

**IN THE UNITED STATES DISTRICT COURT  
THE NORTHERN DISTRICT OF FLORIDA  
PENSACOLA DIVISION**

<b>BAILEY INDUSTRIES, INC.,</b>	)	
	)	
<b>Plaintiff,</b>	)	
	)	
<b>v.</b>	)	<b>CIVIL ACTION NO. 3:10-mc-0064</b>
	)	
<b>CLJP, INC.,</b>	)	
	)	
<b>Defendant.</b>	)	

**BAILEY INDUSTRIES, INC.'S REPLY BRIEF TO CLJP, INC.'S RESPONSE TO  
MOTION TO COMPEL AND MOTION TO REQUIRE PAYMENT OF COPY COSTS**

Bailey Industries, Inc. ("Bailey"), by and through its undersigned counsel, hereby submits its Reply Brief to CLJP, Inc.'s ("CLJP") Response to Motion to Compel and Motion to Require Payment of Copy Costs ("Opposition Brief"), and requests that this Court deny CLJP's motion and enter an order compelling CLJP to immediately comply with this Court's subpoena.

**INTRODUCTION**

As should be transparent, Bailey believes that communications attached to its Motion To Compel, as well as the communications that occurred after this Court entered its August 23, 2010 Order, demonstrate CLJP'S history of obstructive and non-responsive manner following service of this Court's June 24, 2010 subpoena (the "Subpoena") and Bailey's attempts to reach a resolution without this Court's intervention. While not attaching as exhibits each exchange between counsel, several are necessary to show further support of this Motion to Compel, so Bailey incorporates its explanation of recent events from its motion seeking leave to file this Reply, as if fully re-stated here. The events of the last week may be fairly described as a microcosm of the last few months. From the very onset of the subpoena process, Bailey has bent over backwards to work with CLJP to allow CLJP to produce the responsive documents without

disclosing its confidential/proprietary information. To alleviate CLJP's concerns, Bailey drastically limited the scope of the Subpoena, allowed CLJP to redact its customer information, and agreed that CLJP could be made a party to Bailey and Legacy Cabinets, Inc. ("Legacy")'s claw back/confidentiality agreement and protective order in the underlying, pending litigation in the United States District Court for the Northern District of Alabama, 2:09-cv-1574-VEH (the "Alabama litigation").

In spite of these concessions, and Bailey's continuous efforts to contact CLJP to resolve any issues to date, CLJP still refuses to: (1) produce any invoice documentation with the actual invoice monetary total and the city of the sale; and (2) provide confirmation that CLJP searched its servers, laptops, hard drives, etc. for responsive communications given that Legacy produced several CLJP emails that were not produced by CLJP. CLJP's production of these two items would lead to resolving all disputes raised by this Motion.

CLJP would not even confer to explain how a modified production could lead to the discovery of CLJP's pricing structure. CLJP would not even share through counsel what searches had been conducted so that Bailey could evaluate the sufficiency of the searches, propose ideas, or evaluate whether it would be willing to incur the costs it may deem necessary to conduct further searches and discuss using a third-party vendor for the searches. Instead, CLJP is essentially telling Bailey and this Court that it has done everything it wants to do, now get lost. Accordingly, Bailey requests that this Court deny all requests for relief proffered in CLJP's opposition brief, and instead grant Bailey's Motion to Compel, specifically at the least ordering CLJP to produce or provide the two items described above.

**ARGUMENT**

1. CLJP's production of invoices and spreadsheets with modified redactions will satisfy Bailey's discovery request without risking disclosure of CLJP's alleged sensitive pricing structure. CLJP's providing Bailey a detailed explanation of what searches it conducted towards producing responsive correspondence, including emails, would lead to compliance with that portion of the Subpoena. CLJP refuses to produce or provide either of these two things, and refuses to sufficiently explain why.

2. Since shortly after CLJP's first response to the Subpoena July 26, 2010, Bailey has allowed CLJP's production to be made subject to and a part of Bailey/Legacy confidentiality/claw back agreement and protective order entered in the Alabama litigation. This agreement and order also calls for production to be marked as "attorney's eyes only."<sup>1</sup> Although CLJP's actual production is not before the Court based upon the parties' agreements, CLJP's production consisted of CLJP's eleven (11) page agreement with Legacy, two (2) emails, a four (4) page spreadsheet with all of the information redacted but for the invoice number, invoice date, and city/state of the sale, and 112 pages of invoices with redaction of the total sales price and city of the sale (the only two items Bailey now actually requests) from each invoice.

