 2008, and January 13, 2009. Many other disputed matters were addressed before and during those Discovery Conferences, but the Treasure Island room folios were never at issue. That is because B&G's counsel, upon receiving Lexington's request in December 2008, agreed to immediately search for and promptly produce any room folios for Treasure Island that could be located.

On January 9, 2009, B&G produced 1,463 pages of Treasure Island room folios, registration cards and cancellation records. In the cover letter that accompanied the production, B&G's counsel wrote that "[a]lthough we believe some of this material may already have been produced, we are producing these documents in an abundance of caution and in an effort to avoid continued discovery conflicts." See Exhibit "A" hereto. B&G's counsel also expressly reserved the right to "supplement this production if any other documents responsive to your request are located." Id. Lexington did not object to this production upon receiving it. Lexington never contended that this production was late or that it violated the April 11 Order. If Lexington believed that the January 9, 2009 production of room folios violated the April 11 Order and impaired Lexington's ability to conduct discovery or to prepare expert reports, it should have raised that issue no later than the Discovery Conference held on January 13, 2009, not over four (4) months later.

Lexington's Motion argues for the first time that B&G "failed" to produce room folios before January 2009. Motion at 3, 4. Even if that were true, Lexington certainly did not raise the April 11 Order or B&G's alleged lack of compliance with it when Lexington began looking for the room folios in mid-November 2008 among the documents that B&G had produced (according to Lexington's own Affidavit, Doc. No. 526-3).¹ In late 2008/early 2009, neither party acted with the understanding that the April 11 Order was applicable to the production of the room folios.

In short, Lexington's reliance on the April 11 Order in its Motion must be scrutinized in the proper context. Lexington has now invoked the April 11 Order only because B&G ultimately learned, in April 2009, that the January 9, 2009 production was incomplete and it proceeded to supplement its production in May 2009. The real issues, then, are why the January 2009 production was not complete and whether B&G should be sanctioned for fulfilling its duty to supplement in May 2009.

2. B&G Did Not Knowingly Withhold Any Room Folios From The January 9, 2009 Production.

As set forth in the attached Affidavit of Katherine Martin (Exhibit "B"), B&G produced what it believed constituted all of the Treasure Island room folios on January 9, 2009. Specifically, in order to locate and produce the room folios, Ms. Martin (in late December 2008) accessed "IQWare," the Property Management System that was used for Treasure Island.² Ms. Martin printed all of the room folios, registration cards and cancellation reports for Treasure

¹ Notably, Lexington's Affidavit states that it searched for the folios among the documents that B&G produced in August 2008, not in any of the documents produced pursuant to the April 11 Order. Doc. No. 526-3. See also Doc. No. 526-4 (Camp email dated December 15, 2008).

² IQWare is computer software utilized by various operating departments at the hotels, including the Front Desk, Sales, and Accounting. One function of IQWare is to create and maintain guest records. ¶ 4, Aff. (Exhibit "B").

Island that were stored in IQWare, and she turned them over to B&G's counsel for production.³
¶¶ 4-5, Aff. (Exhibit "B").

B&G had no reason to believe that its production of Treasure Island room folios on January 9, 2009, was incomplete. B&G reasonably believed that any available Treasure Island guest folio data would be stored in IQWare, because that was where all room folio data was created and stored in the regular course of B&G's business. ¶¶ 4-6, Aff. (Exhibit "B"). Even Lexington's Motion points to IQWare as the logical place to look for all the requested room folios. Motion at 8. B&G did not "withhold" any room folios, as Lexington repeatedly alleges in its Motion. Instead, B&G produced all of the room folios that it believed existed.

