

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

DIGITAL ASSURANCE CERTIFICATION, LLC,

Plaintiff,

Case No. 6:17-CV-72-ORL-41TBS

v.

ALEX PENDOLINO, JR.,

Defendants.

_____ /

**AMENDED¹ MOTION TO COMPEL DISCOVERY RESPONSES
FROM LUMESIS, INC.**

Plaintiff, Digital Assurance Certification, LLC (“DAC”), hereby moves pursuant to Federal Rules of Civil Procedure 37 and 45 for an order overruling objections and compelling Lumesis, Inc. (“Lumesis”), currently a non-party,² to produce documents responsive to DAC’s Requests for Production or Inspection of Documents and Things served via Rule 45 subpoena on May 9, 2017.

¹ Plaintiff amends its motion filed August 18, 2017 to replace Exhibit 1 and to revise Section “A” herein to reflect Lumesis’s *Second Amended* Objections and Responses to Plaintiff’s subpoena, rather than its [first] amended responses. An additional telephone conference concerning the substance of DAC’s motion to compel occurred between counsel for DAC and counsel for Lumesis on August 22, 2017 (the date of this filing). During the call, counsel for Lumesis again confirmed its objections to DAC’s subpoena on the basis of being overly broad and unduly burdensome, and further advised of Lumesis intent to file a motion to quash the subpoena unless DAC withdrew same. Lumesis filed the motion to quash [Doc. 67] shortly after the call ended. Other than these issues, the balance of the motion remains substantially unchanged.

² Although Lumesis currently is a non-party, on May 24, 2017, DAC filed a motion for leave to amend to, among other things, add Lumesis as a party. [Doc. 60]. That motion remains pending.

PERTINENT BACKGROUND

This is a trade secret misappropriation case involving Defendant Alex Pendolino (“Pendolino”), formerly a DAC employee and now employed with DAC’s competitor, Lumesis. DAC filed its Verified Complaint on January 17, 2017. [Doc. 1] Although Defendant Pendolino filed a motion to dismiss the complaint, or in the alternative for more definite statement [Doc. 45], and Plaintiff filed a response [Doc. 49], Plaintiff thereafter filed a motion for leave to amend the complaint [Doc. 60] and attached its proposed Amended Complaint, which Plaintiff believes moots Defendant’s motion to dismiss.

As explained in the motion for leave to amend, DAC seeks to add Lumesis, Defendant Pendolino’s new employer, to the action. As described in detail in the motion for leave and the proposed Amended Complaint, in the course of DAC’s continued investigation into the circumstances of Defendant Pendolino’s new employment with DAC’s competitor, Lumesis, DAC has discovered that Lumesis recently began marketing materials that bear a substantial resemblance to DAC’s own products. *See, e.g.*, Proposed Amended Compl. [Doc. 60-1] at ¶¶ 66–70. In addition, one of DAC’s customers, Stifel Financial Corporation, recently left DAC to become a customer of Lumesis. *See id.* at ¶ 66.

DAC initially sought discovery from Defendant Pendolino, who responded that his work-issued computer and materials stored on it were the property of his employer Lumesis and therefore must be obtained directly from Lumesis. DAC therefore issued a subpoena to Lumesis, which responded to the subpoena with boilerplate objections and refused to produce any responsive documents, with the notable exception of a DAC Summary Findings Report furnished to Lumesis by DAC’s former client Stifel Financial Corporation in seeming

violation of the Terms of Use restricting its distribution. One theme of Lumesis's objections is that DAC's request imposes "undue burden and expense on non-party Lumesis" and that the information "is obtainable from the parties to the Lawsuit," (i.e., Defendant Pendolino). See **Exhibit 1** attached hereto – Lumesis, Inc.'s Second Amended Objections and Responses to Plaintiff [DAC]'s Subpoena in a Civil Action. at ¶¶ 2, 4. However, Lumesis's insistence that DAC seek the discovery from Defendant Pendolino leaves DAC without any prospect of obtaining the discovery in view of Defendant Pendolino's objection to the production of any documents or electronic devices or electronically stored information belonging to his employer Lumesis. See **Exhibit 2** attached hereto - Defendant Pendolino's Response to DAC's First Request for Production, at ¶¶ 1-2, 4-6, 10. If the Court grants DAC leave to amend the complaint to add Lumesis as a party, Lumesis's objections based on being a non-party will be rendered moot. However, as the Scheduling Order [Doc. 59] sets the discovery deadline at November 1, 2017, DAC needs to proceed with obtaining its discovery from Lumesis as a non-party to keep on track with the impending deadlines.

