UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 1:16-cv-21199-CMA/O'Sullivan

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.
_____/

PLAINTIFFS' MOTION FOR LIMITED CLARIFICATION OF ORDER [ECF NO. 303]

Plaintiffs respectfully seek limited reconsideration and/or clarification with respect to the Court's Order [ECF No. 303] ("*Daubert* Order") pertaining to Defendants' compliance with this Court's Scheduling Orders and Federal Rule of Civil Procedure 26(a)(2)(B). Specifically, Plaintiffs ask the Court to clarify:

(1) Whether the Court intended to supersede the self-executing exclusion of evidence by Rule 37(c) resulting from Defendants' failure to timely provide Expert Reports including the yet-to-be-prepared Murray Report and the Supplemental Smith Report [ECF NO. 235-10];

(2) Whether this Court's ruling, pursuant to Rule 37(c), based upon Defendants' failure to provide an expert witness report with respect to Joseph Murray, or an untimely Supplemental Report with respect to Mr. Smith, was based upon a finding that such failures were substantially justified or harmless

(3) Whether the Court intends to hold a hearing pursuant to Rule 37(c) to determine an appropriate lesser sanction to impose for Defendants' failure to provide an expert report from Joseph Murray; and

(4) Whether the Court found that the opinion testimony of Joseph Murray, as opposed to the Murray Disclosure itself, withstood Plaintiffs' *Daubert* challenges.

Background

The Court's Scheduling Order [ECF No. 23] set the following deadlines: (a) exchange of written expert summaries or reports by January 30, 2017; (b) the parties exchange rebuttal expert witness summaries or reports by February 13, 2017; (c) the parties complete all discovery by February 17, 2017; and the parties file any pre-trial motions and *Daubert* motions by March 21, 2017. This matter is set for the two-week trial calendar beginning on June 26, 2017. Further, the Court referred all discovery matters to Magistrate Judge John J. O'Sullivan.

The parties, in their Joint Scheduling Report [ECF No. 20 at p. 10] consented to have Discovery Disputes referred to the Magistrate Judge, but specifically did not consent to have Motions for Sanctions referred to the Magistrate Judge.

I. Are Sanctions pursuant to Rule 37(c) self-executing, or are Plaintiffs required to raise by motion?

The Court did not pass upon Plaintiffs' Rule 26 challenges related to the Smith Reports, and only addresses the challenges related to the Murray Disclosure. See *Daubert* Order at p. 3. Sanctions pursuant to Rule 37(c) are self-executing, without need for a motion. The Rule 37 "Notes of Advisory Committee Rules-1993 Amendment" provide, in pertinent part:

> *Subdivision (c).* The revision provides a self-executing sanction for failure to make a disclosure required by Rule 26(a), without need for a motion under subdivision (a)(2)(A).
>
> Paragraph (1) prevents a party from using as evidence any witnesses or information that, without substantial justification, has not been disclosed as required by Rules 26(a) and 26(e)(1). This automatic sanction provides a strong inducement for disclosure of material that the disclosing party would expect to use as evidence, whether at a trial, at a hearing, or on a motion, such as one under Rule 56.
>
> Limiting the automatic sanction to violations "without substantial justification," coupled with the exception for violations that are "harmless," is needed to avoid unduly harsh penalties in a variety of situations: *e.g.*, the inadvertent omission from a Rule 26(a)(1)(A) disclosure of the name of a potential witness known to all parties; the failure to list as a trial witness a person so listed by another party; or the

> lack of knowledge of a pro se litigant of the requirement to make disclosures. In the latter situation, however, exclusion would be proper if the requirement for disclosure had been called to the litigant's attention by either the court or another party.
>
> Preclusion of evidence is not an effective incentive to compel disclosure of information that, being supportive of the position of the opposing party, might advantageously be concealed by the disclosing party. However, the rule provides the court with a wide range of other sanctions—such as declaring specified facts to be established, preventing contradictory evidence, or, like spoliation of evidence, allowing the jury to be informed of the fact of nondisclosure—that, though not self-executing, can be imposed when found to be warranted after a hearing. The failure to identify a witness or document in a disclosure statement would be admissible under the Federal Rules of Evidence under the same principles that allow a party's interrogatory answers to be offered against it.

Plaintiffs seek clarification as to whether this Court's ruling resulting from Defendants' failure to timely make mandatory disclosures pursuant to Rule 26(a)(2)(B)[1] (regarding the Murray Disclosure) supersedes the automatic and self-executing preclusion of such evidence imposed by Rule 37(c) and whether this Court's ruling, which does not address Plaintiffs argument with respect to the Supplemental Smith Report, effects the self-executing exclusion of such Supplemental Report pursuant to Rule 37(c) which arises without the need to be raised by motion.

II. Was Defendants' Violations related to the Murray Disclosure and Supplemental Smith Report Substantially Justified or Harmless?