Significantly, B&G had no reason to produce only some of the folios. To the contrary, B&G had every incentive to be as comprehensive as possible in producing the room folios, in order to dispel the notion advanced by Lexington that Treasure Island was not renting rooms to transient guests after Hurricane Frances and before Hurricane Jeanne. As it turns out, moreover, the partial production of folios arguably supported Lexington's theory because the limited number of folios showed that only emergency workers stayed at Treasure Island after Hurricane Frances. Doc. No. 526-6 (at Page 11 of 15). Lexington is complaining now only because the additional room folios produced last month – the same folios that B&G allegedly "withheld" from Lexington – undercut the theory that Treasure Island was closed to the public before Hurricane Jeanne, a notion that was given life only from the incomplete production of folios. Lexington's contention that B&G willfully withheld documents that could only favor B&G's position is simply illogical.

³ These documents had to be printed for production because IQWare's proprietary software does not permit downloading or exporting data. ¶ 5, Aff. (Exhibit "B").

3. B&G Fulfilled Its Duty To Supplement Upon Locating Additional Room Folios In May 2009.

Rule 26(e)(1), Fed.R.Civ.P., creates an affirmative duty to supplement incomplete discovery responses: A party who has responded to a request for production must supplement its response “in a timely manner if the party learns that in some material respect the disclosure or response is incomplete or incorrect.” In this case, B&G did not know that its January 9 production of room folios was incomplete. B&G’s business interruption expert, Stan Johnson, did not review or reply upon any of the room folios in preparing his expert report. See Deposition of Stanley D. Johnson, CPA (April 29, 2009) at 136, 230-31 (Exhibit “C” hereto). Mr. Johnson instead relied on various B&G financial reports and records in determining that Treasure Island suffered more than \$4 million in business interruption losses due to Hurricane Jeanne. Doc. No. 526-5 (at Pages 3 and 11 of 11).

On the other hand, Lexington’s business interruption expert, Peter Fogarty, analyzed the Treasure Island room folios that were produced, and he summarized his analysis in Exhibit K to his expert report dated March 30, 2009. See Exhibit “D” hereto; Doc. 526-6 (at Page 11 of 15). Mr. Fogarty also analyzed B&G’s “Early Bird Reports,” which reflected the number of rooms sold on a daily basis at Treasure Island from August through October 2004, and he summarized his analysis of those statistics in Exhibit J to his expert report. See Exhibit “E” hereto.⁴

Mr. Fogarty’s comparison of the room folios to the Early Bird Reports revealed a large disparity in the number of occupied room nights set forth in the two sets of documents. In the month of September 2004, the room folios analyzed by Mr. Fogarty showed a total of 316 occupied room nights, whereas the Early Bird Reports (and B&G’s Daily Operating Reports)

⁴ Mr. Fogarty admitted during his deposition that the room statistics in the Early Bird Reports matched those contained in separate “Daily Operating Reports” maintained by B&G. Doc. No. 526-7 (Fogarty Dep.) at 107-113.

showed a total of 871 occupied room nights. The greatest difference occurred during the nine-day period from September 15 through September 23, 2004: The room folios showed only 13 occupied room nights, whereas the Early Bird Reports and Daily Operating Reports showed a total of 412 occupied room nights. A spreadsheet reflecting these numbers on a daily basis in September 2004 is attached hereto as Exhibit "F".

Based on his analysis of the room folios and the Early Bird Reports, Mr. Fogarty readily testified in his deposition that a complete set of room folios had "never been supplied to us"; "We're missing folios. No question about it." Doc. No. 526-7 at 117. Although Lexington claims that the room folios were "critical" to its defense (Motion at 2, 7), Lexington never alerted B&G about the missing room folios after the January 9, 2009 production. Rather, in his expert report dated March 30, 2009, Mr. Fogarty "suggested" for the first time that B&G may not have produced all of the room folios.⁵

Based on the incomplete set of folios that he analyzed, moreover, Mr. Fogarty found that only Florida Power & Light ("FPL") and Belfor workers stayed at Treasure Island after Hurricane Frances. Doc. No. 526-6 (at Page 11 of 15); see also Exhibit "D" hereto. Thus, Mr. Fogarty opined as "fact" that "Treasure Island did not sell another room to transient guests (the public)" after Hurricane Frances. Doc. No. 526-6 (at Page 11 of 15).⁶ Mr. Fogarty concluded

