UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
Tampa Division

U&I CORPORATION, a foreign corporation,

Plaintiff/Counter-Defendant,

v. CASE NO. 8:06-cv-2041-T-17EAJ

ADVANCED MEDICAL DESIGN, INC.,
a Florida corporation,

Defendant/Counter-Plaintiff.
_____/

RESPONSE TO DEFEDNDANT/COUNTERPLAINTIFF'S MOTION TO COMPEL AND MOTION FOR SANCTIONS WITH MEMORANDUM OF LAW IN SUPPORT

Plaintiff, U&I Corporation, a foreign corporation, ("U&I"), by and through its undersigned counsel, hereby files its Response to Defendant's Motion to Compel and Motion for Sanctions, and would state as follows:

Factual Background

Undersigned's client contacts are all, except one, based in Korea, which has an 11 hour time difference and is across the Date Line. Plaintiff is a South Korean manufacturing and distribution medical device company based in the Seoul area with worldwide distribution relationships. U&I's product lines focus on spinal and trauma implants and instruments. U&I's distribution business model has been to engage third party distributors familiar with the industry, language, geography and medical regulations for distribution of its products.

On or about January 5, 2002, U&I as Supplier/Seller and AMD as Dealer/Buyer entered into an agreement as well as two Addendums thereto, the first executed on or about February 15, 2002 and the second executed on or about August 25, 2003, regarding the sale and marketing of certain products in the Caribbean, Mexico, Central and South America (the "Distribution Agreement"). On July 27, 2006, undersigned wrote AMD and terminated the subject agreement based on its failure to cure the outstanding balance. Based on U&I's termination of the Distribution Agreement and AMD's failure to cure, U&I filed suit in this action against AMD for its failure to pay the $339,106.00 outstanding balance from 2005 and 2006.

AMD has counterclaimed on the basis of the same contract for alleged breach and anticipatory breach. Defendant/Counter-Plaintiff's Counterclaim and legal theory appear to allege a worldwide scheme of U&I to improperly terminate its distributors based on its relationship with Zimmer Spine, Inc. ("Zimmer Spine"). Absent Defendant's failure to pay as demanded and required under their Distribution Agreement, the subject contract would not be terminated for failure to pay by U&I.

Procedural Facts

It is important to note that Plaintiff's claims are simply premised on failure to pay certain invoices for products received by Defendant, thus most of the discovery centers around Defendant's counterclaim. In fact, the vast amount of issues and discovery surrounds Defendant's attempt in its counterclaim to support allegations of a worldwide scheme, which are contradicted by Annex C of the U&I and Zimmer Spine November 2005 Distribution Agreement. See U&I 26823-26878.

AMD's continuing general notion that Plaintiff has not undertaken a good faith effort to comply with discovery is unfounded and untrue. AMD's position in its latest motion requires the Court to take the presumptive position that because some non-party has an e-mail communication from Plaintiff or Plaintiff's counsel that Plaintiff or its counsel (1) must have a copy of the same e-mail communication; and (2) is intentionally refusing to produce the same. This is simply untrue. No less, the difference in a document preservation system of historic multi-billion dollar publicly traded company like Zimmer, Inc. compared to U&I is clearly obvious and understandable.

Undersigned is personally cited and I believe that my statements are misrepresented to the Court in an attempt to bolster AMD's position in its Motion and this case. Undersigned communicated in writing its substantial concern about the improper and insufficient disclosure of the material conversation between the attorneys and requested AMD reconsider its Motion to that extent. AMD's counsel has responded and taken the position that it will not correct its footnote, but acknowledged that Undersigned advised her in a specific conversation about its diligent search of both paper and electronic documents, including e-mail. AMD's counsel response further acknowledged that Undersigned advised her prior to the filing of AMD's motion that Undersigned's e-mails went back only to January 2006. AMD's counsel clarified that it was not attempting to connect its argument about the U&I 2005 server issue to the unavailability of any documents from Undersigned or Mr. Jung.

Although informed and now acknowledging its pre-motion conversation that Undersigned's e-mails only go back to January 2006, AMD, no less, is reaching in its

motion for e-mails from Undersigned pre-dating November 10, 2005 based on Zimmer Spine's production.