Counsel for DAC and Lumesis have engaged in numerous communications regarding Lumesis's objections. Lengthy telephone conferences between the attorneys occurred on May 30, 2017 and June 16, 2017. An additional telephone conference occurred on August 22, 2017 (after the filing of DAC's [Doc. 65] motion). In addition, several letters and emails have been exchanged. DAC attempted to alleviate Lumesis's concerns about the potential disclosure of confidential information by proposing Lumesis join in a confidentiality agreement already being contemplated between DAC and Defendant Pendolino. Lumesis initially asserted that the confidentiality agreement was a matter between Defendant

Pendolino and DAC but subsequently joined in discussions over its form, and all participants made various revisions to the agreement and were able to reach agreement on all terms of the confidentiality agreement with one exception – Lumesis insisted that one of DAC’s attorneys, Steven Hollman, and attorneys at his firm be excluded from reviewing documents designated by Lumesis as “highly confidential” documents. *See Exhibit 3*. DAC considered Lumesis’s added restriction to be unreasonable and several communications occurred in an effort to reach resolve this issue. *See Composite Exhibit 4*. Following an exchange of communications on August 8, 2017, wherein Lumesis again refused to enter into the agreement unless its proposed provision was included, counsel for DAC advised Lumesis’s counsel that it would include the confidentiality issue in this motion to compel for resolution by the Court. It was only after DAC so-advised Lumesis, and after DAC drafted its motion to compel, that Lumesis’s counsel agreed to remove its objectionable restriction and confirmed that Lumesis would join in the agreement, but it maintained its position on any additional production, as discussed below.³

MEMORANDUM OF LAW

Federal Rule of Civil Procedure 45 empowers parties to obtain documents, information, and testimony from non-parties.⁴ The scope of discovery under Rule 45 is the same as the scope of discovery under Rule 26. *Baptiste v. Centers, Inc.*, No. 5:13-CV-71-OC-

³ Prior to Lumesis’s addition of the exclusionary language to section 5.c.i, Defendant Pendolino (through counsel, Ms. Mooney) had concurred in the last agreed-to version of the agreement, and confirmed via telephone on August 16, 2017 in a follow-up conferral prior to filing this motion, that Defendant Pendolino agreed to be bound based on whatever resolution the Court imposed with respect to this issue.

⁴ As noted above, DAC has moved for leave to add Lumesis as a party to this action. Upon such leave being granted, Lumesis would be obligated to engage in discovery as a party.

22PRL, 2013 WL 3196758, at *2 (M.D. Fla. June 21, 2013); *see also Chambers v. Sygma Network, Inc.*, Case No. 6:12-cv-1802-ORL-37TBS, 2013 WL 1775046, at *3 (M.D. Fla. April 25, 2013) (quoting Rule 26(b)(1) and applying to a Rule 45 subpoena dispute); *Madeline LLC v. Street*, No. 09-80705-MC, 2009 WL 1563526, at *1 (S.D. Fla. June 3, 2009) (“Rule 45 must be read in conjunction with [Rule] 26, because the latter rule ‘clearly defines the scope of discovery for all discovery devices.’”)(citations omitted). Federal Rule of Civil Procedure 26(b)(1) allows parties to obtain discovery regarding any non-privileged matter that is relevant to any party’s claim or defense. *Polycarpe v. Seterus, Inc.*, Case No: 6:16-cv-1606-Orl-37TBS, 2017 WL 2257571, at *1 (M.D. Fla. May 23, 2017). “The overall purpose of discovery under the Federal Rules is to require the disclosure of all relevant information so that the ultimate resolution of disputed issues in any civil action may be based on a full and accurate understanding of the true facts, and therefore embody a fair and just result.” *Id.* (quoting *Oliver v. City of Orlando*, No. 6:06-cv-1671-Orl-31DAB, 2007 WL 3232227, at * 1 (M.D. Fla. Oct. 31, 2007) (in turn citing *United States v. Proctor & Gamble Co.*, 356 U.S. 677, 682 (1958))).