⁵ Specifically, Mr. Fogarty wrote: "The total number of rooms sold according to the room folios provided does not equal the number of rooms sold on the Treasure Island internal early bird report for the same time period suggesting that either we were not provided with all of the room folios or that the Treasure Island rooms sold statistics were over stated." Doc. No. 526-6 (at Page 11 of 15). With respect to the latter possibility, Mr. Fogarty admitted in his deposition that he had no reason to believe that the Early Bird Reports did not accurately reflect the results of operations at Treasure Island in September 2004. Doc. No. 526-7 at 115-16.

⁶ Mr. Fogarty takes the odd position that the FPL and Belfor workers who stayed at Treasure Island are somehow distinguishable from the "general public." To the contrary, these persons were, like other guests, paying customers who chose to stay at Treasure Island and who

that this so-called “fact” “directly contradicts” the expert reports of Mr. Johnson and of CCA Consulting which stated that Treasure Island was shut down by Hurricane Jeanne. Id.

B&G had no reason to believe, through March 2009, that its January 9 production of room folios was not complete. By contrast, both Lexington and Mr. Fogarty apparently knew for some time that the production of folios was incomplete but said nothing, allowing Mr. Fogarty to reach favorable conclusions for Lexington that were made possible by the incomplete folios. In preparing for the depositions of Stan Johnson (scheduled for April 29, 2009) and Peter Fogarty (scheduled for May 14, 2009), counsel for B&G focused on, among other things, Mr. Fogarty’s room folio analysis. At counsel’s direction, B&G began searching at the end of April for any missing room folios that could be located. Ms. Martin of B&G conducted an extensive search through the archive section of IQWare but found no additional room folios for Treasure Island stored there. The only Treasure Island room folios in IQWare were those that Ms. Martin accessed and printed in late December 2008. ¶ 7, Aff. (Exhibit “B” hereto).

Ms. Martin then learned the probable reason why IQWare did not contain all of the Treasure Island room folios: When IQWare was installed at Treasure Island in February 2004, certain General Parameters were set whereby guest folios were to be automatically archived 160 days after a guest’s departure date and the archived information was set to be purged 24 months after the folio was archived. Id. Therefore, in theory, none of the Treasure Island room folios

generated revenue for the hotel. Mr. Fogarty’s attempt to distinguish between “public” and “nonpublic” guests is misplaced and is irrelevant for purposes of analyzing B&G’s business interruption losses. See Exhibit “C” (Johnson Dep.) at 231-32.

should have been available in IQWare when B&G searched for them in December 2008, as they would have been purged (according to the General Parameters) approximately two years earlier.⁷

B&G then looked for the missing room folios in boxes stored in an off-site storage facility. After analyzing an index of boxes maintained in off-site storage, Ms. Martin retrieved two boxes containing Treasure Island daily “audit packs” for August and September 2004. The audit packs document the general operations of the hotel on a daily basis and typically contain posting journal reports, credit card reconciliations and cash drop information. ¶ 8, Aff. (Exhibit “B”). On occasion, some guest folios are also printed and included in the audit packs. After searching through the boxes, Ms. Martin found that some of the daily audit packs contained up to ten folios each while other audit packs did not contain any folios. Id. Without determining whether any of the folios were duplicates of what had been previously located in IQWare, Ms. Martin supplied copies of what she could find to B&G’s counsel on May 4, 2009. Id. These were in turn given by B&G’s counsel to a paralegal in order to review and identify any folios that were missing from the January 9, 2009 production. That analysis, completed on May 8, 2009, identified 138 pages of missing room folios. From a further analysis of those room folios, B&G’s counsel realized on May 11, 2009, that a large number of room folios were still missing.