3. To date from CLJP's redacted production, Bailey is unable to show the value of CLJP's sales of Legacy's many different products to destinations within the New Orleans, Louisiana area, between March 1, 2008, and August 13, 2009, which is the agreed narrower scope Bailey has sought for months. (See Doc. 1-1 at 3). This information is relevant to the Alabama litigation because it support's Bailey's claim against Legacy that Bailey's competitors

---

<sup>1</sup> To be clear, Bailey does seek this discovery with the intent of introducing the documents produced as evidence in the Alabama litigation. CLJP has not, however, made any request for a hearing on that issue, has not filed any motion to quash this subpoena, and has never requested or filed a motion for any different protective order.

were making sales within Bailey's protected market. Lumping all other Louisiana sales into the spreadsheet renders the produced but redacted document useless to Bailey because as evidence in the Alabama litigation it would overstate CLJP's sales and, therefore, Bailey's damages, and with the redactions there is no way to make the document useful as currently redacted. Any arguments of relevance based perhaps on Legacy's unfounded and unsupported interjection of a "grandfather provision," would be most appropriate for the Northern District of Alabama at trial with Legacy when all discovery is completed. *See* Fed. R. Civ. P. 26 (scope of discovery). Finally, Bailey's expert witness is unable to complete her expert report on damages without CLJP's invoice total per city.

4. In the last conference between Mr. Long for Bailey and Mr. Cozart for CLJP on August 26, Bailey offered to accept the spreadsheet, and waive its request for the invoices, if CLJP would amend its redactions to show only sales in New Orleans, Louisiana, by CLJP's simply omitting the sales to customers in other cities, and producing a document that can be offered as evidence of total sales by CLJP of Legacy products to New Orleans customers, which is what CLJP has known Bailey seeks from the very beginning of this long process toward compliance with the Subpoena. If unredacted, to be sure, this spreadsheet is exactly what the Subpoena and this Motion seeks, in relevant part.

5. For months, Bailey has repeated that revealing CLJP's customer name is not requested. Bailey does not seek to discover sensitive customer lists. So this Motion has nothing to do with CLJP's redaction of its customers' names. The rest of CLJP's self-serving and argumentative conclusions are based on the convenient false premise that Bailey seeks to discover CLJP's pricing structure.

6. To date from CLJP's responsive correspondence and filings, Bailey is unable to understand and obtain concrete confirmation what searches were conducted so that Bailey will know that CLJP's explanation that it apparently deleted at least those documents that Bailey has shown once existed, and determine and discuss with CLJP what further searches may be appropriate or requested at even perhaps Bailey's expense. Instead, all CLJP now says is that they did a thorough search and refuses to search any more. If a court would be satisfied with that kind of response, it begs the question of whether any conference of counsel would ever be helpful towards resolving discovery disputes in the first place.

7. CLJP has yet to provide any rationale or explanation as to how Bailey or anyone can decipher any confidential customer and/or pricing information by CLJP producing invoices limited to the total value of a sale and the city in which that sale occurred.

8. Accordingly, instead of working with Bailey to resolve its discovery dispute, both before and after this Motion to Compel was filed, CLJP has now filed an Opposition Brief asserting two main arguments: (1) Bailey is a competitor of CLJP, and thus CLJP redacted and should not be compelled to produce "information that would identify the name of the customer and information that would identify CLJP's pricing structure"; and (2) CLJP "has made a thorough search of its e-mail system and produced all the emails that it has been able to locate", and that CLJP "should not be required to expend these significant amount of resources for something that could likely be fruitless exercise." (CLJP's Opposition Brief, p. 3 & 6-7). CLJP further asks this Court to deny Bailey's Motion to Compel, require Bailey to pay its subpoena invoice, and enter an Order "requiring Bailey ... to reimburse CLJP for the lost productivity and fees incurred in responding to the Subpoena" and to "CLJP's attorney fees and costs for the response to Bailey's motion." *Id.* at 7.