A. The Requests and Boilerplate Objections

Pursuant to Local Rule 3.05, DAC hereby reproduces the requests for production and the objections asserted.⁵ In addition to the objections asserted in response to each request, Lumesis also provided lengthy “General Objections” which it incorporated into each of the

⁵ Because Lumesis advised in response to Request No. 12 that no such documents exist, DAC does not seek to compel any responsive documents for that request.

responses by reference. *See* Ex. 1 at p. 8 (“The foregoing General Objections and Reservations are incorporated by reference into each of the Objections set forth below.”).

Request No. 1. The Windows System and User Registries (or functional equivalent for non-Windows devices) for any computer device (including laptops, desk computers, and tablets) issued to Pendolino by Lumesis, including the Dell XPS desk top computer, serial number H080KB2, and including information sufficient to show all data related to installed software, and external hardware devices connected to each such computer device.

Response/Objection: Lumesis objects to Request No. 1 because it is overly broad, violates Sections III A. 1. of the Civil Procedure Handbook of the Middle District of Florida, that

“In addition to complying with the provisions of Rules 34 and 45, Federal Rules of Civil Procedure, a request for documents, whether a request for production or a subpoena *duces tecum*, should be clear, concise, and reasonably particularized.”

Further, pursuant to the Civil Procedure Discovery Handbook of the Middle District of Florida, p. 26, “Inspection of an opponent’s computer system is the exception, not the rule and the creation of forensic image backups of computers should only be sought in exceptional circumstances which warrant the burden and cost. A request to image an opponent’s computer should include a proposal for the protection of privacy rights, protection of privileged information, and the need to separate out and ignore non-relevant information.”

Request 1 calls for the production of documents not identified with reasonable particularity, not relevant to the above-captioned matter, and not specifically limited to DAC Documents containing DAC Trade Secrets that are the subject of the claims set forth in the Complaint. The Lumesis documents and information requested contain Lumesis Proprietary Information irrelevant to this action, and that predate Pendolino’s employment with Lumesis. The disclosure of such Lumesis Proprietary Information to DAC, a major Lumesis competitor, would put Lumesis at a distinct competitive disadvantage.

Lumesis has already provided DAC with the Declarations of Timothy Stevens and Charlie Longson (Docs. 40 and 41), both of which attest to the fact that no DAC Documents were located on the Dell XPS desk top computer, serial number H080KB2 (the only computer provided by Lumesis to Pendolino), or on the Lumesis cloud servers accessible by that computer.

Lumesis has requested that DAC provide it with a method of limiting its search parameters to enable it to locate specific documents, but DAC was unwilling to do so. The requested documents are not readily accessible. To obtain them Lumesis will need to retain a forensic expert, resulting in unnecessary expense, and undue burden.

Request No. 2: The Master File Table (or functional equivalent for non-windows devices) (including Filename, File Path, Last Modified, Last Accessed, Created and Entry Modified date and time stamps) for any computer device (including laptops, desk computers, and tablets) issued to Pendolino by Lumesis, including the Dell XPS desk top computer, serial number H080KB2, and including information sufficient to identify the complete file structure and distinct folders.

Response/Objection: Lumesis incorporates by reference both its General Objections stated above, and its specific objections stated in its Objections to Request No. 1, above.

Request No. 3: The Internet History and temporary file cache files for any computer device (including laptops, desk computers, and tablets) issued to Pendolino by Lumesis, including the Dell XPS desk top computer, serial number H080KB2, and including information disclosing the Internet History activity of the custodian of such computer device.

Response/Objection: Lumesis incorporates by reference both its General Objections stated above, and its specific objections stated in its Objections to Requests No. 1 and 2, above.

Request No. 4: A file listing of all Cloud Storage (including Drop box, OneDrive, Google Drive) files synchronized locally for any computer device (including laptops, desk computers, and tablets) issued to Pendolino by Lumesis, including the Dell XPS desk top computer, serial number H080KB2, and including information disclosing the Internet History of the custodian of such computer device.