B&G took Mr. Fogarty’s deposition on May 14, 2009. After Mr. Fogarty testified about the missing folios, Lexington’s counsel, Mr. Camp, interjected by stating that if B&G has “additional room folios that reflect guests staying at Treasure Island at any time between Hurricane Charley through Hurricane Jeanne, we’d like to have them.” Doc. No. 526-7 at 118-19. During the ensuing exchange between counsel, B&G’s counsel informed Lexington’s counsel that B&G had found additional room folios and would produce them to Lexington. Id. at

⁷ However, the room folios that remained in IQWare apparently did not react to the General Parameters and were never archived or purged. ¶ 7, Aff. (Exhibit “B”).

119-21. B&G did not, as Lexington argues in its Motion, “ambush” Mr. Fogarty with any of the newly found room folios. In fact, B&G’s counsel did not ask Mr. Fogarty any questions about any of the missing folios that had been found. B&G’s counsel did not mark any of the new folios as exhibits. B&G’s counsel never intended to question Mr. Fogarty about documents that had not yet been produced. The deposition transcript reveals absolutely no effort by B&G’s counsel to “cross-examine” Mr. Fogarty with the additional folios, as repeatedly alleged by Lexington. Motion at 2, 9. This false accusation is personally insulting and offensive.

The deposition transcript also refutes Lexington’s allegation that B&G’s counsel “refused to produce the documents” when Lexington’s counsel “immediately requested copies of all withheld TI Room Folios.” Motion at 5. In reality, at the end of Mr. Fogarty’s deposition, Mr. Camp expressly acknowledged that B&G’s counsel had “assured” him that B&G would produce the newly found room folios. Doc. No. 526-7 at 232. Counsel concluded their discussion with the following exchange:

MR. CAMP: What I’d like to propose is that you produce what you have to us as soon as possible with the understanding that you’re going to continue to look and will get us whatever you have, but I don’t want to wait. You know, I don’t want to go out a week or two or three. I’d like to get those as soon as possible. If you could use every effort to bring this particular issue to a close, I’d appreciate it.

MR. BEAUDINE: That’s fine. And we will try to bring it to a close as soon as possible.

Doc. No. 526-7 at 232-33.⁸

⁸ B&G’s counsel had always intended to produce any and all additional room folios that could be located. It was clear by the time of Mr. Fogarty’s deposition that B&G had not located all the missing folios and that further searching was necessary. B&G’s counsel informed Lexington’s counsel that he had planned to produce all of the additional room folios that could be found in one supplemental production, but agreed to produce the first group of additional folios while B&G continued to search for more.

Consistent with counsel's discussion at the end of Mr. Fogarty's deposition, B&G produced the 138 pages of additional room folios by Federal Express on May 18, 2009. See cover letter dated May 18, 2009 (Exhibit "G" hereto). In the meantime, B&G continued to search for any additional room folios. Ms. Martin returned to off-site storage and pulled the last two Treasure Island boxes that could possibly contain any room folios, both labeled "Miscellaneous" and "Credit Cards" for the month of September 2004. ¶ 9, Aff. (Exhibit "B"). After an extensive search through hundreds of moldy credit card receipts and other documents, Ms. Martin located approximately 50 pages of room folios, which she supplied to B&G's counsel on May 26, 2009. Id. After those documents were reviewed and collated, B&G produced these additional room folios by Federal Express on May 29, 2009. See cover letter dated May 29, 2009 (Exhibit "H" hereto).

B&G has exhausted its search for the missing room folios. B&G fulfilled its obligation under Rule 26(e)(1), Fed.R.Civ.P., to supplement its January 9, 2009 production with the additional folios that were supplied on May 18 and May 29, 2009. Its supplemental production has provided most, but not all, of the missing folios. The spreadsheet attached hereto as Exhibit "I" reflects that the gap has been closed from 316 out of 871 occupied room nights (Exhibit "F") to 713 out of 871 occupied room nights documented by the room folios.

