

IN THE CIRCUIT COURT OF THE  
TWELFTH JUDICIAL CIRCUIT IN AND  
FOR MANATEE COUNTY, FLORIDA

STATE OF FLORIDA,

v.

JANET LANDRUM,

Defendant.

CASE NO. 2008 CF 003193

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MANATEE CO FLORIDA

2009 OCT 15 AM 11:33

FILED FOR RECORD  
R.B. SHORE

**CMI, INC.'S MOTION TO QUASH WITNESS SUBPOENA DUCES  
TECUM SERVED ON ITS REGISTERED AGENT**

Pursuant to Fla. R. Crim. P. 3.361, CMI, Inc., a Kentucky corporation ("CMI"), hereby moves the Court for entry of an order quashing the witness subpoena *duces tecum* directed to CMI and issued in the above-styled case.<sup>1</sup>

**FACTUAL BACKGROUND**

1. The above-named defendant has served a witness subpoena *duces tecum* on CMI, an out-of-state corporation, by serving CMI's registered agent in the State of Florida ("Subpoena"). A copy of the Subpoena is attached as Exhibit B. The Subpoena purports to

<sup>1</sup> / As explained in its notice of limited appearance, CMI is appearing in this proceeding for the exclusive purpose of seeking to quash what it believes is an unlawfully issued subpoena that improperly extends the authority of the Court beyond the boundaries of the State of Florida. As more fully explained below, CMI does not believe, respectfully, that the Court can exercise its authority over CMI *as a witness* via the subpoena in question. Further, should this motion be denied, CMI reserves its right to seek a protective order to safeguard against the unlawful disclosure and/or appropriation of the Source Code. The Subpoena seeks to not only "inspect" CMI's trade secrets, but also states that the trade secrets "may be copied at that time." See Subpoena at p. 1. CMI is the owner of the copyrighted Source Code and has never transferred ownership of the Source Code to the State of Florida. See Final Summary Judgment entered on September 10, 2009, *Florida Dept. of Law Enforcement v. CMI*, Leon County Circuit Court Case No. 2008-CA-003619, attached hereto as Exhibit A. Accordingly, both federal and state law protect the Source Code from improper disclosure and/or appropriation.

require CMI's custodian of records "to appear [sic] the Honorable DIANA L. MORELAND at the . . . Lynn N. Silvertooth Judicial Center, 2002 Ringling Blvd., Sarasota, Florida, 34237," and produce "[a]ny and all evidence existing in paper, electronic or other form of any and all source code(s) used in the Intoxilyzer 8000, software version 8100.27 and any and all evidence existing in paper, electronic or other form of any and all source code(s) used [sic] the Intoxilyzer 8000 submitted to the United States Department of Transportation for evaluation to be included on the conforming parts list" (hereafter, the "Source Code"). The Intoxilyzer 8000 ("Intoxilyzer") is the breath-alcohol measurement device currently used by law enforcement agencies in the State of Florida.

2. Although the Subpoena purports to be "without deposition," it is disingenuous to believe that this Subpoena is not about testimony. As the Court may recall, the State previously sought and obtained a certificate of materiality pursuant to the Uniform Act, Sections 942.01, *et seq.*, Fla. Stat. (the "Certificate"). Furthermore, in parallel Sarasota County cases the State obtained a Certificate which requires a CMI representative to appear at an evidentiary hearing on October 16, 2009 to give live testimony in consolidated proceedings and produce documents regarding the filter micron bands used in the Intoxilyzer. The Source Code and operating software are not at issue in the Certificate. However, in an apparent attempt to circumvent the Uniform Act and the Court's Certificate, defendant has now issued the Subpoena seeking the production of documents relating to the Source Code and other software at what appears to be *the exact location and the exact same time as the hearing at issue in the Certificate* (i.e., October

16, 2009). As a result, it is clear that the Subpoena is much more than simply a “subpoena duces tecum without deposition.”<sup>2</sup>

3. By way of background,<sup>3</sup> the Source Code is the human-readable format of programming from which is subsequently derived the machine-readable operating software for the Intoxilyzer (also known as the “object code”).

