

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
Tampa Division**

U & I CORPORATION,
a Foreign corporation

Plaintiff

Case No. 8:06-cv-02041-T-17EAJ

v.

ADVANCED MEDICAL DESIGN, INC.,
a Florida corporation

Defendant.

_____/

ADVANCED MEDICAL DESIGN, INC.,
a Florida corporation,

Defendant/Counter-Plaintiff,

v.

U & I CORPORATION,
a Foreign corporation,

Plaintiff/Counter-Defendant.

**ADVANCED MEDICAL DESIGN, INC.'S MOTION FOR PROTECTIVE ORDER AND
MOTION FOR SANCTIONS WITH MEMORANDUM OF LAW IN SUPPORT**

Advanced Medical Design ("**AMD**") by and through its undersigned counsel and pursuant to Federal Rules of Civil Procedure 26 and 37, hereby files this Motion For Protective Order and Motion for Sanctions ("**Motion**") regarding certain third party subpoenas duces tecum served by U & I Corporation ("**U & I**"), and as grounds therefore states as follows:

BACKGROUND

U & I served seven (7) subpoenas duces tecum without deposition (collectively referred to as "**the Subpoenas**") on seven (7) different entities; the subpoenas all call for the production

of identical material on December 17, 2007, at the office of Paul Silverberg, counsel for U & I, at Silverberg & Weiss, P.A., 2665 Executive Park Drive, Suite 2, Weston, Florida 33331. Six of the subpoenas were served on the registered agent for each of the six (6) entities, at the address of Robert Dimarco, CPA, and as registered agent, 3444 East Lake Road, Suite 412, Palm Harbor, Florida 34685. True and correct copies of the six (6) subpoenas served on Robert Dimarco are attached hereto as composite **Exhibit "A"**. The remaining subpoena (the "seventh Subpoena") was served out of the "United States District Court Massachusetts District Court", at the address of 28 Cook Street, Billerica, Massachusetts. A true and correct copy is attached hereto and incorporated herein as **Exhibit "B"**. To date, none of the subpoenas have been served on counsel for AMD by U&I; copies of the subpoenas were obtained from the entities served with the subpoenas. Furthermore, counsel for AMD was notified at 3:44 p.m. on December 14, 2007 that there were three (3) additional subpoenas duces tecum for entities that were not previously identified, to which counsel for AMD will address upon further review if necessary, though would anticipate making the same objections to the additional subpoenas. A true and correct copy is attached hereto and incorporated herein as **Exhibit "D"**.

ARGUMENT

1. The subpoenas call for production on a date past the discovery deadline set by the Court.

The subpoenas on their face indicate they were issued November 26, 2007, and call for production on December 17, 2007. Discovery in this case was ordered to be completed by December 10, 2007. See Dkt 38. No extension regarding the discovery deadline was sought or

agreed to by the parties¹. Counsel for U & I impermissibly calls for production on a date past the discovery period in this case, and the material sought in the subpoenas should not be required to be produced. See, e.g., Middle District Discovery (2001) at F.1 (stating discovery should be served so that the response is due prior to the discovery deadline). Further, this Court should impose sanctions on U & I for its failure to obey the Scheduling Order as modified by its Order dated August 9, 2007 extending the discovery period until December 10, 2007. See Fed. R.Civ.P. 37(b) (2007).

2. The subpoenas are harassing in nature, and seek information that is not relevant to this action.

U & I served a total of seven subpoenas essentially seeking the same information but from different entities. AMD is unaware of what type of business six (6) of the entities conduct, though it appears U & I served subpoenas on six entities that share AMD's registered agent, Robert Dimarco. The six entities are not related to AMD or its principal. The seventh subpoena was served on Lab Medical Manufacturing, Inc., which manufactures medical products. The information sought in the subpoenas appears to revolve around the issue of whether AMD's principal somehow was involved with previously or currently selling a medical device which competes with U & I's product, and which U & I now appears to suggest infringes upon its patent. The pleadings and filings in this case are void of any allegation that U & I's patent was infringed, or that AMD is the cause, and U & I has not asserted any defenses to AMD's Counterclaim based on AMD or its principal allegedly distributing a competing product. Based on this, the information sought in the subpoenas is not relevant or likely to lead to admissible evidence, and is merely harassment, particularly based on the number of entities served.

¹ Counsel for AMD and U&I corresponded via email regarding seeking a limited extension of the discovery deadline for the purpose of conducting specific depositions, but counsel for U&I and counsel for AMD did not agree on an extension, as counsel for U&I failed to respond to counsel for AMD's latest inquiry regarding same.