Lexington's Motion creates a paradox because it seeks to sanction B&G for fulfilling its duty to supplement under Rule 26(e)(1). Rule 37(c)(1), Fed.R.Civ.P., provides that a party's failure to supplement as required by Rule 26(e) may result in its inability to use the supplemental information at trial. In this case, B&G supplemented under Rule 26(e) but Lexington nonetheless seeks to exclude the supplemental information based on the very fact that B&G supplemented. Lexington's Motion turns Rule 37 on its head. See Marianjoy Rehabilitation

Hosp. v. Williams Electronics Games, Inc., 1996 WL 411395 at *3 (N.D. Ill. July 19, 1996) (“Defendant thus finds itself in the curious position of requesting the imposition of sanctions for behavior that not only is not prohibited by the Federal Rules of Civil Procedure, but is required by them”).

The absurdity of Lexington’s position is further highlighted by the unauthorized “Supplement” to its Motion that Lexington filed on June 2, 2009, following B&G’s May 29, 2009 supplemental production. Doc. No. 529. In referring to the May 29 production, Lexington contends: “Apparently, Plaintiffs need to be confronted by the possibility of sanctions in order to take their discovery obligations seriously.” Id. at 2. But Lexington then quickly uses the same May 29 production as “additional evidence” of conduct that should be “severely” sanctioned. Id. The discovery rules are not intended to promote such gamesmanship.

4. Lexington Has Not Shown Any Actual Prejudice Caused By The Incomplete Production Of Room Folios.

Lexington has failed to demonstrate any actual prejudice caused by the incomplete production of Treasure Island room folios on January 9, 2009. Swofford v. Eslinger, 2009 WL 1025223 at *3 (M.D. Fla. April 14, 2009) (“[T]he Court might be inclined to fashion an appropriate sanction *if it found that the production was inappropriately delayed and that prejudice resulted*”) (emphasis in original). Some perspective is needed here. B&G has always maintained that Treasure Island was open, renting rooms, and earning revenue before Hurricane Jeanne, and that Hurricane Jeanne forced Treasure Island to close. B&G supplied voluminous documentation and extensive testimony during the course of discovery to substantiate its position. In so doing, B&G did not rely upon any Treasure Island room folios.

In order to probe B&G’s position, Lexington asked for room folios to see who was staying at Treasure Island. The partial set of room folios that B&G produced on January 9, 2009,

led Lexington's expert (Mr. Fogarty) to conclude that Treasure Island was not renting any rooms to the transient public after Hurricane Frances and before Hurricane Jeanne. Lexington—but not B&G—knew that the production of room folios was grossly incomplete, but it remained silent. This was apparently a strategic and conscious decision on its part.⁹ Now that the additional room folios have been discovered, Lexington knows that it can no longer maintain that Treasure Island was closed to the general public before Jeanne, unless those additional room folios are suppressed. Thus, Lexington's "prejudice," if any, is its inability to maintain a false argument in light of the additional room folios. It is inconvenienced by the truth. A theory that was enabled by an incomplete production is now made unsupportable by a fuller picture.

The illusory nature of Lexington's alleged prejudice is evidenced by the absence of any specifics in its Motion. Lexington has failed to explain how any of its fact or expert discovery would have been handled differently if it had received a more complete production of Treasure Island room folios on January 9, 2009. Lexington complains that the room folios contain information that was "necessary to rebut" B&G's business interruption and property damage claims (Motion at 7), but Lexington knows that the opposite is true: The room folios, if anything, bolster B&G's business interruption claim because they rebut a defense theory raised by Lexington. Lexington further complains about the impact of the additional folios on Mr. Fogarty's report, which was based on admittedly "incomplete information" and may need revising. Motion at 7, 11. However, B&G is not asking Mr. Fogarty to revise or supplement his