9. In terms of CLJP's sales invoices, and as previously mentioned, CLJP has yet to explain to Bailey or this Court how the production of any invoice with only the invoice total and city of the sale (no other address information) could in any way allow Bailey's attorney's (as the documents were produced attorney's eyes only) to "identify the name of the customer" or "CLJP's pricing structure". Bailey does not seek, nor has it ever sought, CLJP's pricing structure, and CLJP is perfectly capable of responding fully with redacted documents that will not allow discovery of such pricing structure.

10. Bailey is not challenging whether CLJP can claim its customer and pricing information as confidential/proprietary. CLJP is not releasing any confidential/proprietary information by only providing to Bailey the invoice total and city location of the sale. Moreover, from the very beginning of the CLJP subpoena process, Bailey has explained to counsel multiple times that while Bailey would work with CLJP to protect its customer information and pricing structure, and that Bailey only requests the invoice amount (without the individual invoices' detailed purchase information - model(s), itemized prices, quantity, etc.) and location of the sale (just the city) to establish part of its damages against Legacy for Legacy's breach of contract (i.e., improperly allowing other Legacy sales in Bailey's protected areas). In fact, counsel for CLJP has consulted with counsel for Legacy about Legacy's litigation with Bailey on at least one occasion, and thus for CLJP to represent to this Court that Bailey has failed to "provide any rational argument for why the [redacted] information should be produced" is clearly disingenuous. *Id.* at 5.

11. Moreover, Bailey sent CLJP multiple emails and left several messages for CLJP's counsel during its attempts to resolve the dispute by asking CLJP to explain its rationale, but CLJP never gave Bailey any explanation or rationale. Bailey even offered to allow CLJP to

simply reproduce the summary spreadsheet (CLJP0014-0017) if it showed the invoice totals along with the city of each respective sale, even if the scope was narrowed to simply New Orleans, Louisiana. Recognizing that CLJP has not, and cannot, provide any justification for redacting the invoice totals, CLJP offers in footnote 1 to provide "information to the Court for an in camera review if the Court believes that would be helpful." CLJP's offer, however, still follows its practice of not responding to the actual issue of how providing Bailey or Bailey's attorney with only the invoice totals, without the product(s) or model(s) or quantity, in any way divulges any secret pricing structure. But CLJP rejected this proposal,<sup>2</sup> refusing to explain how such modified but still redacted or agreed limited production would lead to discovery of any sensitive pricing structure.

12. CLJP cannot provide any justification for its choice of redactions and refusal to discuss details of its "thorough" searches, and Bailey's motion to compel should be granted.

13. This Motion demonstrates, in terms of CLJP's production, that CLJP's objections concerning the production of emails was that it had produced the results of its initial search, and that it would not conduct any further search and/or provide details of said search until: (1) the confidentiality agreement and protective orders were executed, (2) Bailey produced all CLJP emails (so that CLJP could "perform an accurate review of the system"), and (3) Bailey paid CLJP's subpoena invoice. Continuing its obstructionist manner, CLJP maintained its position in spite of the fact that counsel for Bailey had agreed to withhold access to all CLJP documents by Bailey until the protective documents were executed, that CLJP's position on the Legacy

---

<sup>2</sup> In fact, Bailey was under the impression that CLJP had agreed to this proposal until it reproduced the spreadsheet on August 25th with the "Inv Total" column redacted but for the inventory total. Bailey attempted to explain that this production did not solve anything because Legacy has and would be challenging the geographical limits of Bailey's protected areas, and thus Bailey needed to have the ability to identify the invoice total with the actual city of the sale.

production of CLJP emails was completely inconsistent with the *Federal Rules of Civil Procedure*, and that Bailey had represented, from the very beginning of CLJP's production, that it would pay a reasonable fee once CLJP actually produced documents without the improper and unsubstantiated redactions.

