

**UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
WESTERN DIVISION**

Midwest Engineering Services, Inc.,)
Professional Service Industries, Inc.,)
GME Consultants, Inc., and)
GME Consultants of Illinois, Inc.,)

Plaintiffs,)

v.)

International Union of Operating Engineers,)
Local 150, AFL-CIO, *et al.*,)
Defendants.)

Case No. 05 C 50023

JURY TRIAL REQUESTED

NOTICE OF MOTION

TO:

Mr. Christopher J. Cocoma
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YOU ARE HEREBY NOTIFIED that on **Wednesday, October 5, 2005, at 1:30 p.m.**, or as soon thereafter as counsel can be heard, we shall appear before the Honorable P. Michael Mahoney, Magistrate Judge of the Northern District of Illinois, Western Division, and then and there present **Defendant Local 150's Motion for Protective Order**, a copy of which is hereby served upon you.

By: s/Dale D. Pierson
One of the Attorneys for Defendant Local 150

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DEFENDANT LOCAL 150'S MOTION FOR PROTECTIVE ORDER

Defendant, International Union of Operating Engineers, Local 150, AFL-CIO (“Local 150” or the “Union”), moves for entry of a protective order pursuant to Rule 26(c), F. R. Civ. P., and Local Rule 37.2 of the Local General Rules of the United States District Court for the Northern District of Illinois. Specifically, Local 150 respectfully requests that this Court enter a protective order and/or quash Plaintiffs’ subpoenas to third party competitors, in so far as they seek proprietary information and/or trade secrets which would enable Plaintiffs to gain an unfair competitive advantage in the marketplace. In support of this Motion, Local 150 states as follows:

1. On February 10, 2005, Plaintiffs filed their “Verified Complaint for Temporary Restraining Order, Preliminary and Permanent Injunctive Relief, and Damages;” Plaintiffs amended that Complaint on February 28 and March 9, 2005. On February 10, Plaintiffs also filed their “Motion for Expedited Discovery” and “Motion for Temporary Restraining Order.”

2. On March 17, 2005, the Court entered an “Agreed Temporary Restraining Order.” There, the Court enjoined and restrained Plaintiffs, as well as Defendants, from causing unsafe motoring conditions and otherwise driving unsafely or in a manner contrary to the rules of Illinois roads.

3. On or about March 17, 2005, the Court also granted Plaintiffs’ Motion for Expedited Discovery and referred the matter to the U.S. Magistrate Judge for management of discovery into those matters which would be the subject of a preliminary injunction hearing sometime in August 2005.

4. At the discovery conference conducted on March 31, 2005, by the Magistrate Judge, the Court set August 1, 2005, as the deadline for discovery into the preliminary injunction phase of the case.

5. On May 25, 2005, Local 150 conducted the deposition of William Kwasny, the Corporate President of Plaintiffs GME Consultants, Inc., and GME Consultants of Illinois, Inc. Through the course of that deposition, Defendant Local 150’s counsel initiated questioning into Plaintiffs’ allegations that “signatory contractors” joined in a conspiracy with Local 150 “that resulted in Local 150 contractors obtaining at least a 70 percent share of the market within a two-year period as they each became signatory contractors with Local 150” (Second Amended Complaint, ¶ 13(j)). After determining that the two-year period alleged in the Complaint was Spring 2002 through Spring 2004, Defendant’s counsel asked (Exhibit A, transcript of deposition of William Kwasny conducted May 25, 2005, at 207-208):

Q. Okay. And the reference to a 70 percent share of the market is to what market?

A. There has been reference to—

MR. SMETANA: Objection. Wait a minute. This is not this part of this case. I'm sorry. We have—this is not for the preliminary injunction. We're not going to ask for the preliminary injunction on anything to do with this because you have to prove relevant market. We have an expert for that. That's all the next part of the case. He's not competent to answer that. It's described in an allegation what it is, but that's why we have regular discovery. This is for preliminary injunction purposes. We're not seeking preliminary injunction in those areas, and I explained that to the magistrate judge.

