**IN THE UNITED STATES DISTRICT COURT**
**FOR THE WESTERN DISTRICT OF TENNESSEE**
**WESTERN DIVISION**

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| **FLEET BUSINESS CREDIT CORPORATION,** | ) | |
| | ) | |
| **Plaintiff,** | ) | |
| | ) | |
| **vs.** | ) | **No. 01-2417-GV** |
| | ) | |
| **HILL CITY OIL COMPANY, INC.,** | ) | |
| | ) | |
| **Defendant.** | ) | |

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**ORDER DENYING PLAINTIFF'S MOTION FOR PROTECTIVE ORDER AND FINDING *SUA SPONTE* DEFENDANT'S SUBPOENA DUCES TECUM INVALID**

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**On May 8, 2002, the defendant in this case, Hill City Oil Company, Inc. ("Hill City") issued a subpoena duces tecum to a non-party, EnCapital, an entity located in Boston, Massachusetts, for documents allegedly pertaining to the instant action. Presently before the court is the May 17, 2002 motion of the plaintiff, Fleet Business Credit Corporation ("Fleet") for a protective order to prevent Hill City's access to the requested documents. United States District Court Judge Julia Smith Gibbons referred this matter to the United States Magistrate Judge for determination.**

**Fleet argues that the documents Hill City seeks should not be produced by EnCapital because they are irrelevant to the issues in this case in that they relate to transactions and events which occurred after the time period at issue. Further, it insists that Hill City failed to comply with the requirements of Federal Rule of**

**Civil Procedure 45 by issuing the subpoena to EnCapital without providing notice and a copy of the subpoena to Fleet and by requiring Encapital to produce the documents in Mississippi.**

**In response to the motion, Hill City contends that Fleet has no standing to file a motion for a protective order on behalf of a non-party. In the alternative, Hill City's position is that EnCapital's documents are highly relevant to this case as they relate to internal business relationships between EnCapital and Fleet that pertain to the time period encompassed by this lawsuit. In addition, Hill City requests the court to modify the subpoena to allow for production in Boston, Massachusetts rather than Jackson, Mississippi. For the reasons set forth below, Fleet's motion for protective order is denied and the court *sua sponte* finds that Hill City's subpoena duces tecum issued to EnCapital is invalid.**

**FACTUAL BACKGROUND**

**At the heart of this action are twenty-four service contracts originally entered into by Hill City and Entergy Systems and Service, Inc. (now called Efficient Solutions, Inc. or "ESI"), between 1993 and 1997. Pursuant to the contracts, ESI agreed to provide lighting systems at some of Hill City's properties. ESI further agreed to install the lighting, as well as perform the requisite maintenance and service to the lighting system as needed during the contract term. In exchange, Hill City agreed to make monthly payments to ESI for the term of the contract. ESI**

**allegedly also contracted in a similar fashion with other entities to install and service lighting systems.**

**ESI filed for Chapter 11 bankruptcy reorganization in June of 1999. Prior to its bankruptcy filing, ESI assigned its payment rights to nineteen of the twenty-four Hill City contracts at issue to Fleet. It is a disputed issue between the parties as to whether ESI also delegated its duties to Fleet through the assignment of the Hill City contracts. The bankruptcy court allowed Fleet to service and collect on all twenty-four outstanding contracts with Hill City, which included five contracts not previously assigned to Fleet by ESI. The parties dispute whether the bankruptcy court gave Fleet *permission* to perform services under the contracts or *ordered* such performance. Fleet designated MBW Electrical Solutions, Inc. ("MBW") to provide service under the twenty-four agreements with Hill City as well as other ESI customers. Hill City admits that in March of 2000, it refused to receive any further services from MBW and refused to make further payments. Fleet insists Hill City breached these contracts by failing to make payments as specified in the agreements.**

**The documents sought by Hill City pertain to transactions between Fleet and Sylvania Lighting Corporation ("Sylvania") that occurred in 2001. Specifically, Hill City's subpoena seeks from EnCapital "All documents executed on or as of the date the transaction closed in the second quarter of 2001 whereby Sylvania**

**Lighting Services Corp. assumed the servicing of the Fleet Business Credit Corporation's lighting installation and maintenance services portfolio." EnCapital handled these transactions for Fleet. According to Hill City, EnCapital's website states that Sylvania performed the servicing of a lighting portfolio owned by Fleet, and that the services previously had been performed by MBW. Hill City claims that ESI's customers were told that Sylvania had assumed the service portion of the contracts in 1999, and if that was in fact false, the subpoenaed documents would be pertinent to Hill City's claims against Fleet for fraud.**

**ANALYSIS**

**A. Standing**

**Hill City argues that Fleet does not have standing to challenge the subpoena issued against EnCapital, a non-party. Fleet is not challenging the subpoena in the form of a motion to quash; rather, it seeks a protective order. According to Rule 26(c) of the Federal Rules of Civil Procedure, "upon motion by a party or by the person from whom discovery is sought . . .," the court may issue a protective order. Fed. R. Civ. P. 26(c). Many district courts have acknowledged this aspect of the rule which allows a party to file a motion for protective order on behalf of a non-party. *See EEOC v. Kim & Ted, Inc.*, No. 95C1151, 1995 U.S. Dist. LEXIS 14510, *8 (N.D. Ill. October 4, 1995); *United States v. McMillan*, No. 3:95-CV-633WS (S.D. Miss. Sept. 28, 1995)(unpublished**