4. The Source Code is the intellectual property of CMI. It was created by CMI at considerable expense and is used in Intoxilyzer units throughout the United States. CMI considers the Source Code to be a highly valuable, proprietary trade secret, which CMI has taken extensive measures to protect from disclosure to the public and even client-users of the Intoxilyzer. At least one Florida appellate court has acknowledged the trade secret nature of the Source Code. *See Moe v. State*, 944 So. 2d 1096 (Fla. 5th DCA 2006) (“It is without dispute that the State does not have possession of the source code because it is the property of CMI, Inc. It is also without dispute that the code is a trade secret of CMI, Inc. and that CMI, Inc. has invoked its

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<sup>2</sup> / A Uniform Act certificate was previously issued in this case which is limited to the filter micron band issue. However, despite the court’s limitation on the scope of the certificate, defendant is trying to back-door the issue through this improper Subpoena. In addition, at the Sarasota County Court hearing which resulted in the issuance of a parallel Uniform Act certificate for the consolidated Sarasota cases, other defendants in the those proceedings (which will be heard with this case) attempted to expand the scope of the certificate in that case by including the Source Code. The trial judge rejected the effort and limited the certificate to the filter micron band issue. Again, despite the trial court’s refusal to expand the scope of the certificate, defendant is trying to circumvent the issue through this improper Subpoena.

<sup>3</sup> / This background is provided merely for the edification of the Court. It is not material to the narrow *legal* question of whether the Subpoena constitutes a valid exercise of this Court’s authority to compel the appearance of a witness.

statutory and common law privileges protecting the code from disclosure. Therefore, the State cannot obtain possession of the code.”).

5. The criminal defense bar generally contends that it must have access to the Source Code in order to determine whether a particular Intoxilyzer unit is functioning properly. CMI strongly disagrees with this position, believing that the accuracy of any particular instrument may be determined without the Source Code.<sup>4</sup> Be that as it may, the Court need not resolve the dispute as to the materiality of the Source Code in order to resolve whether the Subpoena was validly issued and served.

### ARGUMENT

#### I. THE UNIFORM ACT IS THE EXCLUSIVE MECHANISM FOR SERVING A SUBPOENA ON AN OUT-OF-STATE NONPARTY WITNESS.

The purpose of the “Uniform Law to Secure the Attendance of Witnesses from Within or Without a State in Criminal Proceedings,” codified at sections 942.01 through .06, Florida Statutes (the “Uniform Act”), which Florida and Kentucky have both enacted, is to establish uniformity in the manner by which out-of-state witnesses are compelled to appear in criminal proceedings. Section 942.05 states that the Uniform Act “shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of the states which enact it...”

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<sup>4</sup> / See *State v. Bastos*, 985 So. 2d 37, 42-43 (Fla. 3d DCA 2008) (“The defendants are entitled to bring forth testimony, or conduct testing, to demonstrate that interferences yield false positives or skew the machine’s readings. However, we cannot accept the proposition that simply because a piece of testing equipment is used in a criminal case, it follows that the source code for its computer must be turned over.”); see also *State v. Archer, et al.*, Case No. 09-CT-501734 (Fla. 20th Cir. Ct. July 17, 2009) (*en banc*) (denying production of CMI’s Intoxilyzer 8000 source code), attached hereto as Exhibit C.

While there has been limited Florida case law interpreting the Uniform Act, it has been examined at length by the appellate courts of other states that have enacted it.

**A. The Court's subpoena power over witnesses does not extend beyond state borders.**

The Uniform Act serves the salutary purpose of allowing for the participation of out-of-state witnesses who would otherwise be beyond the subpoena power of the forum court.<sup>5</sup> Those courts which have examined the issue of extra-territorial subpoena power, including the U.S. Supreme Court, have noted the limited scope of such power. In *Minder v. Georgia*, 183 U.S. 559, 22 S.Ct. 224 (1902), the U.S. Supreme Court held it was not a denial of due process to deny a criminal defendant's request for continuance because of the absence of an out-of-state witness because the witness was beyond the subpoena power of the court.<sup>6</sup> *Id.* at 562, 22 S.Ct. at 225.