Response/Objection: Lumesis incorporates by reference both its General Objections stated above, and its specific objections stated in its Objections to Requests No. 1, 2, and 3, above.

Request No. 5: All link files (.LNK) and Jump List entries from each custodian of any computer device (including laptops, desk computers, and tablets) issued to Pendolino by Lumesis, including the Dell XPS desk top computer, serial number H080KB2, sufficient to show the usage of relevant files, regardless of where those files were stored.

Response/Objection: Lumesis incorporates by reference both its General Objections stated above, and its specific objections stated in its Objections to Requests No. 1, 2, 3, and 4 above.

Request No. 6: Each DAC Document or information that resided on, or was transferred to, or was stored for any period of time on or in any computer hard drive, recycle bin,

email system, database, shared network drive, cloud network interface, storage provider, electronic interface or other storage medium to which Pendolino or Lumesis had access.

Response/Objection: Lumesis incorporates by reference both its General Objections stated above, and its specific objections stated in its Objections to Requests No. 1, 2, 3, 4, and 5 above. Lumesis specifically objects to this Request No. 6 because “**any computer hard drive, recycle bin, email system, database, shared network drive, cloud network interface, storage provider, electronic interface or other storage medium to which Lumesis had access**” would necessarily require the search of each computer and computing device of each Lumesis employee, across multiple platforms, which would require Lumesis to retain forensic experts and third party vendors at substantial cost and inconvenience to itself, its employees, and relevant service providers, causing a great and undue burden for Lumesis. Lumesis has already provided DAC with the sole DAC document it is aware was in its possession.

Request No. 7: All computer artifacts for any computer device (including laptops, desk computers, and tablets) issued to Pendolino by Lumesis, including the Dell XPS desk top computer, serial number H080KB2, sufficient to show whether any DAC Documents, data or information has resided on, has been transmitted to or from, has been stored for any period of time on or in, or has been deleted from any such computer device, or any component or part thereof.

Response/Objection: Lumesis incorporates by reference both its General Objections stated above, and its specific objections stated in its Objections to Requests No. 1, 2, 3, 4, and 5, above. Lumesis specifically objects to Request No. 7 because it calls for the production of documents, as well as “data and information” not identified with reasonable particularity, and not specifically limited to identified DAC Documents containing DAC Trade Secrets that are the subject of the claims in the Complaint.

Request No. 8: All Documents that constitute, reflect or relate to communications between Pendolino and Stifel Financial Corp. or any affiliate of Stifel Financial Corp. (collectively, “Stifel”) or any person or entity acting for Stifel, including Mary McPike.

Response/Objection: Lumesis incorporates by reference its General Objections stated above. Lumesis specifically objects to this request to the extent it seeks (i) documents and information not specifically limited to identified DAC Documents containing DAC Trade Secrets that are the subject of the claims in the Complaint; (ii) documents and communications that predate Pendolino’s employment with Lumesis; (iii) documents and information subject to confidentiality and non-disclosure obligations between Lumesis and Stifel; and (iv) documents and information more readily available elsewhere, namely from Pendolino, a party to this action, Stifel, and Ms. McPike..

Request No. 9: All Documents concerning efforts by Pendolino or Lumesis to develop a Summary Findings Page or other record that serves the same or an equivalent function or object as the DAC Summary Findings Page.

Response/Objection: Lumesis incorporates by reference its General Objections stated above. Lumesis specifically objects to this request to the extent it seeks (i) documents and information not defined with reasonable particularity and/or relevant to the subject of the claims in the Complaint, (ii) not specifically limited to identified DAC Documents containing DAC Trade Secrets that are the subject of the claims in the Complaint, (iii) documents that predate Pendolino's employment with Lumesis, and/or (iv) Privileged Documents. Lumesis does not know what a "Summary Findings Page" or "DAC Summary Findings Page" is.

Request No. 10: All Documents evidencing discussions between Lumesis and Pendolino concerning the recruitment of, relationship with or employment of Pendolino by Lumesis.

Response/Objection: Lumesis incorporates by reference its General Objections stated above. Subject to the foregoing objections and execution of a confidentiality agreement, Lumesis will provide Pendolino's employment agreement to DAC.

Request No. 11: All Documents that constitute, reflect or relate to the employment of Pendolino by Lumesis.

