

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

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INSITUFORM TECHNOLOGIES, INC., )  
and INA ACQUISITIONS CORP., )  
 )  
Plaintiffs, )  
 )  
vs. ) No. 05-2414-MlV  
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 )  
PER AARSLEFF A/S, AARSLEFF )  
RÖRTEKNIK AB, and AARSLEFF OY, )  
 )  
Defendants. )

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ORDER DENYING PLAINTIFFS' MOTION  
TO COMPEL PRODUCTION OF DOCUMENTS

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Before the court is the January 9, 2008 motion of the plaintiffs, Insituform Technologies, Inc., and INA Acquisitions Corp. (collectively "Insituform"), seeking an order compelling the defendants, Per Aarsleff A/S, Aarsleff Rörteknik AB, and Aarsleff OY (collectively "Per Aarsleff"), to produce documents responsive to Request Nos. 5 and 6 of Insituform's Third Request for Production of Documents. Insituform contends it needs the documents in order to properly determine its damages. Per Aarsleff opposes the motion on the grounds that the requested documents are confidential, irrelevant, incapable of aiding Insituform in any damages determination, and that production would cause the company to violate Danish law. The motion was referred to the United States Magistrate Judge for determination. For the reasons below,

the motion is denied.

#### BACKGROUND

This case includes claims involving breach of contract, misappropriation of trade secrets, and fraud. Specifically, Insituform alleges that Per Aarsleff failed to pay certain royalties owed under licensing agreements. (Pls.' Supplemental Mem. Supp. 1.) The licensing agreement provided that Per Aarsleff was to pay royalties amounting to a certain percentage of the contract price of jobs performed using the Insituform Process, a proprietary process for relining sewer pipes developed by Insituform. (*Id.*) These royalty licensing agreements covered work done by Per Aarsleff in Denmark, Poland, Sweden, and Finland, among other territories. (*Id.*)

During the relevant proceedings, the scope of the present motion has narrowed considerably. In its initial form, Insituform's motion sought five types of documents from Per Aarsleff, namely Per Aarsleff's 1) non-audited financial statements, 2) internal financial reports prepared for its board of directors, 3) financial reports from its subsidiaries used to prepare its consolidated financials, 4) other consolidating financial statements, and 5) consolidated financials for its Pipe Technologies division. (Pls.' Mem. Supp. 4.) Insituform argued that the documents were relevant to establishing both damages from

unpaid royalties and punitive damages.<sup>1</sup> (*Id.* at 4-6.) It also asserted that compelling the production of the requested documents placed no undue burden on Per Aarsleff. (*Id.* at 6-8.) In opposition to the motion, Per Aarsleff has argued that the documents sought by Insituform do not provide any information that will assist it in quantifying the royalty base and that compelled production would put Per Aarsleff at risk of violating Danish law. (Defs.' Resp. Opp'n 9-13.)

Pursuant to the motion, a telephonic hearing was held on April 10, 2008, during which the scope of this discovery dispute was narrowed down. As indicated by Per Aarsleff, the only way to determine the amount of revenue generated from its use of the Insituform Process is to review individual job files. (Defs.' Supplemental Mem. Opp'n 3.) During the hearing, Insituform explained that it had hired accountants in Denmark, Sweden, Finland, and Poland to review Per Aarsleff's job files. Insituform claimed that, after reviewing the job files, the accountants determined that some job file numbers were missing from the numbered sequences they reviewed. It now contends that it needs the additional financial information in order to quantify the revenues associated with the missing job files.

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<sup>1</sup> On February 22, 2008, the court dismissed Insituform's fraud claims and request for punitive damages. (Order, Doc. No. 145, Feb. 22, 2008.) Therefore, relevancy to punitive damages is not a basis for compelling production of the requested documents.

In its original response in opposition to the present motion, Per Aarsleff attached a declaration from John Szygenda, the Financial Director for Per Aarsleff A/S. (Defs.' Resp. Opp'n Ex. A.) That declaration also included two redacted financial documents (referred to individually as "Exhibit A-A" and "Exhibit A-B") intended to show that the type of information sought by Insituform was not contained in any documents held by Per Aarsleff. (See Exs. A, B, attached to Defs.' Resp. Opp'n Ex. A.) During the hearing, when asked by the court to indicate specific portions of Exhibits A-A and A-B that would assist it in quantifying the revenues and royalties, Insituform referred the court to page 4 of Exhibit A-B. Insituform stated that it sought to compare the information on page 4 of Exhibit A-B regarding revenues earned by the Pipe Technologies division with the revenues shown in Per Aarsleff's job files that were previously inspected. It claimed that comparing the two sources of information will allow its accountants to quantify any discrepancies.

At the close of the hearing on April 10, 2008, the court directed Insituform to file supplemental materials from its accountants indicating precisely how the information identified on page 4 of Exhibit A-B would provide information beyond what was contained in the financial statements already produced and how it would assist in quantifying the Pipe Technologies revenue. The court also stated that it would not consider the motion to compel

for any of the other internal financial documents requested in the original motion outside of page 4 of Exhibit A-B, as identified by Insituform's counsel, because the requests seemed overly broad and the documents appeared irrelevant to the issues in the case.