⁹ Contrary to Lexington's suggestion, B&G is not arguing that Lexington is to "blame" because it should have informed B&G that the production was missing a lot of folios. Motion at 6. B&G is simply pointing out that if a party is going to claim severe prejudice from a production that it knew was incomplete, it should take reasonable steps to avoid or mitigate its alleged prejudice. In this instance, had Lexington promptly notified B&G of the deficient production, B&G could have launched a search for the missing folios in January or February, which would have enabled B&G to supplement much sooner.

expert report, understanding that an erroneous conclusion therein was promoted by incomplete records and can no longer be maintained (honestly) in light of all the available facts.

B. Awarding The Requested Sanctions Would Be Unjust and Excessive

Lexington's Motion seeks dismissal of the case, or at a minimum, striking B&G's business interruption claim and precluding B&G's use of the additional Treasure Island room folios "for any purpose" in this case. Motion at 10, 11. Lexington contends that the so-called "minimum" requested sanctions are "measured and proportionate." Motion at 10. The opposite is in fact true; the requested sanctions are grossly disproportionate and would not redress the alleged discovery violations.

First, sanctions are inappropriate because B&G's incomplete production of room folios on January 9, 2009, was inadvertent and unintentional. The Eleventh Circuit has repeatedly cautioned that dismissal of an action under Rule 37(b)(2)(A)(v), Fed.R.Civ.P., "ought to be a last resort – ordered only if noncompliance with discovery orders is due to willful or bad faith disregard for those orders." U.S. v. Certain Real Property Located at Route 1, Bryant, Ala., 126 F.3d 1314, 1317-18 (11th Cir. 1997) (citation omitted). Violation of a discovery order caused by "simple negligence, misunderstanding, or inability to comply will not justify a Rule 37" dismissal. Malautea v. Suzuki Motor Co., Ltd., 987 F.2d 1536, 1542 (11th Cir. 1993). As demonstrated above, B&G did not knowingly disobey the April 11 Order, which was not even understood by either side as the basis of the January 9 production of room folios. When B&G produced the Treasure Island folios, moreover, it believed that the production was complete and

it had no reason to believe otherwise. ¶¶ 4-6, 10, Aff. (Exhibit “B”). For a period of several months after the January 9 production, only Lexington knew otherwise.¹⁰

Next, dismissal of even part of this action under Rule 37(b)(2)(A)(v), namely B&G’s claim for more than \$4 million of business interruption losses, would not be a “just” sanction but would rather result in a windfall for Lexington. As previously noted, B&G’s business interruption claim does not rely or depend upon any Treasure Island room folios. Lexington seized upon the incomplete room folios to argue that B&G’s business interruption claim falsely assumed that Treasure Island was still open to the general public before Hurricane Jeanne. Had all of the available room folios been produced on January 9, 2009, Lexington would not have been able to use the folios to support that argument, because the additional folios confirm that Treasure Island was in fact open before Jeanne. What Lexington is really complaining about is the removal of a factually flawed ground for attacking B&G’s business interruption claim. Therefore, because Lexington cannot use a false argument to defend the business interruption claim on its merits, Lexington contends that the claim should be stricken. Such a counterintuitive result is offensive to fundamental fairness and it must be rejected.

Sanctions are appropriate only “to remedy any prejudice shown to result from unjustified non-compliance with discovery obligations.” Swofford v. Eslinger, 2009 WL 1025223 at *3 (M.D. Fla. April 14, 2009). As shown above, Lexington suffered no actual prejudice from the incomplete production of room folios, and any alleged prejudice could have been avoided had

¹⁰ Further, as also explained above, B&G had no reason to withhold any of the folios that were missing from the January 9 production. This lack of motive substantiates the fact that the incomplete production was unintentional. See Blackledge v. Alabama Dept. of Mental Health & Mental Retardation, 2007 WL 3124452 at *14 (M.D. Ala. Oct. 25, 2007) (“The court also cannot think of any reason, and none has been offered by Defendants, why it would be advantageous to Blackledge to conceal this letter from Defendants. The absence of any self-serving or sinister motive to conceal also supports a finding that Blackledge’s failure to disclose was not intentional”).