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<sup>5</sup> / There is little dispute in Florida that the Uniform Act extends to subpoenas *duces tecum*. *Bastos*, 985 So. 2d at 40; *Mastrapa v. So. Fla. Money Laundering Strike Force*, 928 So. 2d 421 (Fla. 3d DCA 2006); *Delit v. State*, 583 So. 2d 1083, 1085 (Fla. 4th DCA 1991).

<sup>6</sup> / This decision actually gave rise to the Uniform Act. See *Preston v. Blackledge*, 332 F. Supp. 681, 683 (E.D.N.C. 1971) (tracing history). See generally 81 Am. Jur. 2d Witnesses ss. 15 and 34:

Sec. 15 - Generally, a state has no power to subpoena witnesses over which it has no jurisdiction. Thus, the constitutional right of compulsory process, which includes the subpoena of witnesses, is applicable to the states but extends only to in-state process. *In the absence of an interstate compact, compulsory process cannot extend beyond the territory of the state, and a state court cannot require the attendance of a witness who is a nonresident of, and is absent from, the state.*

Sec. 34 - In the absence of statute or interstate compact, compulsory process cannot extend beyond the territory of the state, and a state court cannot require the attendance of a witness who is a nonresident of, and is absent from, the state. *To remedy this situation, the Uniform Act to Secure Attendance of Witnesses from without a State in Criminal Proceedings provides that if a person in any state, which by its laws has made provision for commanding persons within its borders to attend and testify in criminal prosecutions ... is a material witness in a prosecution pending in a court of record in the state, a judge of such court may issue a*

(continued . . .)

The Alabama Supreme Court in *In re National Contract Poultry Growers' Ass'n*, 771 So. 2d 466 (Ala. 2000) concluded that a court's subpoena power over an out-of-state nonparty is entirely distinct from its personal jurisdiction over that same entity as a party to litigation:

[A] finding that [an entity] is subject to the personal jurisdiction of Alabama courts would not necessarily mean that it was obligated to respond to a subpoena by having to appear and produce documents in an Alabama court in a lawsuit to which it is not a party. *The underlying concepts of personal jurisdiction and subpoena power are entirely different.* Personal jurisdiction is based on conduct that subjects the nonresident to the power of the...courts to adjudicate its rights and obligations in a legal dispute.... By contrast, the subpoena power...over...a corporation that is not a party to a lawsuit is based on the power and authority of the court to compel [its] attendance...at a deposition or the production of documents by a person or entity.

*Id.* at 469 (emphasis added; also noting that power to reach beyond state's border depended on the "existence of a rule or statute *in the other state*...which makes available compulsory process to foreign litigants") (emphasis added).

Similarly, the Louisiana Supreme Court rejected the idea that a trial court may reach across state lines to subpoena a nonparty corporation, even when that corporation has a registered agent in the state:

A principal consequence of designating an agent for service of process is to subject the foreign corporation to jurisdiction in a Louisiana court. *Finding CKB subject to the personal jurisdiction of Louisiana courts, however, does not necessarily mean that this [out-of-state] corporation is bound to respond to a subpoena ... by having to appear and produce documents in a Louisiana court in a lawsuit in which they are not a party.* ... Whereas the long-arm statute extends Louisiana's personal jurisdiction ... beyond Louisiana's borders, *there is no similar authority for extending the subpoena power ... beyond state lines to command in-state attendance of nonresident nonparty witnesses.*

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(... continued)

certificate, ... which certificate must be presented to a judge of a court of record in the county in which the witness is found.