14. It was not until this Court's August 23, 2010 Order that CLJP offered to produce an affidavit as to how its servers were operated, and how deleted emails were archived. On August 24, 2010, CLJP offered a draft of the affidavit of Keith Brian Schultz in a potential solution to resolving the email issue. In discussing Mr. Schultz's affidavit, Bailey reiterated its initial concerns about CLJP's email production arising from the fact that the only two emails produced by CLJP were from January/July of 2008, but Bailey had received several emails from Legacy Cabinets in which CLJP had notified Legacy Cabinets in December 2008 of Bailey's sales activities potentially violating CLJP's agreement with Legacy, and CLJP's communications with Legacy Cabinets in the summer of 2009 concerning Bailey's business activities and customers. Bailey reiterated that it needed any responsive CLJP emails to establish: (1) Legacy's procedures for potential violations of a distributor's protected territory (as opposed to the lack of action from Legacy when Bailey complained of similar violations); and (2) Legacy's interference with Bailey's contractual/customer relationships.<sup>3</sup> Accordingly, as a potential resolution, Bailey requested that Mr. Shultz's affidavit be amended to address not only the deleted files procedures for CLJP, but also the manner of CLJP's "thorough" search of CLJP's servers, laptops, hard drives (which would include all Outlook "sent" folders). Counsel of record for CLJP initially agreed that such explanation would be appropriate. Based on these representations from CLJP in conference, Bailey was willing to withdraw the email portion of its Motion to Compel. But

---

<sup>3</sup> Bailey had even provided CLJP with an example of a missing email and suggested additional search terms to run.

when CLJP sent an email at the 11th hour refusing to change its redactions, he mysteriously added the statement that he understood the email issue was resolved. The final teleconference among counsel of record, in which a final plea for another joint conference was requested and refused, at least made it clear that the email issue was not resolved, although easily resolvable with a simple explanation of what searches CLJP considers "thorough". As shown in its final word (Exhibit B to Bailey's Motion For Leave to File Reply), CLJP acknowledges the question but simply refuses to answer it to allow further discussion and evaluation of what Bailey is willing to do or incur (at its own expense) to satisfy the production request.<sup>4</sup>

15. Accordingly, CLJP refused Bailey's offer to resolve the email production issue by confirming what it had actually done to show for a thorough search of all emails, and thus Bailey requests that this Court order CLJP to search all emails for responsive documentation to the Subpoena.

16. Despite its improper objections and its complete inability to either provide this Court with any rationale for its invoice redactions or confirmation that it actually searched all of its emails, CLJP asks this Court to order Bailey to pay its subpoena invoice. Initially, it should be noted that the August 17, 2010 invoice, which is labeled Exhibit "2" to the Opposition Brief, is actually the second invoice that CLJP sent to Bailey. The first invoice, which was sent on or about August 6, 2010, was for 260 copies at a rate of \$.75 per page, even though CLJP only provided 130 copies to Bailey. Accordingly, Bailey contacted CLJP to notify them of the billing

---

<sup>4</sup> To every question in conference, the answer is the same: "CLJP conducted a thorough search." Did CLJP search all employee laptop hard drives? What search terms were used for its searches? In response to all of these and other obvious questions, CLJP counsel would only say, "CLJP conducted a thorough search," which leaves Bailey no choice but to pursue discovery of at least these easy questions.

discrepancy (CLJP later admitted that it had billed Bailey for the copies it provided to Legacy), and that Bailey would pay a reasonable fee once the redacted invoice issue was resolved:

CLJP also redacted most, if not all, of the relevant data from a large majority of the documents themselves. As we discussed several weeks ago, Bailey is willing to work on the scope of the produced information with CLJP, but the produced invoices, without the actual invoice totals and/or amounts, are worthless.

\* \* \*

Stephen, I believe that my client has been very patient with CLJP, both in addressing the motion to quash and in allowing CLJP over 6 weeks to respond to a relatively simple subpoena. Accordingly, Bailey objects to paying any subpoena invoices until CLJP corrects its invoice (both in price and accuracy) and provides the requested documentation.

(See Bailey's August 6, 2010 correspondence, attached as Exhibit "D" to Bailey's motion to compel). Bailey has always represented that it will compensate CLJP for copies responsive to the Subpoena at issue, but stands by its position and objections because CLJP has not complied with the Subpoena.<sup>5</sup>

17. Rule 45(a)(1)(C) of the *Federal Rules of Civil Procedure* is clear that a party, like Bailey, may "command" a third-party like CLJP "to produce documents, electronically stored information." Rule 45(e) allows this Court to "hold in contempt a person who, having been served, fails without adequate excuse to obey the Subpoena." Both before and after Bailey filed its Motion to Compel, Bailey has attempted to work with CLJP to resolve the issues related to CLJP's production, but to date, CLJP has simply refused to provide any justification for its current positions or explain its actions of compliance. If CLJP truly believed that it was being forced to produce confidential/proprietary information, then it had fourteen (14) days to assert its