Defendants served the Murray Disclosure [ECF No. 215-1] on January 30, 2017. This Court found that the Murray Disclosure does not meet the requirements of Expert Reports under Rule 26(a)(2)(B). See *Daubert* Order at p. 7. Similarly, although the Court did not address it, it cannot be disputed that the Supplemental Smith Report was filed almost two months after the deadline for such filing, and is therefore violative of Rule 26(a). Federal Rule of Civil Procedure 37(c)(1) requires absolute compliance with Rule 26(a), that is, it "mandates that a trial court punish a party for discovery violations in connection with Rule 26 unless the violation was harmless or is substantially justified." *Roberts ex rel. Johnson v. Galen of Virginia, Inc.* 325 F.3d 776, 782 (6th Cir. 2003) (internal citation omitted).

[1] It should be noted that Defendants also violated the Court's Scheduling Order requiring the exchange of expert reports by January 30, 2017.

This Court's *Daubert* Order does not address whether Defendants' violations were harmless or substantially justified, and Plaintiffs seek clarification as to such, considering the following facts:

- Defendants first provided supplemental disclosure documents related to the Murray Disclosure late in the day on February 16, 2017 (16 days after the deadline for such disclosures and hours before his scheduled deposition), despite having had prepared some type of report in October 2016 (*see Daubert* Order at p. 7.)
- Defendants have, to the present day, failed to provide a copy of Murray's C.V. despite Plaintiffs' requests for such in August of 2016 (*see* ECF No. 215 at p. 5).
- Plaintiffs' discovery of such possible violation on Friday, February 17, 2017 would have given them 5 business days to schedule a hearing before Magistrate Judge O'Sullivan, obtain an expert report and conduct additional investigation or depositions, despite the following depositions having been previously scheduled:
    - Deposition of Dewey Weaver on Feb. 21, 2017
    - Deposition of Fabio Penon on Feb. 22, 2017 in the Dominican Republic
    - Deposition of AmpEnergo, Inc. on Feb. 23, 2017 in New Hampshire
    - Deposition of Leonardo Corporation on Feb. 24, 2017
    - Deposition of Kau-Fui Vincent Wong on Feb. 27, 2017
    - Deposition of The Boeing Company on Feb. 28, 2017
    - Deposition of J.M. Products on March 1, 2017
- A written expert report of Joseph Murray served on Plaintiffs on May 31, 2017 will not allow Plaintiffs any time to investigate the opinions contained therein, conduct any discovery related thereto, or present a rebuttal expert in opposition[2].

Based upon this Court's holding , in *United States v. Batchelor-Robjohns*, 2005 U.S. Dist. LEXIS 13552, *12-13 (S.D. Fla. 2005), that "Rule 37(c)(1) requires absolute compliance with Rule 26(a), in that it mandates that a trial court punish a party for discovery violations in connection with Rule 26 unless the violation was harmless or substantially justified."; and that "[t]he language of Rule 37(c)(1) is clear that the consequence for Plaintiff's failure to justify its nondisclosure is the exclusion of [the expert's] testimony at trial."

[2] The time for rebuttal expert disclosures/reports had come and gone before Mr. Murray's deposition on February 17, 2017.

Plaintiffs seek clarification as to whether the Court finds that Defendants' violation of Rule 26(a)(2)(B) is substantially justified or harmless, and if so, the bases for such findings.

III. Does the Court intend to hold a hearing to determine if a lesser sanction is appropriate?

Rule 37(c)(1) provides that, upon finding that a party's violation was substantially justified or harmless, instead of the automatic sanction of exclusion, on motion and after giving the opportunity to be heard, a court may impose other appropriate sanctions. In the present case, Plaintiffs have not been given an opportunity to be heard as to an appropriate lesser sanction. While this Court stated that a sanction is appropriate, the Court did not impose any sanction but rather, the Court permitted Defendants to serve Plaintiffs with a written expert report prepared by Murray by May 31, 2017 – four months after such was due, and less than four weeks prior to the start of the trial period. As the Notes to Rule 37 make clear, limiting the automatic sanctions is needed to avoid unduly harsh penalties in situations where there is no harm to the opposing party. Such is not the present case.

Plaintiffs seek clarification as to whether the Court will hold a hearing to determine if a lesser sanction is appropriate, and if so, what such sanction should be.

IV. Did Murray's Opinion Testimony withstand *Daubert* challenges?

The Court declined to address Plaintiffs' *Daubert* challenges to the Murray Disclosure, but the Court was silent as to whether Murray's opinion testimony withstood such challenges. Plaintiffs seek to exclude not only Murray's written materials, but also his oral testimony. Plaintiffs' ask for clarification as to whether Murray's oral testimony should be excluded on *Daubert* grounds as set forth in Plaintiffs' Motion (*see* ECF No. 215 at pp.7-14).

WHEREFORE, Plaintiffs respectfully requests this Court to clarify its May 17, 2017 Order [ECF No. 303] as to those matters set forth above, and grant such other and further relief as the Court may deem just and proper.

Dated: May 18, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May 18, 2017, the foregoing document was served on all counsel of records identified on the attached Service List via the manner specified.

/s/Brian W. Chaiken, Esquire
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