*Phillips Petro. Co. v. OKC Ltd. P'ship*, 634 So. 2d 1186, 1187-88 (La. 1994). A similar decision issued from the Mississippi Supreme Court in *Syngenta Crop Protect., Inc. v. Monsanto Co.*, 908 So. 2d 121, 127 (Miss. 2005). In that case, the court concluded that a registered agent cannot be used "to gain access to documents located outside of the state to be used in a legal dispute between [other parties].... [T]he basic concepts of personal jurisdiction and subpoena power are vastly different."<sup>7</sup>

Finally, and perhaps most specifically on point, the Texas Court of Appeals in *Reader's Digest Ass'n, Inc. v. Dauphinot*, 794 S.W. 2d 608 (Tex. Ct. App. 1990) concluded that the Uniform Act trumps any attempt to use a witness subpoena served on a corporation's registered agent in order to get an out-of-state witness to testify. Addressing a situation substantially similar to the one at issue here, the Court of Appeals stated:

[I]t is claimed the subpoena [on the corporation's registered agent] is invalid because it was not properly issued in accordance with the [Uniform Act] [citation omitted].

\* \* \*

Both the real party in interest and the respondent argue that [the Uniform Act] applies only to "persons who truly have no contact with the State of Texas" and state that relator "has more than significant contact with Texas through its business dealings because its employees and agents reside in Texas and conduct its corporate business on a daily basis." This argument is not supported by citation to any authority, nor do we know of any. ... Assuming arguendo that a corporation may can be properly subpoenaed as a witness, ... *we hold that the proper procedure provided by law in this case for the summoning of a witness from another State to testify in a criminal proceeding in this State is through compliance with [the Uniform Act]. Consequently, the subpoena before us issued*

<sup>7</sup> / Florida's long-arm jurisdiction statute, section 48.193, also addresses jurisdiction over an entity *as a party to litigation*. §§ 48.193(1), Fla. Stat. (subjecting entity to jurisdiction for "any cause of action"); 48.193(2), Fla. Stat. (subjecting entity to jurisdiction for a "claim").

*without authority in law, and upon relator's application, should have been quashed.*

*Id.* at 610 (emphasis added).<sup>8</sup>

Given the underlying purpose of the Uniform Act to maintain consistency among enacting states, this Court should adopt the reasoning of the U.S. Supreme Court and the courts of Alabama, Louisiana, Mississippi and Texas and conclude that a subpoena cannot extend beyond Florida's borders absent compliance with the Uniform Act. As Florida's Fourth District Court of Appeal indicated in *Delit*, in construing the Uniform Act, "the uniform holdings of our sister states should be given great weight..." 583 So. 2d at 1085-86; *see also* § 942.05, Fla. Stat. (the Uniform Act "shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of the states which enact it..."); *Bastos*, 985 So. 2d at 40 ("Florida has adopted the Uniform [Act], including that portion...which calls for uniformity of interpretation by the adopting states [citation omitted]. Therefore, we are to follow the prevailing rule of the adopting states.")

Service of these types of subpoenas on CMI's registered agent subjects CMI to the onerous burden of having to run around the state defending itself or risk being held in contempt for non-compliance. *See Bastos*, 985 So. 2d at 41 (noting that CMI has been subjected to similar requests in "several hundred pending DUI cases"). The very purpose of the Uniform Act is to avoid such a chaotic approach to obtaining the participation of out-of-state witnesses. If this Court is to adhere to the admonition of Florida's appellate courts to "follow the prevailing rule of the adopting states," then it will construe the Uniform Act in the manner that the Texas Court of

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<sup>8</sup> / It bears noting that, while not directly relevant to the legal question presented, CMI – unlike Reader's Digest – has no employees or offices in Florida conducting its business.



Appeals has, and in accordance with the analysis of the United States, Mississippi, Louisiana and Alabama Supreme Courts regarding the limitations of subpoena power over witnesses. The Uniform Act is the only valid mechanism for obtaining the testimony *duces tecum* of out-of-state witnesses in criminal proceedings.

**B. Unlike the Subpoena, the Uniform Act specifically contemplates an opportunity for the out-of-state witness to participate and be heard within his or her state of residence.**

The Uniform Act was intended to achieve the dual purposes of creating a mechanism for obtaining the participation of out-of-state witnesses while at the same time safeguarding the sovereignty of adopting states and protecting the witness' right to be heard under reasonable conditions.

