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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

NUVASIVE, INC.,  
  
Plaintiff,  
  
v.  
  
ABSOLUTE MEDICAL, LLC, et al.,  
  
Defendants.

Case No.: 18cv1844-GPC-MDD

**ORDER ON NUVASIVE’S  
MOTIONS TO COMPEL NON-  
PARTIES ALPHATEC SPINE INC.,  
PATRICK MILES AND CRAIG  
HUNSAKER TO COMPLY WITH  
SUBPOENAS**

**[ECF NOS. 2, 9 and 10]**

BACKGROUND

Before the Court are three motions to compel compliance with subpoenas issued in connection with a case pending in the Middle District of Florida, *NuVasive Inc. v. Absolute Medical, LLC, Absolute Medical Systems, LLC, Greg Soufleris, Dave Hawley and Ryan Miller*, Civil Case No. 6:17cv2206-ORL-41GJK. The lawsuit alleges that Defendant Absolute Medical, LLC, violated a contract with Plaintiff in which Defendant was bound to sell Plaintiff’s products exclusively. The Complaint alleges that

1 Defendant Soufleris, the owner of Absolute Medical, LLC, formed Absolute  
2 Medical Systems, LLC, (“AMS”) to avoid contractual limitations. Defendants  
3 Hawley and Miller are alleged to be salespersons who participated in the  
4 breach of contract by selling and attempting to sell competitor’s products. A  
5 copy of the First Amended Complaint in the underlying action was filed in  
6 connection with this motion at ECF No. 9-3. The FAC identifies the  
7 competitor as Alphatec Spine, Inc. NuVasive has sued Alphatec for patent  
8 infringement in this Court in Case No. 18-cv-0347-CAB-MDD.

9 Pursuant to Rule 45, Fed. R. Civ.P., Plaintiff served subpoenas duces  
10 tecum upon Alphatec, its CEO and Chairman, Patrick Miles, and its General  
11 Counsel, Craig Hunsaker. Each objected to the subpoenas and did not  
12 comply. Plaintiff moved to compel Alphatec to comply on August 6, 2018.  
13 (ECF No. 2). On August 17, 2018, Plaintiff moved to compel Mr. Miles (ECF  
14 No. 10) and Mr. Hunsaker (ECF No. 9) to comply. Each timely responded in  
15 opposition.

### 16 LEGAL STANDARDS

17 Rule 45 governs obtaining information by subpoena from non-parties.  
18 Under Rule 45(d)(1), the requesting party or attorney “must take reasonable  
19 steps to avoid imposing undue burden or expense on a person subject to the  
20 subpoena.” A non-party subject to a subpoena duces tecum “deserve[s] extra  
21 protection from the courts.” *High Tech Medical Instrumentation v. New*  
22 *Image Indus.*, 161 F.R.D. 86, 88 (N.D.Cal.1995) (citing *United States v.*  
23 *Columbia Broadcasting System*, 666 F.2d 364, 371–72 (9th Cir.1982)).  
24 And, Rule 45(d)(1) requires this Court, the court where compliance is  
25 required, to “enforce this duty and impose an appropriate sanction . . . on a  
26 party or attorney who fails to comply.”

27 Apart from the special duty imposed on the requesting party by Rule

1 45(d)(1), Rule 26(b), Fed. R. Civ. P., provides that discovery may be obtained  
2 only if it is relevant to any party's claim or defense and proportional to the  
3 needs of the case. *See Soto v. Castlerock Farming & Transp., Inc.*, 282 F.R.D.  
4 492, 503 (E.D. Cal. 2012).

#### 5 DISCUSSION

6 First, regarding relevance, Plaintiff states, upon information and belief,  
7 that the respondents have relevant information because of the allegations in  
8 the underlying action that Defendants breached their agreements with  
9 Plaintiff by selling Alphatec products. (*See* ECF No. 2 at 6, ECF No. 9-1 at 5,  
10 ECF No. 10-1 at 5). This assertion, coupled with an alleged admission by  
11 Defendant Soufleris that he and Defendant Hawley communicated with  
12 Alphatec, is sufficient to satisfy the relevance requirement for the subpoena  
13 to Alphatec. But there is nothing in the pleadings nor in the FAC to support  
14 Plaintiff's "information and belief" that Mr. Miles or Mr. Hunsaker personally  
15 have relevant information. On this basis alone, the Court denies the motion  
16 to compel and quashes the subpoenas to Mr. Miles and Mr. Hunsaker.

