

**IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS  
COUNTY DEPARTMENT, LAW DIVISION**

Percussionaire Corporation, an Idaho corporation,)

Plaintiff,

v.

Adel Bougatef, M.D. and Marleen De Heyn,  
a husband and wife and the marital  
community thereof,

Defendants.

No. 15 L 8054

**MEMORANDUM OPINION AND ORDER**

Illinois Supreme Court Rule 204(b) authorizes Illinois courts to assist parties with in-state discovery related to out-of-state litigation. This court previously issued an order for document production by and the depositions of various Illinois residents related to an Idaho lawsuit. Since Rule 204(a) authorized this court's prior order and there exists no reason to alter it, the respondents' motion to vacate must be denied.

**RELEVANT FACTS**

An identically captioned case is pending before Judge Barbara A. Buchanan in the District Court of the First Judicial District of the State of Idaho, in and for the County of Bonner. In that case, Percussionaire Corporation filed a complaint raising claims for breach of contract, breach of fiduciary duty, breach of the Idaho Trade Secrets Act, interference with contract, and injunctive relief stemming from the defendants' employment with and termination of employment from Percussionaire.

On July 31, 2015, Judge Buchanan ordered the issuance of foreign commissions and letters rogatory for the depositions of and

production of documents by: Tamara Muller, Independence Plus, Inc., Circuitlife LLC, Ventilife LLC, Herman J. Marino, Richard M. LaBarge, Tom Ross, Marshall, Gerstein & Borun, LLP, StarFish Medical, and Vincent Crabtree. The order requests the permission from courts of the jurisdictions in which those persons or corporate entities reside to allow for document production and depositions. Judge Buchanan explicitly wrote that: "Based on prior sanction orders of this Court, the depositions and production of documents shall proceed as though no privilege exists between Defendants, their counsel or third parties." She also wrote that: "It is requested that any issues as to the scope of these discovery depositions should be directed to this Court for resolution." On August 5, 2015, Judge Buchanan issued a supplemental order using identical language adding Plenary Partners, LLC to the list of persons and corporate entities subject to deposition and document production.

On August 6, 2015, Percussionaire filed in the Circuit Court of Cook County a petition (plus 13 exhibits) for the issuance of subpoenas in aid of foreign jurisdiction as authorized by Supreme Court Rule 204(b).<sup>1</sup> The next day, August 7, this court granted the petition and entered an order for the issuance of subpoenas and for the production of documents and depositions of: Muller, Independence Plus, Circuitlife, Ventilife, Marino, LaBarge, Marshall, Gerstein & Borun, and Plenary Partners. This court assumes that the other persons and corporate entities named in Judge Buchanan's orders reside in other jurisdictions.

On August 11, 2015, Judge Buchanan issued an order outlining the defendants' "clear pattern of evasion and delay" in the Idaho case and their failure to comply with "previous lesser sanctions" imposed to elicit the production of various documents. As a result, Judge Buchanan ordered that: (1) the defendants' remaining counterclaims and affirmative defenses be dismissed with prejudice; and (2) a

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<sup>1</sup> In this and other pleadings, the parties refer to "30(b)(6)," which is, of course, Federal Rule of Civil Procedure 30(b)(6). This court should not have to remind the parties that the federal rules are inapplicable in Illinois state court. The Illinois Supreme Court has provided Rule 206(a)(1) for the same purpose.

default judgment be entered on Percussionaire's claims for breach of contract, breach of fiduciary duty, and breach of the Idaho Trade Secrets Act.

On August 24, 2015, the Illinois respondents identified above (except Plenary Partners) filed a motion to vacate this court's August 7 order for the production of documents and issuance of subpoenas.

On September 3, 2015, Judge Buchanan granted, in part, the defendants' motion to reconsider her earlier rulings, and on September 4 she issued amended orders covering all persons and corporate entities from whom and from which Percussionaire seeks discovery. In those orders, she modified the scope of discovery to read: "Based on prior sanction orders of this [c]ourt, the depositions and production of documents shall proceed as though no privilege exists between Defendants, their counsel or [any] third party[, provided the information or document being sought is related to this case and has been shared with that third party.]" (The bracketed text indicates a change from the July 31 and August 5 orders.)

On September 4, 2015, Plenary Partners filed a motion to join the other respondents' motion to vacate this court's August 7 order.

On September 8, 2015 Percussionaire filed its response to the motion to vacate. The next day, September 9, the respondents presented to this court the motion to vacate. At that time, Percussionaire supplied this court with its response. The court indicated that it would take this matter under advisement and ordered the parties to return on September 16 at 1:00 p.m.

## ANALYSIS

The respondents' motion to vacate presents five arguments. First, the respondents argue that the need for discovery "has been largely disposed [off]" by Judge Buchanan's August 7 default order. Mtn. at 1. Second, they argue that the document requests are extensive and seek the production of "proprietary, confidential, and privileged information." *Id.* at 2. Third, the respondents argue that

three of the subpoenas are inappropriate since they are directed to attorneys who undoubtedly have concerns about privileged communications, *id.* at 5-9, while three others are extensive and directed to non-parties who also have concerns about privileged communications. *Id.* at 9-13. Fourth, the respondents argue that Percussionaire's motion "makes no attempt to explain how this information is even remotely relevant. . . ." *Id.* at 2 & *passim*. Fifth, they argue that Percussionaire is asking this court to use Supreme Court Rule 204(b) to trump Rule 224. Each argument is addressed *seriatim*.