Response/Objection: Lumesis incorporates by reference its General Objections stated above. Subject to the foregoing objections and execution of a confidentiality agreement, Lumesis will provide Pendolino's employment agreement to DAC.

Request No. 13: All Documents that constitute, reflect or relate to any policy or practice of Lumesis pertaining to or governing use by Lumesis employees of any computer issued to such employee by Lumesis or governing use or access to any Lumesis email system, database, shared network drive, cloud network interface, storage provider, electronic interface or storage medium to which Pendolino had access.

Response/Objection: Lumesis incorporates by reference its General Objections stated above. Lumesis specifically objects to this request to the extent it seeks documents and information (i) not specifically limited to identified DAC Documents containing DAC Trade Secrets that are the subject of the claims in the Complaint; (ii) documents and communications that predate Pendolino's employment with Lumesis; and (iii) containing Lumesis Proprietary Information relating to the policies, guidelines, and processes of its business and human resources operations, which are not relevant to the claims set forth in the Complaint.

Request No. 14: A forensic image of any cell phone, tablet, physical storage device, or device or program used to access cloud storage, that was used to copy, download, transmit, receive, open or store any DAC Documents.

Response/Objection: Lumesis incorporates by reference both its General Objections stated above, and its specific objections stated in its Objections to Requests No. 1, 2, 3, 4, and 5, above. Lumesis specifically objects to this Request No. 14 because “**any cell phone, tablet, physical storage device, or device or program used to access cloud storage**” would necessarily require the search of each such device or program of each Lumesis employee, across multiple platforms, which would require Lumesis to retain forensic experts and third party vendors at substantial cost and inconvenience to itself, its employees, and relevant service providers, causing a great and undue burden for Lumesis. Lumesis has already provided DAC with the sole DAC document it is aware was in its possession.

Request No. 15: Any DAC document or information transmitted or stored for any period of time to the Lumesis secure Google drive on the cloud.

Response/Objection: Lumesis incorporates by reference both its General Objections stated above, and its specific objections stated in its Objections to Requests No. 1, 2, 3, 4, 5, 6, and 14 above. Lumesis specifically objects to this Request No. 15 because this request would necessarily require the search of every computer, computing device, or program of each Lumesis employee, across multiple platforms, which would require Lumesis to retain forensic experts and third party vendors at substantial cost and inconvenience to itself, its employees, and relevant service providers, causing a great and undue burden for Lumesis. Lumesis has already provided DAC with the sole DAC document it is aware was in its possession.

Request No. 16: All Documents concerning or containing information created by, in any way communicated or disseminated by, or ever belonging to, DAC, including without limitation: (i) client contracts; (ii) marketing information; (iii) client request for reviews and the summary page of results or other work papers documenting the results of the summary findings; (iv) financial information, including but not limited to profitability and cash flow data; (v) DAC employee compensation and bonus data; and (vi) any other information transferred to you from DAC.

Response/Objection: Lumesis incorporates by reference both its General Objections stated above, and its specific objections stated in its Objections to Requests No. 1, 2, 3, 4, 5, 6, 14, and 15 above. Lumesis specifically objects to this Request No. 16 because the term “Documents” is not defined with any reasonable particularity, and is not limited to those DAC Documents containing the DAC Trade Secrets which are the subject of the claims set forth in the Complaint. This Request is unduly burdensome as it would necessarily require the search of every computer, computing device, or program of each Lumesis employee, across multiple platforms, which would require

Lumesis to retain forensic experts and third party vendors at substantial cost and inconvenience to itself, its employees, and service providers. Lumesis also objects to the Request to the extent it requires production of documents that predate Pendolino's employment with Lumesis, that are Lumesis Proprietary Information, Privileged Information, or otherwise subject to obligations of confidentiality and non-disclosure to third parties. Lumesis is aware of only one DAC document that it ever received, which was already provided to DAC.

Request No. 17: All Documents concerning the use, transfer, communication, deletion or destruction of any Documents covered by this Subpoena.