In further support of the irrelevance and harassing nature of the subpoenas, U & I, in its recently served Response to AMD's Fourth Request For Production, claims that materials relating to Solas Spine, Inc. (the entity mentioned throughout the subpoenas), are irrelevant because the pleadings do not contain any issues regarding Solas Spine, Inc. and because Solas Spine, Inc. is a non-party.² A true and correct copy of AMD's Fourth Request for Production and U & I's Response is attached hereto as **Exhibit "C"**.

AMD has standing to challenge the relevance of documents sought in a third party subpoena. See Dkt. 69; see also Auto-Owners Ins. Co. v. Southeast Floating Docks, Inc., 231 F.R.D. 426, 429-30 (M.D. Fla. 2005). By U & I's own admission, and as established by the pleadings in this case, the information sought in the subpoenas is not relevant to this action, and the documents should not be required to be produced.

3. The subpoenas were not served on AMD, the opposing party, prior to service.

AMD was not provided notice of U & I issuing the subpoenas, which is not in compliance with Rule 45(b), of the Federal Rules of Civil Procedure. See Fed.R.Civ.R. 45(b). AMD first received notice of the subpoenas when the served entities forwarded copies of the subpoenas to AMD. This is the *only* reason AMD had notice of the issuance and service of the subpoenas and the ability to evaluate the information sought, as well as the method in which it was sought, to determine whether it was appropriate and necessary to file a motion for protective order.

² AMD's November 7, 2007 4th Request to Produce No. 1 requested "A copy of any materials relating to U & I Corporation's allegations of patent infringement by Solas Spine, Inc., including but not limited to, a copy of the U & I patent(s) allegedly infringed and copies of paperwork submitted to any government body relating to Solas Spine, Inc. and/or its products." In U & I's December 7th, 2007 Response to AMD's 4th Request to Produce No. 1, U & I stated "Objection. U & I has not plead at this time any allegations against Defendant in this matter regarding Solas Spine, Inc. The request is overbroad and irrelevant as not currently involving non-party Solas Spine, Inc. U & I further objects to this request as the requested materials are work product and subject to the attorney-client privilege. If the Court overrules U & I's prior objections, U & I will provide an updated privilege log."

4. The subpoenas call for production at a place more than 100 miles from the address where the subpoenas were served.

Six (6) of the subpoenas were served at the address of Robert Dimarco, CPA, and as Registered Agent, 3444 East Lake Road, Suite 412, Palm Harbor, Florida 34685, calling for production at Silverberg & Weiss, P.A., 2665 Executive Park Drive, Suite 2., Weston, Florida 33331. These six (6) subpoenas call for production more than 100 miles from the place the subpoena was served which is impermissible under Rule 45 of the Federal Rules of Civil Procedure. See Fed. R. Civ. P. 45(c) (2007). The seventh subpoena was served at the address of Lab Medical Manufacturing, Inc, 28 Cook Street, Billerica, Massachusetts, calling for production at Silverberg & Weiss, P.A., 2665 Executive Park Drive, Suite 2., Weston, Florida 33331, which is also more than 100 miles from the place production is commanded. This too, is impermissible under the Rules. Id.

WHEREFORE, Advanced Medical Design, Inc. hereby respectfully requests that this Court enter a Protective Order against the production of the documents sought in the subpoenas, and further, that the Court impose sanctions on U&I for its failure to obey the Court Order regarding the discovery deadline, and award Advanced Medical Design, Inc. its fees and costs associated with the Motion For Sanctions.

CERTIFICATE OF COMPLIANCE WITH LOCAL RULE 3.01

Counsel for AMD and counsel for U & I spoke on December 14, 2007, regarding the relief requested herein, and counsel for U & I agrees that the place of production should be less than 100 miles from the place of service of the subpoena. Additionally, counsel for U&I is forwarding the subpoenas to counsel for AMD, otherwise, counsel for U&I does not agree to the relief sought.

Respectfully Submitted,

s/ Chaila Restall

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COUNSEL FOR DEFENDANT

AND COUNTER-PLAINTIFF

ADVANCED MEDICAL DESIGN, INC.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on December 14, 2007, a copy of the foregoing ADVANCED MEDICAL DESIGN, INC.'S MOTION FOR PROTECTIVE ORDER AND MOTION FOR SANCTIONS WITH MEMORANDUM OF LAW IN SUPPORT was served upon Plaintiff/Counter-Defendant via the CM/ECF systems and the United States Mail at the following address:

Paul K. Silverberg (FBN: 147877)

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s/ Chaila Restall

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