Lexington promptly brought to B&G's attention the knowledge that only Lexington possessed, namely that many folios were missing from the January 9 production. However, Lexington made the strategic decision to remain silent, apparently hoping to capitalize upon the incomplete production. Lexington should not be able to misuse the discovery rules to reap a windfall:

The purpose of the discovery rules is to facilitate resolution of cases on their merits with what is supposed to be an efficient self-executing or self-policed exchange of relevant information. Creation of satellite litigations or opportunities for seeking sanctions is not a goal of the process. Id. at *1.

For the same reasons, the Court should reject Lexington's request that the additional room folios be excluded from jury consideration. Lexington wants to be able to tell the jury only part of the story, namely that only FPL and Belfor workers stayed at Treasure Island after Hurricane Frances. Lexington asks this Court to assist it in preventing B&G from telling the jury the rest of the story, regarding the other guests who stayed at Treasure Island between the last two hurricanes. The Court should not impose any sanctions that would clear the way for Lexington to knowingly mislead the jury.

The Supreme Court has observed that "[t]here is no gainsaying that arriving at the truth is a fundamental goal of our legal system." James v. Illinois, 493 U.S. 307, 311 (1990) (citation omitted). Similarly, the former Fifth Circuit once said:

The common goals of all trials, civil and criminal, of issues of fact is to arrive at the truth, and it would seem that inconsistent positions should be permitted or not permitted according to whether they might help or hinder a search for the truth.

Henderson v. U.S., 237 F.2d 169, 172 (5th Cir. 1956).

Moreover, the Rules of Evidence are intended to promote a noble goal -- that "the truth may be ascertained and proceedings justly determined." Rule 102, Fed. R. Evid. Lexington, however, wants to exclude evidence from jury consideration so that it can advance a known falsehood regarding Treasure Island's operations before Hurricane Jeanne. Because the relief

sought by Lexington offends the truth-seeking function of our judicial system, it should not be countenanced. Rather, if the Court were inclined to take some action in this matter, it should exclude all of the Treasure Island room folios, not just those that tell a part of the story that favors Lexington or the rest of the story that favors B&G.

III. CONCLUSION

Lexington has shown its true colors by filing the Motion. In a desperate effort to avoid a trial on the merits, Lexington seeks extreme sanctions due to B&G's inadvertent failure to produce documents that, if anything, would help B&G and hurt Lexington. In doing so, moreover, Lexington curiously implies that it may have more favorably addressed B&G's claim for losses had it timely received the Treasure Island room folios. Motion at 7. However, the reality—as shown by the Motion—is that Lexington will resort to any tactic to avoid an adjudication on the merits. It is now clear (if it wasn't before) that Lexington never intended to pay B&G for any of its losses caused by Hurricane Jeanne, even after receiving ample proof of same. Lexington has steadfastly refused to adjust B&G's claim for Hurricane Jeanne losses, and it has chosen to close its eyes to the overwhelming evidence supporting that claim. Lexington's Motion must be denied.

DATED this 5th day of June, 2009.

s/ Michael J. Beaudine
Michael J. Beaudine, Esq.
beaudine@lseblaw.com
Florida Bar No. 772763
Daniel H. Coultoff, Esq.
coultoff@lseblaw.com
Florida Bar No. 994480
**LATHAM, SHUKER,
EDEN & BEAUDINE, LLP**
390 N. Orange Avenue, Suite 600
Orlando, Florida 32801

Telephone: (407) 481-5800
Facsimile: (407) 481-5801

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on June 5, 2009, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system, which will send a notice of electronic filing to all counsel of record.

s/ Michael J. Beaudine
Michael J. Beaudine, Esq.