Undersigned unequivocally informed AMD's counsel that pursuant to the first request for production and subsequent court order on the objections to such requests, that Undersigned reviewed its entire U&I file, including but not limited to its Zimmer Spine and international distributor files, e-mails, electronic and paper file. The Court should note that some of the document production actually came from Undersigned's U&I files. Undersigned informed AMD's counsel that it would again check for any printed out copies of responsive and non-privileged communications with Zimmer Spine, the paper file did not contain any such documents. Undersigned further advised AMD's counsel that its reviewed its e-mail system and could not locate any responsive e-mails or documents that were not already produced and/or identified. Undersigned has searched its dumped historic e-mails and nothing responsive and unprivileged was found.

Undersigned did not and does not claim any "inaccessibility" issues regarding its e-mail system or other electronic files. Undersigned does not have in its possession, custody or control any responsive documents that have not been produced and/or identified as privileged.

Undersigned and AMD's counsel during that same conversation discussed Mr. Jay Jung's hotmail account. Undersigned informed opposing counsel that this account was specifically reviewed for responsive documents and that such type of hotmail account was not storing such historic e-mails. It is Undersigned's understanding that Mr. Jung's hotmail account is done on-line and not a downloaded version to his hard drive.

Undersigned did not and has not raised any issue regarding documents not being "retrievable".

Undersigned and Mr. Jung's hotmail account have no known issues with regard to accessibility, irretrievability or damage, whether similar or different to the U&I 2005 server issue. No responsive e-mail documents exist in Undersigned's computer system that have not been produced and/or identified. Undersigned, on behalf of its client, did produce a Privilege Log that identified responsive but privileged e-mail communications.

Undersigned did contact the Florida Bar regarding its obligations to preserve e-mail communications, and there are no relevant requirements on preservation related to this matter. As to the subject e-mails, which are part of AMD's search, Undersigned believes it did not consider, at that time, those 2004 and/or 2005 e-mails as necessary information to further intentional store or qualify for special preservation as the e-mails at issue are business negotiations on a draft document between U&I and Zimmer Spine, which was finalized in an executed document back in November 2005 and any such communications would have been most likely ruled inadmissible as parol evidence in any litigation regarding the same.

To further advise the Court on the U&I 2005 (pre-litigation) server issue, U&I filed with the Court on December 11, 2007 (dkt 74) the January 25, 2005 statement of Details of Unrecoverable Data by vendor Sam Jyoung D&S. In that 2005 statement, it is clear that the part of the hard drive was broken and that numerous attempts were made to restore U&I's information. According to its website, the company is a complete data recovery solution provider. Moreover, U&I Vice President of Business Development,

Jay Jung filed his affidavit as to the 2005 (pre-litigation) server problem on December 6, 2007 (dkt 73). Mr. Jung is clear that the main server problem caused interruption in U&I's e-mail, and that the server hard drive breakage caused a loss of data that was unrecoverable and otherwise irretrievable. U&I in early 2005 not only contacted vendor Sam Jyoung D&S, but contacted another vendor to see if they could retrieve the lost information, which was unsuccessful. U&I disposed of the failed hard drive in January 2005 (pre-litigation). U&I has clearly taken all reasonable precautions, including a second opinion, to preserve its electronic information even considering the same occurred pre-litigation.

Since Defendant/Counter-Plaintiff's first request for production, U&I has produced and/or identified over 14,500 documents as responsive (less then 200 of the identified documents have not been produced but identified under Plaintiff's Privilege Log). Non-party Zimmer Spine has produced almost 1,200 documents, including the subject e-mails from 2004 and early 2005, which AMD claims under their Motion for Partial Summary Judgment supports its legal theory. AMD is unable to identify any documents that it knows U&I still has in its possession, custody or control of U&I for which it has not produced (or a privilege claimed). AMD is asking the Court to guess and presume U&I's possession, custody or control of documents, because Zimmer Spine maintained copies of e-mail communications that U&I lost due to its 2005 server or were not otherwise maintain, and which were not required to be maintained.

Although the Court has initially granted a generous scope to AMD's production based on its initial allegations and claims, it is clear from AMD's Motion for Partial

Summary Judgment and AMD's deposition transcript, that AMD asserts that it ended the U&I relationship in December 2005, if not the first few days of January 2006. See AMD deposition transcript, Page 61, Lines 16-22. The scope of discovery should close on this date as to AMD's reasonable requests as all other items are beyond its contractual rights.

To be clear, PRIMA and the subject cages (Peek), as of the date of filing this Response, are not generally available for distribution internationally, including to Zimmer Spine.