6. Similarly, at the status conference conducted August 19, 2005, Plaintiffs' counsel stated that the "three essential areas for which we will seek preliminary injunctive relief" included "the police power issues," that is, allegations currently addressed in the temporary restraining order (Exhibit C, transcript of proceedings conducted August 19, 2005, at 11); the "target information," presumably allegations that Local 150 somehow subsidized signatory contractors with so-called "target" funds (*id.* at 12); and the "ongoing activity" of Local 150 interfering with Plaintiffs' business (*id.* at 13). Plaintiffs' counsel said nothing about seeking preliminary injunctive relief in Plaintiffs' anti-trust claims.

7. After conducting minimal discovery for nearly four months and seeking two extensions on the so-called "expedited" discovery schedule, in mid-August, Plaintiffs served over 30 third party subpoenas on its unionized competitors in the construction materials testing industry. Those subpoenas seek, *inter alia*, "all documents" showing "all projects" undertaken in an 18-county area in Wisconsin, Illinois, and Indiana since January 1, 2000, to the date of the response, including "all documents showing project costs;" as well as practically every conceivable financial record the companies could have kept in that same five-year period.

8. In response to that subpoena, at least one counsel for several firms objected to the relevance of such broad and intrusive requests (Exhibit B). In reply, counsel for Plaintiffs wrote on August 29, 2005, "with regard to relevancy, Requests 1 and 2 basically seek project revenue

and cost information which is relevant to estimating the actual size of the relevant market, your client's joint share of that market, and economic damages to our clients relating to your client's increase in share" (id.).

9. The various comments of counsel demonstrate that the proprietary information Plaintiffs seek from their competitors has nothing to do with their claims for preliminary injunctive relief. Indeed, as Defendant's counsel has stated previously, Plaintiffs' lawsuit is a sham designed to interfere with Local 150's ongoing efforts to organize employees in the construction materials testing industry. Plaintiffs already enjoy a substantial competitive advantage over unionized testing firms because Plaintiffs pay their employees starvation wages and substandard fringe benefits. To secure proprietary information about, for example, prices charged by their unionized competitors will give Plaintiffs an additional unfair advantage, reduce employment opportunities for union members, and is an abuse of the litigation process.

10. Rule 26(c) of the Federal Rules of Civil Procedure permits the court (F. R. Civ. P. 26(c)(7)):

Upon motion by a party or by the person from whom discovery is sought, accompanied by a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the court in the district where the deposition is to be taken may make any order which justice requires to protect the party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

* * *

(7) that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a designated way;

Good cause is absent where the information is "highly relevant and non-confidential." Jepson, Inc. v. Makita Electric Works, Ltd., 30 F.3d 854, 860 (7th Cir. 1994). The information sought by

Plaintiffs here is neither. If Plaintiffs' counsel is to be believed, then information about markets has nothing to do with their preliminary injunction motion if they ever file one. More generally, as third party counsel Mr. Smith so succinctly stated in his September 12, 2005 letter, "How does [profit margins] establish the market?" (Exhibit B). Third party deponent Walter Flood testified on September 21, 2005, that the construction materials testing industry is "highly competitive." It is hard to imagine information more confidential than cost and price data in such an industry.

WHEREFORE, Local 150 respectfully requests this Court to enter a protective order and/or quash Plaintiffs' subpoenas to third party competitors in so far as they seek proprietary information and/or trade secrets which would enable Plaintiffs to gain an unfair competitive advantage in the marketplace.

Date: September 30, 2005

Respectfully submitted,

INTERNATIONAL UNION OF OPERATING ENGINEERS,
LOCAL 150, AFL-CIO

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One of the Attorneys for Defendant Local 150

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CERTIFICATE OF SERVICE

The undersigned, an attorney of record, hereby certifies that he electronically filed *Local 150's Motion for Protective Order* with the Clerk of Court using the CM/CM/ECF system. The undersigned further certifies that he caused the foregoing to be served on the following counsel of record via facsimile and regular mail on September 30, 2005:

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