17 Also, the subpoenas to Mr. Miles and Mr. Hunsaker, which appear to be  
18 identical, call for the production of business communications and documents  
19 of Alphatec. Plaintiff presents nothing suggesting that these individuals  
20 possess information beyond that which could be obtained from Alphatec.  
21 Moreover, to the extent that the subpoenas call for the production of  
22 documents and communications with Defendants, Plaintiff provides no basis  
23 for believing that this information is not available from Defendants. Courts  
24 have expressed a preference for parties to obtain discovery from one another  
25 before burdening non-parties with discovery requests. *See Soto*, 282 F.R.D.  
26 at 505. Plaintiff admits to having received many of the documents requested  
27 in the subpoena from Defendants including agreements, sales and

1 commission data and communications between Alphatec and Absolute  
2 Medical employees. (See ECF No. 2 at 9). Plaintiff does not suggest that the  
3 production had gaps that may be remedied by obtaining the requested  
4 information from these individuals. See *Shasta Linen Supply, Inc., v.*  
5 *Applied Underwriters, Inc.*, Nos. 2:16-cv-00158 and 01211, 2018 WL 2981827  
6 \*4 (E.D. Ca. June 14, 2018). Consequently, in addition to denying the  
7 motions to compel compliance by Mr. Miles and Mr. Hunsaker because of lack  
8 of relevance, the motions are denied for Plaintiff's failure to take reasonable  
9 steps to avoid an undue burden upon these individuals.

10 Regarding the subpoena to Alphatec, although general relevance has  
11 been demonstrated, the Court finds that Plaintiff failed to take reasonable  
12 steps to avoid undue burden to Alphatec and has not demonstrated relevance  
13 regarding certain requests. As mentioned above, Plaintiff admits to having  
14 received many of the documents requested in the subpoena from Defendants  
15 including agreements, sales and commission data and communications  
16 between Alphatec and Absolute Medical employees. (See ECF No. 2 at 9).  
17 Plaintiff does not suggest that the production had gaps that may be remedied  
18 by obtaining the requested information from Alphatec. See *Shasta Linen*  
19 *Supply, Inc., v. Applied Underwriters, Inc.*, Nos. 2:16-cv-00158 and 01211,  
20 2018 WL 2981827 \*4 (E.D. Ca. June 14, 2018). Plaintiff asserts that  
21 communications between Alphatec and individuals not employed by  
22 Defendants could not be obtained from Defendants. Plaintiff does not  
23 identify those individuals in their brief but a review of the subpoena leads the  
24 Court to believe that Plaintiff is referring to "Liz Lukianov" and "Brian  
25 Gottstein." (See ECF No. 11-2 at 10-11).

26 In the FAC, Mr. Gottstein is alleged to be a former employee of Absolute  
27 who now works for Alphatec. No reason, beyond that, is given to support

1 asserted information and belief that all of Alphatec's communications with  
2 Mr. Gottstein are relevant. At a minimum, the Gottstein requests are  
3 overbroad. Moreover, if the allegation is that Mr. Gottstein assisted in  
4 Absolute's breach of contract while he was employed with Absolute, those  
5 records should be obtained in the first instance from Absolute or a more  
6 focused request should have been propounded. The Court could not find a  
7 reference to Ms. Lukianov in the FAC nor in Plaintiff's moving papers.

### 8 SANCTIONS

9 Having found the subpoenas were served by Plaintiff without taking  
10 reasonable steps to avoid imposing an undue burden, the Court is required,  
11 under Rule 45(d)(1), to consider sanctions. Regarding the subpoena to  
12 Alphatec, the Court finds that sanctions are not warranted because the  
13 majority of the information sought is relevant. Plaintiff's error is in failing to  
14 demonstrate that the production of these very records from Defendants was  
15 insufficient. To the extent that Plaintiff failed to demonstrate relevance  
16 regarding Ms. Lukianov and Mr. Gottstein, although sanctions could be  
17 awarded regarding that portion of the request, respondent Alphatec spent  
18 little to no time addressing these individuals.

19 It is a different matter regarding the subpoenas to Patrick Miles and  
20 Craig Hunsaker. Plaintiff provides no basis to believe that these individuals,  
21 the CEO and General Counsel respectively of Alphatec, personally possess  
22 the information requested. The Court is of the firm belief that the subpoenas  
23 to these individuals were served in bad faith, intended only to harass. The  
24 Court believes that the reasonable attorney's fees incurred by Mr. Miles and  
25 Mr. Hunsaker should be recovered from Plaintiff.

26 Mr. Miles and Mr. Hunsaker had the same lawyer, Keith M. Cochran,  
27 Esquire, who submitted declarations regarding his background, the time