Response/Objection: Lumesis incorporates by reference both its General Objections stated above, and its specific objections stated in its Objections to Requests No. 1, 2, 3, 4, 5, 6, 14, 15 and 16 above. This Request is unduly burdensome as it would necessarily require the search of every computer, computing device, or program of each Lumesis employee, across multiple platforms, which would require Lumesis to retain forensic experts and third party vendors at substantial cost and inconvenience to itself, its employees, and service providers. Lumesis also objects to the Request to the extent it requires production of documents that predate Pendolino's employment with Lumesis, that are Lumesis Proprietary Information, Privileged Information, or otherwise subject to obligations of confidentiality and non-disclosure to third parties.

Request No. 18: All Documents or information relating to DAC resulting from a search of the Outlook account, including any sent or received mail, of the Dell XPS desk top computer, serial number H080KB2, issued by Lumesis to Pendolino using each of the following search terms:

- DAC
- digital assurance
- summary
- client
- Stifel
- McPike
- Raymond James

Response/Objection: Lumesis incorporates by reference its General Objections stated above. Lumesis specifically objects to this request to the extent it seeks (i) documents and information not specifically limited to identified DAC Documents containing DAC Trade Secrets that are the subject of the claims in the Complaint, (ii) documents and communications that predate Pendolino's employment with Lumesis; and (iii) containing Lumesis Proprietary Information. Lumesis further objects to the request to the extent it calls for a search of the generic terms "summary" and "client", and the terms Stifel, McPike, and Raymond James, to the extent it calls for production of Lumesis' Proprietary Information regarding, *inter alia*, its clients and client

communications, as well as its obligations of confidentiality and non-disclosure to its clients. Lumesis also objects to Request No. 18 to the extent it seeks information already in DAC's possession, or already known or disclosed to DAC, or that is obtainable from source that are more convenient, less burdensome, and/or less expensive, including without limitation, DAC's own clients or former clients.

Subject to the foregoing objections and execution of a confidentiality agreement, Lumesis will conduct and provide DAC with the results of a search of the Outlook account for the Dell XPS desk top computer, serial number H080KB2 for the terms "DAC" and "Digital Assurance".

Request No. 19: All Documents that constitute, reflect or relate to communications between Pendolino or Lumesis and U.S. Bank from October 1, 2016 through November 30, 2016.

Response/Objection: Lumesis incorporates by reference its General Objections stated above. Lumesis incorporates by reference both its General Objections stated above, and its specific objections stated in its Objections to Requests No. 1, 2, 3, 4, 5, 6, 14, 15, 16, and 17 above. This Request is unduly burdensome as it would necessarily require the search of every computer, computing device, or program of each Lumesis employee, across multiple platforms, which would require Lumesis to retain forensic experts and third party vendors at substantial cost and inconvenience to itself, its employees, and service providers. Lumesis also objects to the Request to the extent it requires production of documents that predate Pendolino's employment with Lumesis, that are Lumesis Proprietary Information, Privileged Information, or otherwise subject to obligations of confidentiality and non-disclosure to third parties. Lumesis objects to this Request to the extent it seeks documents and information not specifically limited to identified DAC Documents containing DAC Trade Secrets that are the subject of the claims in the Complaint. Lumesis further objects to this Request to the extent that it seeks any documents or information between Lumesis, a third party not subject to this litigation, and a fourth party. Lumesis further objects to this Request to the extent that it seeks any documents or information between Lumesis and any third party to whom it does or may owe an obligation of confidentiality and non-disclosure, and/or which would disclose Lumesis Proprietary Information. Lumesis additionally objects to this Request to the extent it seeks documents that are not in the possession, custody, or control of Lumesis, or seeks materials available to DAC through sources other than Lumesis, including without limitation DAC's clients or former clients.

Although, pursuant to ongoing efforts by DAC to reach resolution of Lumesis's objections, Lumesis advised on June 27, 2017 that it might produce some documents at some

time this has been an empty promise because nothing further has been produced.⁶ *See Ex.*

4-A (stating:

Notwithstanding the foregoing, we are in the process of reviewing the Requests and, to the extent we have responsive Documents and Things within the scope of the Complaint that are neither confidential nor contain trade secrets, do not require the approval or consent of a third party, are not otherwise privileged, are reasonably accessible, not burdensome, and will not cost Lumesis any further costs and fees than it has already expended on this matter, we will produce them in due course.)