Kentucky's version of the Uniform Act, specifically section 421.240, Kentucky Statutes, contains a provision identical to Florida's section 942.02, Florida Statutes. Both these provisions specifically provide that after the court in the jurisdiction where the proceeding is ongoing has made a determination as to the materiality of the requested witness or documentation, a certificate of materiality "shall be presented to a judge of a court of record in the county in which the witness is found." § 942.03(1), Fla. Stat.; § 421.250(1), Ky. Stat. Upon receipt of such a certificate, the court of record where the witness resides shall order the witness to appear at a hearing during which the court shall confirm that the witness "is material and necessary, that it will not cause undue hardship to the witness to be compelled to attend and testify...in the other state, and that the laws of the state in which the prosecution is pending...will give to him protection from arrest and the service of...process." § 942.02(2), Fla. Stat.; § 421.420(2), Ky. Stat. If the court of record where the witness resides is able to confirm these statutory requirements, then it shall issue a summons requiring the witness to appear in the foreign

jurisdiction. *Id.* In short, the Uniform Act (1) imposes a series of safeguards that are otherwise not available through the Subpoena; and (2) applies a heightened standard of “necessity” and “no undue hardship” that would be circumvented by the Subpoena.

The Uniform Act’s procedures serve a very important purpose in that they comport with due process and afford the out-of-state witness a *reasonable* opportunity to be heard in his or her home state regarding the issues that necessitate his or her appearance in the foreign jurisdiction. In the case of a corporate witness like CMI, which is conceivably subject to being subpoenaed in thousands of DUI prosecutions throughout the State of Florida, the practical consequences are significant. CMI could, in such a scenario, devote one hundred percent of its time to attempting to quash subpoenas as they arise in counties throughout Florida.

It would defeat the carefully crafted balance enacted by the Florida and Kentucky Legislatures if the Uniform Act’s mechanisms could be easily circumvented by serving *witness* subpoenas on a registered agent whose sole purpose is to act as agent for service in matters in which its principal is a *party* to a lawsuit.

**C. The decision in *General Motors* is limited to its facts and does not control the outcome in this case.**

In *General Motors Corp. v. State*, 357 So. 2d 1045 (Fla. 3d DCA 1974), the court concluded that in the context of an ongoing criminal investigation it was appropriate for the State Attorney to subpoena General Motors via its registered agent for production of corporate documents that were located in Florida.<sup>9</sup> *Id.* at 1047. The subpoena in question issued pursuant

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<sup>9</sup> / The Court observed that the subpoena would also extend to out-of-state documents. *General Motors*, 357 So. 2d at 1047. In this case, however, it is undisputed that the Source Code is located outside Florida and that CMI has no offices, employees or documents in the state.

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to section 27.04, Florida Statutes, which confers very broad powers on the State Attorney to investigate criminal wrongdoing. *See State v. Gibson*, 935 So. 2d 611, 613 (Fla. 3d DCA 2006) (describing State Attorney as “one-person” grand jury who must be granted reasonable latitude in that role). In contrast, the investigatory authority of a defendant in a DUI prosecution is non-existent. Moreover, what limited discovery is available to such a defendant is considerably restricted. *See, e.g.*, Fla. R. Crim. P. 3.220.

While the court in *General Motors* observed that the Uniform Act would not be applicable because the subpoena sought production of documents and allowed service of the subpoena on the corporation’s registered agent, the holding in *General Motors* should not be extended beyond its facts. First, the initial premise that the Uniform Act does not extend to requests for documents has since been conclusively rejected in *Bastos*, *Mastrapa* and *Delit*. Regardless, the Subpoena clearly states that CMI may be required to “appear at the [County Courthouse]” in Sarasota, Florida. Accordingly, even if this dicta<sup>10</sup> in *General Motors* remains, the holding therein still does not apply here since appearance is also required under the Subpoena. Secondly, there are excellent policy reasons for not equating the authority of a State Attorney engaged in an ongoing criminal investigation with the authority of a misdemeanor defendant who is reaching beyond the state’s borders to obtain proprietary information belonging to a nonparty witness. Expanding *General Motors* beyond its facts, when its holding is now the subject of serious dispute and criticism, would be judicially imprudent.