As such, the issues remaining in this motion are substantially smaller in scope than those presented in the initial motion to compel. Specifically, it must be determined if page 4 of Exhibit A-B is relevant to Insituform's damages calculations, and, if so, whether compelling production of such internal financial information would place an undue burden on Per Aarsleff due to possible adverse consequences under Danish law.

#### ANALYSIS

The Federal Rules of Civil Procedure permit discovery "regarding any nonprivileged matter that is relevant to any party's claim or defense." FED. R. CIV. P. 26(b)(1). Relevance for purposes of discovery is, of course, defined very broadly. See, e.g., *Andritz-Sprout-Bauer, Inc. v. Beazer East, Inc.*, 174 F.R.D. 609, 631 (M.D. Pa. 1997). The information sought need not be admissible in court in order to be relevant. Rather, the relevance burden is met if the party can show that the information sought "appears reasonably calculated to lead to the discovery of admissible evidence." FED. R. CIV. P. 26(b)(1). Nevertheless, the right to discovery is not unlimited, and does have "ultimate and necessary boundaries." *Hickman v. Taylor*, 329 U.S. 495, 497

(1947). Discovery may be denied "where, in the court's judgment, the inquiry lies in a speculative area." *Micro Motion, Inc. v. Kane Steel Co., Inc.*, 894 F.2d 1318, 1326 (Fed. Cir. 1990).

When an objection to the relevance of the information sought is raised, the burden is on the party seeking the information to demonstrate that the requests are relevant to the subject matter involved in the pending action. See *Andritz-Sprout-Bauer*, 174 F.R.D. at 631 (internal citations omitted). Once the party seeking discovery demonstrates relevancy, the party resisting discovery "bears the burden of demonstrating why the request is unduly burdensome or otherwise not discoverable under the Federal Rules." *Westbrook v. Charlie Sciara & Son Produce Co., Inc.*, No. 07-2657 Ma/P, 2008 WL 839745, at \*2 (W.D. Tenn. Mar. 27, 2008).

In the current case, Insituform has failed to adequately demonstrate how the information contained in Per Aarsleff's internal documents is relevant. During the hearing on April 10, the court, concerned that the information sought by Insituform may be in a speculative area, specifically asked Insituform to supplement its pleadings with statements from its accountants detailing *precisely* how the requested information would be useful, i.e., relevant, in determining damages. Insituform complied, submitting the declaration of Jørgen Jakobsen, a certified accountant hired to review Per Aarsleff's job files in Denmark. (See Pls.' Supplemental Mem. Supp. Ex. A.) Jakobsen's declaration,

however, only contained a one-sentence, conclusory assertion that reviewing the non-redacted information contained on page 4 of Exhibit A-B would allow him to determine the total amount invoiced by Per Aarsleff's Pipe Technologies division for the job files he reviewed.<sup>2</sup> (Jakobsen Decl. ¶ 10.) This is not the type of statement that precisely shows how the information is relevant. Notably, Jakobsen does not describe any formulas or calculations that require the information contained in the requested document or give any examples of how that information is relevant in light of the information already produced by Par Aarsleff.

Furthermore, Jakobsen states in his declaration that "the other accountants employed by Insituform in Sweden, Finland, and Poland would also be able to determine the amount of revenue attributable to missing job files in each of those territories." (*Id.* at ¶ 12.) The court notes that Jakobsen is not a proper witness to testify as to what information may or may not be needed by accountants in other countries. In fact, contrary to Jakobsen's assertion, the accounting report regarding Per Aarsleff's

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<sup>2</sup> Specifically, Jackobsen's declaration stated:

If I were able to review the non-redacted internal financial statements of Per Aarsleff and its subsidiaries with segmentation on geographical and 'line of work' segments including elimination of internal invoices [page 4 of Exhibit A-B], I would be able to determine the total amount invoiced by Pipe Technologies in each of the years I reviewed job files.

(Jakobsen Decl. ¶ 10.)

operations in Finland concludes that "the amount of missing [job files] is not alarming," thus suggesting that there is not even a need for the information requested from page 4 of Exhibit A-B to properly quantify revenues and royalties. (See Defs.' Supplemental Mem. Opp'n Ex. 4 at 3.) Therefore, Insituform has only supplemented its pleadings regarding how the information could possibly be relevant in Denmark. This also falls short of the court's request that Insituform clearly and accurately describe why the information is relevant to the matters in this case.

In finding that Insituform has failed to show how the information it seeks is relevant to its damages calculations, the court also notes that John Szygenda, the Financial Director for Per Aarsleff A/S, describes in his declaration how all of the information Jakobsen declares that he needs is readily and more accurately available in the annual financial statements already produced for Insituform. (Defs.' Supplemental Mem. Opp'n Ex. 5 ¶¶ 7-12.)

Lastly, because Insituform has failed to adequately demonstrate the relevance of the information contained in the documents at issue, the court need not reach the question of whether compelled production of the documents would create an undue burden by causing possible violations of Danish law.

#### CONCLUSION

For the reasons stated above, Insituform has failed to show

how the information contained within the requested documents is relevant to determining its damages calculations. Accordingly, this court finds that the information is irrelevant and undiscoverable under Rule 26. Insituform's motion to compel is therefore DENIED.

IT IS SO ORDERED this 27th day of May, 2008.

/s/ Diane K. Vescovo  
DIANE K. VESCOVO  
UNITED STATES MAGISTRATE JUDGE