

**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' MOTION FOR EXTENSION OF PRETRIAL DEADLINES

Defendants Thomas Darden, John T. Vaughn, Industrial Heat, LLC, IPH International B.V. and Chorokee Investment Partners, LLC (collectively, "Defendants"), pursuant to Fed. R. Civ. P. 16 and Local Rule 7.1, move this Court for an Order extending all pretrial deadlines by sixty ("60") days. In support thereof, Defendants state as follows:

FACTUAL BACKGROUND

Plaintiffs filed their complaint on April 5, 2016. [D.E. 1]. On June 29, 2016, Plaintiffs and Defendants submitted a Joint Scheduling Report, contemplating completion of discovery by May 31, 2017 and a trial period beginning on September 18, 2017. [D.E. 20]. The Court entered its Scheduling Order on July 1, 2016, setting forth the current pretrial schedule, which mandates completion of discovery by February 27, 2017 and a trial period beginning on June 26, 2017. [D.E. 23]. On August 5, 2016, Defendants' filed their Answer, Additional Defenses, Counterclaims and Third-Party Claims ("AACT"), which enlarged the scope and complexity of this litigation by adding additional parties and additional causes of action. [D.E. 29].

Defendants served their Second Request for Production of Documents to Plaintiffs, and their First Request for Production on the Third Party Defendants, on October 14, 2016. As of the date of this motion, Defendants have not received a *single* document in discovery from Plaintiffs or Third Party Defendants USQL or Fabiani.¹ Plaintiffs have represented that they do not intend to produce any responsive documents until January 13, 2017 at the earliest. USQL and Fabiani have represented that they will produce either today or next week a large volume (over 600,000 pages) of testing data and small set of email communications. Fabiani and USQL have

¹ Plaintiffs have thus far only produced photographs and videos. As acknowledged by Plaintiffs, the videos were not even produced in a viewable format.

further represented that they intend to produce additional documents, but are uncertain of when those documents will be produced.

Third Party Defendants James Bass (“Bass”) and Henry Johnson (“Johnson”) have produced some documents, but the total is only 842 pages. Even though this is not a sizable production, the documents in the production have already clearly established important allegations in this case to the benefit of Defendants, including among other things that (a) Third Party Defendant J.M. Products (“JMP”) was not a “real Customer” (to use Rossi’s phrase) using power from Plaintiffs in a manufacturing process, (b) JMP was not associated with the well-known British company of Johnson Matthey, and (c) Rossi was in control of JMP and paying for all JMP’s expenses, but in a manner to conceal this from others, including Defendants. *See* Composite Exhibit A; *see also* Third Amended Answer, Additional Defenses, Counterclaims and Third Party Claims (“AACT”) ¶¶69-79 [D.E. 78].

Defendants cannot, and should not have to, move forward with depositions of Plaintiffs or Third Party Defendants without the production of documents from Plaintiffs, Fabiani or USQL, and only a small production from Johnson and Bass. (Based on an order by Judge O’Sullivan in favor of Defendants entered on January 12, 2017, JMP, Johnson and Bass have additional documents to produce to Defendants. *See* Exhibit B.)

Furthermore, Defendants were informed on January 3, 2017 that Fabiani, who is also the sole member of USQL, has relocated to Russia. He previously resided in Miami (and in fact USQL is still a Florida-based corporation according to the Florida Department of Corporations). Defendants do not know whether they will be able to agree with Fabiani and USQL as to an appropriate location for their depositions or will need the intervention of the Court to resolve where those depositions should occur.

There are a significant number of depositions still to be taken in this case. Plaintiffs have taken three depositions, and have several additional depositions scheduled. Defendants have asked for deposition dates for various witnesses, but have not received dates for most of those depositions from the other parties, and in any event are hampered in scheduling those depositions by not yet having a single document produced by Plaintiffs, Fabiani or USQL, and only an incomplete production from Johnson and Bass. Furthermore, Defendants are unable to provide documents from the other parties to an expert witness to review to formulate opinions for use in this litigation.

ARGUMENT

Federal Rule of Civil Procedure 16(b) allows a Court to modify a scheduling order upon a showing of “good cause” by a movant. Fed. R. Civ. P. 16. Rule 16(b) does not definite good cause, but the advisory note indicates that good cause shall exist if the schedule “cannot reasonably be met despite the diligence of the party seeking the extension.” Fed. R. Civ. P. 16 Advisory Committee Notes. District Courts have broad discretion to modify the deadlines in a scheduling order. *See Ciena Corp. v. Nortel Networks Inc.*, 233 F.R.D. 493 (E.D. Tex. 2006) (District Court granted extension of time to complete discovery upon movant’s finding about a third party’s substantial involvement in opposing corporate party’s operations and corporation delayed making third party available for deposition).

Defendants have been diligent in their efforts to ready this case for trial, but they have been hampered by other parties having not yet produced documents in the case. Also, additinoal hurdles have arisen, such as the relocation of Fabiani (the sole member of USQL) to Russia. Defendants do not seek a lengthy extension, but only 60 days to account for these challenges. Absent this relatively short extension, Defendants will be harmed by not having adequate time to

review whatever documents are produced by opposing parties in this litigation and conduct depositions using those documents, and also are unable to provide such documentation to an expert witness to review to form expert opinions. At the same time, the other parties will not be materially inconvenienced by this relatively short extension, which will allow all parties additional time to complete written discovery and depositions (including potential depositions abroad). *See Romero v. Drummond Co, Inc.*, 552 F.3d 1303, 1320 (11th Cir. 2008).

For all of the foregoing reasons, Defendants believe that their request for a limited extension of pretrial deadlines for 60 days is not only appropriate, but necessary, to complete discovery in an orderly fashion and prepare for trial.

Wherefore, the Defendants respectfully request that the Court extend all pretrial deadlines by sixty (60) days.

CERTIFICATE OF COMPLIANCE WITH LOCAL RULE 7.1

Counsel for Third Party Defendants Fabiani and USQL do not oppose the relief sought herein. Counsel for Third Party Defendants Johnson, Bass, and JMP have stated that they would not oppose the relief sought herein if counsel for Plaintiffs agreed to such relief, but would oppose the relief if Plaintiffs oppose. Counsel for Plaintiffs have informed Defendants that they oppose the relief sought herein.

Respectfully submitted,

/s/ Christopher R.J. Pace

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on January 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/ Michael A. Maugans

Michael A. Maugans