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(. . . continued)

<sup>10</sup> / *See generally Bastos*, 985 So. 2d 39 at n.1 (noting that the discussion in *General Motors* regarding the applicability of the Uniform Act to requests solely for the production of documents may have been “dictum”).

## II. THE UNIFORM ACT CONTROLS OVER FLORIDA'S GENERAL SERVICE OF PROCESS STATUTES.

### A. Florida's service of process statutes.

While Florida has statutes that generally deal with how service of process may be effectuated, there is no statute in Florida -- other than the Uniform Act -- that specifically addresses how an out-of-state witness may be compelled to testify and produce documents in criminal proceedings within Florida.

While section 48.031(3), Florida Statutes, specifically addresses witness subpoenas in criminal proceedings, nowhere in the section is there a mention of service of witness subpoenas on corporations, much less those that are out of state. Section 48.031(3) focuses entirely on individual witnesses<sup>11</sup> and does not cross-reference any other statutory provision for effecting service of a witness subpoena on corporations, whether foreign or domestic.

Section 48.081, Florida Statutes, allows for service of process on a foreign corporation by serving the corporation's registered agent, § 48.081(3)(a), Fla. Stat., but the term "process" is not defined in the statutory provision. Black's Law Dictionary defines "process" as "any means used by court to acquire or exercise *jurisdiction* over a person...[the] means whereby court compels appearance of *defendant* before it..." BLACK'S LAW DICT., 5TH ED. at 1084. Regardless of the meaning of "process," what is immediately apparent is that, unlike section 48.031, section 48.081 does **not** address witness subpoenas. In fact, section 48.081(5), in discussing service of process "pursuant to this section" on corporate officers while in Florida, states:

<sup>11</sup> / For example, section 48.031 allows for service on a qualified individual at the witness' residence, the witness' place of employment or on the witness' spouse. These methods are not consistent with the idea of serving a witness subpoena on a corporation.

When a corporation engages in substantial and not isolated activities within this state, or has a business office within the state and is actually engaged in the transaction of business therefrom, service upon any officer or business agent while on corporate business within this state may personally be made, *pursuant to this section*, and it is not necessary in such case that the *action, suit, or proceeding against the corporation* shall have arisen out of any transaction or operation connected with or incidental to the business being transacted within the state.

(emphasis added). In other words, service under section 48.081 contemplates service of process in proceedings *against* the corporation, not when the corporation is being sought as a witness.

In fact, there is no indication in section 48.031(3)(a) that the statute contemplates service on *out-of-state* witnesses, whether individual or corporate. A provision in 48.081, which addresses service of process on out-of-state corporations for lawsuits, actions or proceedings *against* the corporation, cannot be grafted onto a statute that addresses only service of witness subpoenas within the state, especially when there exists an explicit statutory mechanism – the Uniform Act – for compelling the attendance of out-of-state witnesses in criminal proceedings.

**B. The specificity of the Uniform Act must control over sections 48.031 and 48.081, Florida Statutes.**

The Florida Supreme Court has explicitly held that where two statutes appear to address the same subject matter, the statute that is specific in nature must control over the one that is general in nature. *State v. J.M.*, 824 So. 2d 105, 112-13 (Fla. 2002) (noting that courts cannot ignore Legislature's explicit position in one statute in favor of an interpretation of a statute that does not specifically address the subject); *see also Murray v. Mariner Health*, 994 So. 2d 1051, 1061 (Fla. 2008) (enforcing specific statutory provision over general one) (citing *State v. J.M.*, 824 So. 2d at 112).

In this instance, the Uniform Act represents the Legislature's explicit enactment with respect to how out-of-state witnesses may be compelled to appear in Florida criminal

proceedings. That the Uniform Act applies to corporate witnesses asked to produce documents is beyond dispute; what is more, it has been applied to CMI in connection with attempts to obtain access to the Source Code. *See Bastos*, 985 So. 2d at 38 (considering and rejecting for lack of materiality Uniform Act certificate directed to CMI). The Legislature has implemented a detailed mechanism of safeguards, which cannot be circumvented by resorting to statutory provisions that are silent as to service of witness subpoenas on out-of-state corporations.