Plaintiff and Undersigned believe and in good faith have looked through its available records to be in full compliance with the Court's Order at the time of filing this response.

Memorandum of Law in Opposition

Dismissal/Strike Pleadings

Federal Rules of Civil Procedure Rule 37(b)(2) grants the Court broad authority to issue sanctions upon a party for failure to comply with a court order to provide discovery, however, the Court's power is not unlimited. *See, Searock v. Stripling*, 736 F.2d 650, 653 (11th Cir. 1984). The law is clear regarding discovery sanctions that the Court should only use dismissal as a last resort, when finding evidence that a party's willfulness, bad faith or fault in failing to comply with a discovery request necessary to support the "Draconian remedy of dismissal." *Id.* at 653. Furthermore, the legal standard to be applied when contemplating dismissal of an action is whether there was a "clear record of delay or willful contempt and a finding that lesser sanctions would not suffice." *Jones v. Graham*, 709 F.2d 1457, 1458 (11th Cir. 1983). Based on the discovery efforts of Plaintiff, and the

overall production of over 14,500 documents by Plaintiff, which the vast majority relates to the Counterclaim, there is no basis for a showing of bad faith or willfulness in failing to comply with the discovery requested from U&I. As a result, the Defendant's request to have U&I's action against AMD dismissed should be denied.

Sanctions

Federal Rule of Civil Procedure 37(f) states that "absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system." While conducting the normal course of business, U&I experienced a documented sever breakage pre-litigation and as greater detailed above. As to Undersigned's and Jay Jung's hotmail account, an loss of information was under routine and good-faith operation of their respective e-mail and electronic files.

Sanctions are only appropriate for failure to comply if the party subject to the sanctions cannot show that its violations were neither justified nor harmless. *See, Rabelo v. Bell Helicopter Textron*, 200 F.R.D. 484, 489 (S.D. Fla., May 17, 2001). Other district courts in the Eleventh Circuit have defined harmless as a discovery mistake "if it is honest, and is coupled with the other party having sufficient knowledge that the material has not been produced." *Go Medical Industries PTY, LTD v InMed Corporation*, 300 F.Supp.2d 1297 (N.D.GA 2003) citing *Burney v Rheem Mfg. Co., Inc.*, 196 FRD 659, 691 (M.D.Ala. 2000). The Eleventh Circuit Court in *Devaney v. Continental American*

Insurance Company, stated that a party's discovery conduct under Rule 37 is substantially "justified" if it is a response to a genuine dispute, or if reasonable people could differ as to the appropriateness of the contested action." 989 F.2d 1154 (11th Cir. 1993) citing *Pierce v Underwood,* 784 US 552, 565, 108 S.Ct. 2541, 2550, 101 L.Ed.2d 490 (1988). U&I's actions and production are clearly honest and justified with full attempts to comply with the Rules and this Court's Order.

Compel Production of Computers

AMD's request for production and inspection of U&I's Korean based current business computers is unsupported by current case law or the circumstances, no less for the same to occur as requested in Tampa, Florida. The Federal Rule of Civil Procedure specifically acknowledge, in Rule 37(f), circumstances of electronic information loss. No less this loss occurred pre-litigation and pre-termination of AMD. AMD's own case law, *In Re Ford Motor Co.*, 345 F.3d 1315 (11th Cir. 2003) sets up the requirements for the Court to make a finding of a factual finding of some non-compliance. U&I's 2004 e-mail situation as stated above does not support a factual finding of non-compliance. U&I notified AMD prior to filing this motion for sanctions that the 2004 e-mails were lost due to computer and server problems pre-dating litigation and termination of AMD.

Clearly, Undersigned's computer has substantial attorney-client and work product issues in this case as well as every other client, current and past, of the firm.

Local Rule 3.01 Certification

Counsel for the parties spoke regarding the Motion and issues and the parties were unable to resolve the issues.

Respectfully submitted,

By: *s/Paul K. Silverberg*
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was filed electronically by using the CM/ECF system and has been furnished using the same this 20th day of February, 2008 to L. Joseph Shaheen, Jr., Esq. and Chaila D. Restall, Esq., Akerman Senterfitt, 1700 SunTrust Financial Centre, 401 E. Jackson Street, Tampa, Florida 33602.

By: *s/Paul K. Silverberg*
Paul K. Silverberg