---

<sup>5</sup> CLJP's Motion to Require Payment of Copy Costs (Doc. 11) is not ripe until CLJP complies with the Subpoena. Counsel for Bailey also contacted counsel for Legacy to confirm that Legacy has never received a bill for the CLJP copies that CLJP originally tried to bill to Bailey.

objections to Bailey. *See* F.R.C.P. 45(c)(2)(B). CLJP also had the right to file a motion to quash with this Court if it believed that the Subpoena requires "disclosing a trade secret", Fed. R. Civ. P. 45(c)(3)(B)(i)(3), or filed a motion for a protective order pursuant to Fed. R. Civ. P. 26(c).<sup>6</sup> CLJP instead has chosen to simply not comply with a valid Subpoena despite the voluntary offers of additional protections provided to CLJP by the parties' agreements, protective order, and "attorneys eyes only" designation. All fees and expenses that CLJP now requests are based entirely on CLJP's improper objections, non-responsive tactics, and its own failure to follow the procedures outlined in Rule 45. Accordingly, Bailey requests that CLJP's motion for fees/expenses be denied, and that this Court instead order CLJP to pay for all fees Bailey incurred in seeking CLJP's compliance with the Subpoena. Bailey also requests such other or further relief permitted under the *Federal Rules of Civil Procedure* incurred related to this motion.

**WHEREFORE**, Bailey respectfully requests that this Court enter an Order denying CLJP, Inc.'s responsive objections to Bailey Industries, Inc.'s Motion to Compel, denying any motion by CLJP, Inc. for payment of copying costs, and granting Bailey's Motion to Compel CLJP to immediately provide all responsive documentation to this Court's June 24, 2010 Subpoena. Bailey also requests pursuant to the *Federal Rules of Civil Procedure* an award of its

---

<sup>6</sup> Even if CLJP had requested a protective order, it could not carry its "burden to demonstrate good cause for the protective order requested ... 'The party moving for a protective order has the burden of demonstrating 'good cause.' In order to establish good cause, the moving party must offer a 'particular and specific demonstration of fact, as distinguished from stereotyped and conclusory statements ... Ultimately, moreover, the entry of a protective order lies within the court's sound discretion ... To put it clearly, Defendants have failed to meet their burden of proving that Plaintiffs subpoenas should be disallowed or modified because they have neglected to show any concrete way in which the third-party subpoenas fall outside the range of acceptable discovery.'" *Parke v. Glover*, 2010 WL 370329, \*2 (S.D Ala. 2010) (internal citations omitted).

costs and attorneys' fees incurred by Bailey in preparing and pursuing this Motion, in addition to any other, further and different relief to which it may be entitled.

Respectfully submitted,

*s/ Thomas M. Wood*  
THOMAS M. WOOD (FL Bar # 0692425)

Attorney for Compelling Party  
Bailey Industries, Inc.

**OF COUNSEL:**

Burr & Forman LLP  
Post Office Box 2287  
Mobile, Alabama 36652-2287  
Telephone: (251) 344-5151  
Facsimile: (251) 344-9696

William J. Long  
Burr & Forman LLP  
420 20th St. N.  
3400 Wachovia Tower  
Birmingham, AL 35203  
Telephone: (205) 251-3000  
Facsimile: (205)-458-5100

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing has been served upon counsel and parties listed below at the addresses shown via electronic mail and by depositing same in the United States Mail, first class postage prepaid, on this the 31st day of August, 2010:

Stephen W. Dummer, Esq.  
Allen, Cobb, Hood & Atkinson, P.A.  
One Hancock Plaza  
Suite 1212  
Post Office Drawer 4108  
Gulfport, Mississippi 39502

John S. Johnson  
Hand Arendall, L.L.C.  
2001 Park Place North, Suite 1200  
Birmingham, AL 35203

Stephen M. Cozart, Esq.  
Kubicki Draper, P.A.  
125 W. Romana Street, Suite 550  
Pensacola, Florida 32502

*s/ Thomas M. Wood*  
\_\_\_\_\_  
OF COUNSEL