**opinion); *United States v. Operation Rescue*, 112 F. Supp. 2d 696, 705 (S.D. Ohio 1999). Based on the above-cited caselaw and the plain reading of the Rule, Fleet has standing to seek a protective order.[1]**

**B. Relevance of the Documents Sought by the Subpoena**

**In its memorandum in support of its motion for protective order, Fleet insists that the documents sought by Hill City are irrelevant to this case, as the issues pleaded in the complaint involve a time period before March of 2000, and the documents sought by Hill City are from 2001 and involve different entities, namely Sylvania Lighting Services Corporation and EnCapital. On the contrary, Hill City states in its memorandum in response to Fleet's motion for protective order that it seeks the closing documents between Sylvania and EnCapital because they may show that Fleet admitted that it had acquired not only the rights but also the obligations under the service agreements at issue in this case. In addition, the documents would clarify when Sylvania actually took over the service portion of the agreements and who was responsible for the servicing of the lighting systems prior to**

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[1] **Hill City filed a Motion to Strike Fleet's Reply to Hill City's Response to Fleet's Motion for Protective Order. While the court normally prefers that parties seek leave of court to file reply briefs, in this instance the motion to strike is moot, as the court did not rely on the reply to form the basis of its opinion. Hill City cited caselaw regarding Fleet's standing to file a motion to quash; Fleet did not file such a motion.**

**Sylvania.**

**The court agrees with Hill City. The documents are "relevant to the claim[s] and defense[s]" of the parties to this action. Fed. R. Civ. P. 26(b)(1). Accordingly, Fleet's motion for protective order on grounds of relevancy is denied.**

**C. <u>The Validity of the Subpoena</u>**

**Hill City's subpoena to EnCapital issued out of this district, the Western District of Tennessee where this lawsuit is pending. The subpoena directs EnCapital to produce the documents at Hill City's attorney's office in Jackson, Mississippi. In the alternative, Hill City seeks to modify the subpoena to allow for the production of requested documents in Boston, Massachusetts.**

**The subpoena as issued or as modified, as Hill City requests, does not comply with the Federal Rules of Civil Procedure. According to Rule 34(c) of the Federal Rules of Civil Procedure, "a person not a party to the action may be compelled to produce documents and things or to submit to an inspection as provided in Rule 45." Rule 45(a)(2) states in pertinent part: "[I]f separate from a subpoena commanding the attendance of a person, a subpoena for production or inspection shall issue from the court for the district in which the production or inspection is to be made." In *Herbst v. Brown,* No.99-8792, 2001 U.S. Dist. LEXIS 4286 (S.D.N.Y. April 10, 2001), a district court in New York found a subpoena issued out of New York to a nonparty for production of documents in**

**Florida to be invalid. *See also Natural Gas Pipeline Co. of Am. v. Energy Gathering, Inc.,* 2 F.3d 1397, 1406 (5th Cir. 1993) (recognizing that "[a] district court cannot issue a subpoena duces tecum to a non-party for the production of documents located in another district"); *James v. Booz-Allen & Hamilton, Inc.,* 206 F.R.D. 15 (D.C. Dist. 2002) (quashing subpoenas not issued from the proper district court); *Echostar Communications Corp. v. The News Corp. Ltd.,* 180 F.R.D. 391, 397 (D. Col. 1998)(finding invalid subpoenas issued from court other than where production was to be made); *McNerney v. Archer Daniels Midland Co.,* 164 F.R.D. 584, 588 (W.D.N.Y. 1995)(same).**

**Here, the subpoena was issued by this court, the Western District of Tennessee, on a non-party in Boston, Massachusetts, but calls for production in Jackson, Mississippi. As such, the subpoena is invalid on its face, and this court cannot compel EnCapital to comply with the subpoena.**

**Further, Federal Rule of Civil Procedure 37(a)(1) states that "[a]n application for an order to a person who is not a party shall be made to the court in the district where the discovery is being, or is to be, taken." Plainly, this court does not have the jurisdictional ability to compel EnCapital to comply with a subpoena that forces it to produce documents in Jackson, Mississippi. Such an order would be in contravention to the**

**Federal Rules of Civil Procedure. This court may nevertheless quash a subpoena if it issued from this district. Fed. R. Civ. P. 45(c)(3)(A)("On timely motion, the court by which a subpoena was issued shall quash or modify a subpoena . . . .").**

**Although Fleet has not filed (and probably could not file) a motion to quash the subpoena, a court may declare a subpoena invalid for this procedural defect. *See Echostar Communications Corp.,* 180 F.R.D. at 397; *Herbst,* 2001 U.S. Dist. LEXIS 4286 at *3. Accordingly, the Hill City's request to modify the subpoena is denied without prejudice, and the subpoena is invalid as issued.**

**If the subpoena is reissued out of the appropriate district, counsel for Hill City is reminded that full compliance with Rule 45 is necessary, and notice of the service of a subpoena coupled with a copy of the subpoena must be served on the opposing party. Fed. R. Civ. P. 45(b)(1); *Firefighters' Institute for Racial Equality v. City of St. Louis*, 220 F.3d 898, 903 (8th Cir. 2000); *Brady v. The Capital Group*, No. 91-3873, 1993 U.S. Dist. LEXIS 6040, *3 (E.D. La. May 6, 1993).**

**IT IS SO ORDERED this 26th day of June, 2002.**

**DIANE K. VESCOVO**
**UNITED STATES MAGISTRATE JUDGE**