The specificity of the Uniform Act must trump Florida's general service statutes, particularly when one considers the Legislature's *mandate* (and the Third and Fourth District's recognition) that the Uniform Act be interpreted in a manner consistent with the interpretations of other enacting states. *Every state outside of Florida that has examined the issue has concluded that service of a witness subpoena on a registered agent is not a valid mechanism for compelling the testimony of an out-of-state corporation. See infra* at 3-7. Florida's jurisprudence cannot – and does not – stand alone on this issue.

**C. The failure of the Legislature to carve out an exception in the Uniform Act mandates its application in this case.**

The Uniform Act does not set forth any exceptions to the application of its procedures when seeking to compel the attendance of out-of-state witnesses. For that matter, it does not even recognize the existence of other available statutory or common law methods for obtaining the testimony of out-of-state witnesses. The Legislature knows how to preserve remedies when it wishes to. *See, e.g.*, §§ 815.06(4)(a) (offenses against computer users: “In addition to any other civil remedy available, the owner or lessee of the computer, computer system, computer network, computer program, computer equipment, computer supplies, or computer data may bring a civil action against any person convicted under this section for compensatory damages.”);

672.721 (remedies for fraud: “Remedies for material misrepresentation or fraud include all remedies available under this chapter for nonfraudulent breach. Neither rescission or a claim for rescission of the contract for sale nor rejection or return of the goods shall bar or be deemed inconsistent with a claim for damages or other remedy.”); 553.84 (Florida Building Code: “Notwithstanding any other remedies available, any person or party, in an individual capacity or on behalf of a class of persons or parties, damaged as a result of a violation of this part or the Florida Building Code, has a cause of action in any court of competent jurisdiction against the person or party who committed the violation...”); 721.56(5)(b)(4) (relating to multi-site timeshares: “Nothing contained in this subsection shall abrogate or otherwise interfere with any proprietary rights in the reservation system that have been reserved by the discharged managing entity, in its management contract or otherwise...”).

The failure of the Legislature to provide for such alternate methods of serving a witness subpoena is an indication that the Uniform Act was intended to be the *sole* mechanism for compelling attendance.<sup>12</sup>

The Florida Supreme Court has repeatedly held that where the Legislature addresses a particular subject and does not mention exclusions or exemptions, the statute must be read as mandating what is affirmatively stated. The Latin maxim of *expressio unius est exclusio alterius* – the mention of one thing implies the exclusion of another – has long been a principle of statutory construction in Florida. *See, e.g., Capers v. State*, 678 So. 2d 330, 332 (Fla. 1996);

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<sup>12</sup> / This is hardly surprising in that there are no such alternate methods of serving a witness subpoena on an out-of-state corporation.

*Moonlit Waters Apts., Inc. v. Cauley*, 666 So. 2d 898, 900 (Fla. 1996); *Thayer v. State*, 335 So. 2d 815, 817 (Fla. 1976).

With the Uniform Act, the Legislature not only expressly provided a detailed mechanism – inclusive of multiple hearings, burdens of proof, etc. – for compelling the attendance of out-of-state witnesses, it specifically directed that the statute’s purpose was to achieve uniformity between Florida law and that of other enacting jurisdictions. The Court may not ignore this explicit directive and refuse to apply the Uniform Act in favor of relying on provisions that do not explicitly confer on misdemeanor defendants the right to subpoena corporate witnesses outside the state.

### III. THE ISSUANCE OF THE SUBPOENA IS IN VIOLATION OF THE FLORIDA RULES OF CRIMINAL PROCEDURE.

The Florida Rules of Criminal Procedure do not allow the use of a subpoena *duces tecum* for pretrial discovery. There is simply no mechanism for what the defendant has sought to do – which is, in essence, to discover documents from a non-party. Not only do the rules not contemplate a subpoena for documents, they do not even contemplate that a non-party would have to produce documents in pretrial discovery. In fact, Rule 3.220 specifically excludes subpoenas *duces tecum* from pretrial discovery available to a defendant. Fla. R. Crim. P. 3.220(h)(1) (excluding the issuance of subpoenas *duces tecum* from the acts allowed under Rule 3.220).