As to the argument that this discovery is unnecessary, this court begins its analysis by focusing on Judge Buchanan's August 7 order. That order entered a default judgment against the defendants on three causes of action – breach of contract, breach of fiduciary duty, and breach of the Idaho Trade Secrets Act. That same order is, however, silent as to the remaining two causes of action for interference with contract and injunctive relief stemming from the defendants' employment with and termination of employment from Percussionaire. While the record provided to this court is incomplete, it may very well be that the discovery Judge Buchanan ordered is necessary to arrive at a damages figure for the defaulted causes of action. It may also be that the discovery is necessary to determine liability and damages as to the two remaining causes of action. This court has no basis to second guess the need for discovery and, therefore, will not do so.

The respondents' inferred temporal argument is also off point. That Judge Buchanan's August 11 order entered a default on some claims does not imply that she forgot her prior rulings. The July 31 and August 5 orders authorized out-of-state discovery; the August 11 order imposed sanctions against the defendants. Those orders patently serve two distinct purposes. Had Judge Buchanan wanted to modify or vacate her earlier orders, she certainly could have done so in her August 11 order. Even more pertinent, if the respondents wanted Judge Buchanan to modify or vacate her earlier orders, they had the burden to bring the proper motion before her, not this court.

The inexorable conclusion is that Judge Buchanan wants the out-of-state discovery to go forward.

The respondents' second, third, and fourth arguments may be addressed together for each is similarly flawed. These arguments are the respondents' transparent attempt to ask this court rewrite Judge Buchanan's prior orders. Such a request is nothing short of impertinence. Supreme Court Rule 204(b) does not authorize this court to make such a change. The rule narrowly permits a court to issue an order, "to compel the giving of testimony by the deponent." Ill. S. Ct. R. 204(b). Apart from the rule, even if this court has the discretion to rewrite an interlocutory order from a judge in another jurisdiction, this court refuses to exercise that discretion. This is Judge Buchanan's case. She knows the facts. She knows the relevant Idaho law. She knows the procedural posture of the case.

All of which brings this court back to the July 31 and August 5 orders. Judge Buchanan patently foresaw the possibility that the defendants and respondents might seek an end run around her orders. She, therefore, wisely included in her July 31 and August 5 orders the sentence: "It is requested that any issues as to the scope of these discovery depositions should be directed to this Court for resolution." While Judge Buchanan refers only to depositions, this court will infer the sentence's equal application to document requests. That is the only fair reading possible since the earlier orders call for some witnesses to produce documents and be deposed while others are, at least at this stage, only to produce documents. In short, if the respondents have a problem with the scope of Judge Buchanan's orders, clarification is available in Coeur d'Alene, not Chicago.

It is apparent from the fifth argument that the respondents do not understand the plain distinction between Supreme Court Rules 204(b) and Rule 224. The former authorizes Illinois courts to assist parties in out-of-state litigation that need to obtain discovery from Illinois residents. The latter is reserved for soon-to-be-*Illinois* plaintiffs to petition *Illinois* courts to request limited discovery before filing a complaint in *Illinois* to identify properly those to be named as defendants in an *Illinois* lawsuit. Other than sharing a capital "I,"

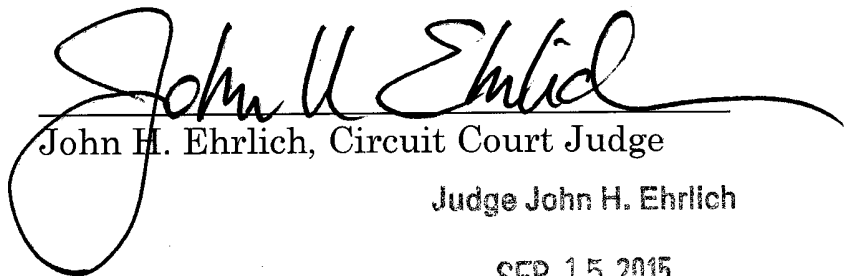
Illinois and Idaho are distinct. Quite simply, Rule 224 is inapplicable here.

## CONCLUSION

Percussionaire seeks an order from this court imposing on the respondents the fees and costs associated with responding to their motion. Whether the respondents' motion to vacate is the basis for further sanctions is an issue solely for Judge Buchanan. Based on this court's limited jurisdiction in this matter,

### IT IS ORDERED THAT:

1. The respondents' motion to vacate this court's August 7, 2015 order is denied;
2. Percussionaire's motion for fees and costs is denied without prejudice to be raised in the proper jurisdiction;
3. This order is not subject to reconsideration and any motion for reconsideration filed will be stricken for lack of jurisdiction;
4. The respondents are given 35 days, until October 20, 2015 to produce the documents requested by Percussionaire and subject to Judge Buchanan's prior orders;
5. The case management conference and ruling on this matter previously scheduled for September 16, 2015 at 1:00 p.m. is stricken, no further date being necessary; and
6. This court shall retain jurisdiction over this matter solely for the purpose of enforcing the subpoenas issued for document production and depositions based on future motions of the parties.



John H. Ehrlich, Circuit Court Judge

Judge John H. Ehrlich

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Circuit Court 2075