

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA**

ANDREA ROSSI and LEONARDO)
CORPORATION,)

Plaintiffs,)

v.)

THOMAS DARDEN; JOHN T. VAUGHN,)
INDUSTRIAL HEAT, LLC; IPH)
INTERNATIONAL B.V.; and)
CHEROKEE INVESTMENT PARTNERS,)
LLC,)

Defendants.)

CASE NO. 1:16-cv-21199-CMA

INDUSTRIAL HEAT, LLC and IPH)
INTERNATIONAL B.V.,)

Counter-Plaintiffs,)

v.)

ANDREA ROSSI and LEONARDO)
CORPORATION,)

Counter-Defendants,)

and)

J.M. PRODUCTS, INC.; HENRY)
JOHNSON; FABIO PENON; UNITED)
STATES QUANTUM LEAP, LLC;)
FULVIO FABIANI; and JAMES BASS,)

Third-Party Defendants.)

DEFENDANTS' RESPONSE TO PLAINTIFFS' AMENDED MOTION FOR ENLARGEMENT OF TIME TO COMPLY WITH SCHEDULING ORDER [DE 23]

Defendants THOMAS DARDEN, JOHN T. VAUGHN, INDUSTRIAL HEAT, LLC, IPH INTERNATIONAL B.V., and CHEROKEE INVESTMENT PARTNERS, LLC (collectively, "Defendants"), hereby respond to "Plaintiffs' Amended Motion for Enlargement of Time to Comply with Scheduling Order [DE 23]" [D.E. 258] in order to clarify representations made therein. In support thereof, Defendants state as follows:

1. Defendants do not oppose a two-week (or longer) extension of time for the parties to file their Joint Pre-Trial Stipulation. Trial is not set until the end of June, and various discovery, summary judgment and *Daubert* motions remain outstanding. The parties have not exchanged drafts of the Pre-Trial Stipulation, and an extension would allow the parties a full opportunity to attempt to narrow issues in dispute with respect to that filing.

2. With respect to extending the deadlines for jury instructions, verdict forms and motions *in limine*, however, none of the reasons advanced by Plaintiffs constitute good cause.

3. First, if certainty regarding the scope of the pretrial submissions were the criterion, then Defendants presume the Court would not have ordered the submissions to be filed seven days after the close of briefing on summary judgment and *Daubert* motions.

4. Second, the re-noticed depositions of the corporate representatives of IPH International B.V. ("IPH") and Cherokee Investment Partners, LLC ("Cherokee") are not the most far-reaching of the pending discovery matters, and this motion is not the appropriate manner by which Plaintiffs should (again) raise this discovery issue. That said, Plaintiffs misrepresent the reason that the depositions did not take place on April 12 and 13, 2017.

5. Defendants did not "unilaterally cancel" the depositions. Rather, there was a disagreement between the parties as to the appropriate scope of the depositions. Defendants

believe that Magistrate Judge O'Sullivan limited the scope of the depositions to certain topics, and any follow up questions on those topics. March 23, 2017 Hrg. Tr. (excerpts attached hereto as Ex. 1) at 96:10-97:1. Defendants offered Plaintiffs the opportunity to conduct the depositions pursuant to Magistrate Judge O'Sullivan's limitations on April 12 and 13, 2017, but Plaintiffs declined.

6. As a result, Defendants set the matter for hearing on their request for a protective order, which Defendants believe was the procedural course that Magistrate Judge O'Sullivan directed in regard to this issue. *Id.* at 50:14-17. The first available date on Magistrate Judge O'Sullivan's calendar for a hearing was April 20, 2017.

7. The fact the Plaintiffs have chosen not to redepose the IPH and Cherokee corporate witnesses does not impede Plaintiffs' ability to draft jury instructions, verdict forms or motions *in limine*. Their attempt to seek a preclusion order has twice been rejected, and they should proceed under the *status quo*, which is that any insufficiencies in the IPH and Cherokee testimony will first be remedied by a second deposition – not by precluding those parties from presenting evidence on particular topics.

8. Plaintiff Rossi's surgery and the religious holidays do not warrant an extension of the deadline to file jury instructions, verdict forms or motions *in limine*. The parties have known about these deadlines for nearly a year. The dates of the holidays have not changed, and Plaintiffs make no showing that the timing of Plaintiff Rossi's surgery was anything other than elective. Moreover, Plaintiff Rossi has been blogging that he returned to work in his factory on April 10. Andrea Rossi, *Journal of Nuclear Physics* (April 9, 2017), <http://www.journal-of-nuclear-physics.com>.

9. Based on the foregoing, Defendants request that the Court grant in part Plaintiffs' motion and extend by at least two weeks the deadline to file the Joint Pre-Trial Stipulation, but deny Plaintiffs' motion with respect to the deadline to file jury instructions, verdict forms and motions *in limine*.

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Dated April 13, 2017.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on April 13, 2016, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system which will send a notice of electronic filing to all counsel or parties of record.

/s/ Erika S. Handelson

Erika S. Handelson