While Rule 3.361 provides a mechanism for the production of tangible evidence *during trial*, that rule is not implicated here. Rule 3.361 specifically falls under section of the Florida Rules entitled “The Trial.” See Fla. R. Crim P. § IX. Moreover, the language of Rule 3.361 expressly limits a properly served subpoena for tangible evidence to production “*before the*



*court.*” Fla. R. Crim P. 3.361(b)(1) and (d) (emphasis added). Accordingly, when the rules are read in tandem, it becomes clear that properly served subpoenas *duces tecum* are permitted *only for trial purposes and not for discovery purposes*. Compare Fla. R. Crim. P. 3.220 (excluding subpoenas *duces tecum* in pretrial discovery) with Fla. R. Crim. P. 3.361 (permitting subpoenas for tangible evidence at trial).

Accordingly, the Subpoena was issued in violation of the Florida Rules and should be quashed because the Florida Rules do not allow for issuance of a subpoena *duces tecum* to a non-party at the discovery stage.

### CONCLUSION

The fundamental purpose of the Uniform Act, as explicitly enacted by the Florida Legislature, would be undermined – if not utterly defeated -- by allowing individual DUI defendants to issue an avalanche of witness subpoenas to out-of-state corporate witnesses who are *not* parties to ongoing litigation. Such subpoenas would intrude upon the sovereignty of Florida’s sister states by reaching across state lines and commanding the appearance of their residents as witnesses in Florida’s courts without any input from or the participation of the courts in those states. Additionally, they would potentially force corporate witnesses, as is occurring in this case, to choose between protecting valuable proprietary trade secrets and risking being bled to death by litigating in multiple forums throughout the State of Florida. The Uniform Act, which was specifically enacted by the Legislature to address the lack of subpoena authority the courts had over out-of-state witnesses, must control over interpretations of Florida’s general service of process statutes.

Further, the Subpoena has been issued in violation of the Florida Rules. A subpoena for production of documents from a non-party is not permitted at the discovery stage, but, instead,

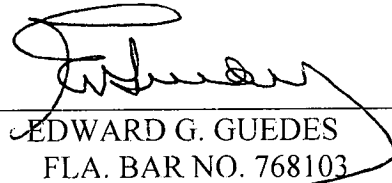
may issue solely for production of documents at trial. Since the Subpoena is for discovery purposes, the Subpoena is an invalid attempt to extend discovery into an area neither contemplated nor permitted under the Florida Rules.

WHEREFORE, CMI, Inc. respectfully requests that the Court enter an order quashing the witness subpoena served on CMI's registered agent, and granting such other relief as the Court deems proper.

*Respectfully submitted,*

WEISS SEROTA HELFMAN PASTORIZA COLE  
& BONISKE, P.L.  
2525 Ponce de Leon Blvd., Ste. 700  
Coral Gables, Florida 33134  
Tel.: (305) 854-0800  
Fax: (305) 854-2323

By: \_\_\_\_\_

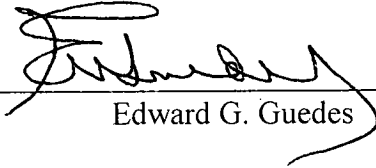


EDWARD G. GUEDES  
FLA. BAR NO. 768103  
eguedes@wsh-law.com  
JOHN J. QUICK  
FLA. BAR NO. 648418  
jquick@wsh-law.com

*Counsel for CMI, Inc.*

**CERTIFICATE OF SERVICE**

I HEREBY certify that a true and correct copy of the foregoing was furnished via Facsimile and U.S. Mail this 14<sup>th</sup> day of October, 2009 to **Pamela J. Buha, Esq.**, Office of the State Attorney, P.O. Box 1000, Bradenton, Florida 34206-1000; and, **Mark Lipinski, Esq.**, *Attorney for Defendant*, 518 12th Street, Bradenton, Florida 34205-7411.

  
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Edward G. Guedes