Such a generalized, noncommittal response is similar to that found by this Court to be a “waste[] of time and resources of the parties and the court.” *Polycarpe*, 2017 WL 2257571, at *4 (citing numerous cases).

Similarly, although Lumesis stated in its Second Amended Responses to Requests 10, 11, and 18, that it would produce some documentation in partial response to the request, no such production has been made.⁷ Indeed, prior to DAC filing this Amended motion (*see supra* fn. 1), and within minutes of the parties’ telephone conference on August 22, Lumesis filed a lengthy motion to quash the subpoena, thus demonstrating its continued objection to producing any responsive documents.

⁶ Lumesis attached a single email chain between Lumesis employees and Stifel employees to the June 27, 2017 letter, *see Ex. 4-A*, as well as a copy of DAC’s Summary Findings Report apparently from Stifel (DAC refrains from attaching this document as it contains confidential and trade secret information).

⁷ Lumesis has given no timeframe for when it might produce any such documents. Furthermore, even if Lumesis does voluntarily produce the documents promised in responses 10, 11, and 18, such documents would be a narrow carve-out of what was requested by DAC. By Lumesis filing a motion to quash the subpoena [Doc. 67] on this date, it calls into question whether it had any intention to produce the limited documents mentioned in responses 10, 11, and 18.

B. The Objections Should Be Overruled and Production Compelled

The Federal Rules of Civil Procedure “strongly favor full discovery whenever possible.” *Farnsworth v. Proctor & Gamble Co.*, 758 F.2d 1545, 1547 (11th Cir. 1985). It is well-settled that discovery is broad and “a party may use a Rule 45 subpoena to ‘obtain discovery regarding any non-privileged matter that is relevant to any party’s claim or defense.’” *Madeline*, 2009 WL 1563526, at *1 (citing Fed.R.Civ.P. 26(b)(1)); *Baptiste*, 2013 WL 3196758, at *2; *accord Chambers*, 2013 WL 1775046, at *3. Such “[i]nformation can be relevant and therefore discoverable, even if not admissible at trial, so long as the information is reasonably calculated to lead to the discovery of admissible evidence.” *Anglin v. Maxim Healthcare Servs., Inc.*, No. 6:08-cv-689-Orl-22DAB, 2009 WL 928305, at *1 (M.D. Fla. Apr. 3, 2009) (denying motion to quash). This broad scope of non-party discovery is among the reasons that “a Rule 45 subpoena should be enforced unless it is clear ‘that the evidence sought can have no possible bearing on the issues.’” *Benavides v. Velocity IQ, Inc.*, No. 8:05-CV-1536-T-30, 2006 WL 680656, at *2 (M.D. Fla. Mar. 15, 2006) (internal citations omitted).

DAC’s requests seek documents and electronically stored information pertaining to Pendolino’s and Lumesis’s apparent access to and use of DAC’s proprietary and confidential business information, including but not limited to DAC’s *Summary Findings Page* which is a proprietary product provided to DAC customers under restrictions relating to its use. DAC also seeks documents and things necessary to answer the question whether Defendant Pendolino took, used, and delivered to Lumesis DAC confidential information obtained through improperly accessing the Lumesis share drive; whether that material was improperly

copied or transmitted for purposes unrelated to DAC's business; and whether any of that confidential DAC information was transmitted to Lumesis and Lumesis's computer systems. Finally, DAC has requested documents and information which evidence Lumesis's solicitation of DAC's customer, Stifel Financial Corporation, by using DAC's proprietary information or a product strikingly similar to DAC's Summary Findings Page and whether that product was developed through the improper use of DAC confidential information. Defendant Pendolino had direct access to Stifel Financial Corporation when he was working at DAC. All of these requests are directly related to DAC's claims in the complaint against Pendolino and similarly are relevant to DAC's claims in the proposed Amended Complaint against Lumesis.

In response to DAC's request for highly relevant documents, Lumesis has offered boilerplate objections, stating that each of DAC's requests are "overly broad," "not relevant" and "unduly burdensome." Use of such boilerplate objections is routinely and almost uniformly rejected by this and other federal courts. *See Polycarpe*, 2017 WL 2257571, at *2 ("Objections which state that a discovery request is 'vague, overly broad, or unduly burdensome' are, by themselves, meaningless, and are deemed without merit.") (citing *Siddiq v. Saudi Arabian Airlines Corp.*, No. 6:11-cv-69-Orl-19GJK, 2011 WL 6936485, at *3 (M.D. Fla. Dec. 7, 2011) (internal citation omitted); *see also Chambers*, 2013 WL 1775046, at *3 ("boilerplate objections are, as one Court observed, 'ironically, themselves overbroad and vague.'") (internal citation omitted).

As mentioned above, after receipt of the objections, counsel for DAC initiated communications with counsel for Lumesis, both by email and telephone, to address the

deficiency of the responses and to propose entering into a confidentiality agreement to alleviate Lumesis's stated concerns regarding its contention that the requested Lumesis documents warrant special confidentiality protection. While DAC's telephone discussion with counsel for Lumesis on August 16, 2017, therein advising of DAC's intent to file this motion, resulted in Lumesis agreeing to enter into the confidentiality agreement, the issue of Lumesis's blanket objections to DAC's document requests remains unresolved. Indeed, in a follow-up discussion on the same date as this amended filing, counsel for Lumesis again confirmed its position that DAC's subpoena requests were overbroad and unduly burdensome remained unchanged and, in fact, Lumesis requested DAC withdraw the subpoena to avoid a motion to quash.

The party objecting to a subpoena bears the burden of establishing that its objections should be sustained, and "generic, non-specific objections, intoning the same boilerplate language, are inconsistent with both the letter and the spirit of the Federal Rules of Civil Procedure." *Fin. Bus. Equip. Solutions, Inc. v. Quality Data Sys.*, No. 08-60769-CIV, 2008 WL 4663277, at *5 (S.D. Fla. Oct. 21, 2008). Lumesis has offered nothing other than generic objections. Therefore, its objections should be overruled and the documents compelled to be produced.

CONCLUSION

For the reasons discussed above, DAC requests that the Court overrule Lumesis's objections and compel production of the documents and information requested in DAC's subpoena.

3.01(g) CERTIFICATION

In accordance with Local Rule 3.01(g), the undersigned certifies that counsel for Plaintiff and counsel for Defendant Pendolino and non-party Lumesis have conferred by telephone in lengthy calls on May 30, 2017 and June 16, 2017, and by numerous emails and letters from the service of the subpoena to the present. On August 8, 2017, counsel for DAC again requested consensus on the confidentiality agreement, which was rejected on that same date by Lumesis's counsel. On August 16, 2017 counsel for DAC spoke with counsel for Lumesis by telephone again requesting resolution of the confidentiality and advising of DAC's intention to seek an order compelling production from the Court and imposition of a confidentiality order. By follow-up communication on August 17, 2017, counsel for Lumesis agreed to withdraw its objectionable provision from the confidentiality agreement; however, no resolution was reached with respect to the objections to DAC's document request.

Following DAC's filing of the motion to compel on August 18, counsel for DAC and Lumesis engaged in another telephone conference on August 22, 2017 (the date of this filing). During this conference, counsel for Lumesis confirmed Lumesis's objections to DAC's subpoena remained unchanged, and advised that Lumesis intended to file a motion to quash the subpoena. Shortly thereafter, Lumesis filed its motion to quash [Doc. 67]. The filing of the motion to quash calls into question whether Lumesis ever intended to produce any documents, even once the confidentiality agreement was executed (which has not yet occurred). Thus, despite the many communications, the parties have been unable to reach any agreement with respect to DAC's request for production of documents and electronic information.

Dated: August 22, 2017

/s/ T. Todd Pittenger

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Attorneys for Plaintiff

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on August 22, 2017, 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 attorneys of record. I further CERTIFY that on August 22, 2017, I served the foregoing via email upon counsel for Lumesis, Inc.: Jill Riola, and Daniel Johnson, Carlton Fields, 450 S. Orange Ave., STE 500, Orlando, FL 32801-3370, *jriola@carltonfields.com*, *djohnson@carltonfields.com*; and Steven Pacini, Latham & Watkins, 200 Clarendon St., Boston, MA 02116, *Steven.Pacini@lw.com*.

/s/ T. Todd Pittenger

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