

**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

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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*.

[REMAINDER OF PAGE INTENTIONALLY LEFT BLANK]

Dated April 13, 2017.

Respectfully submitted,

/s/ Erika S. Handelson  
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*Attorneys for Defendants/Counter-Plaintiffs*

**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*

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Erika S. Handelson



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IN THE UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA

MIAMI DIVISION

CASE NO. : 16-cv-21199-CMA

ANDREA ROSSI, et al., )  
 )  
Plaintiffs, )  
v. )  
 )  
THOMAS DARDEN, et al., )  
 )  
Defendants. )

March 23, 2017

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DISCOVERY HEARING PROCEEDINGS

BEFORE THE HONORABLE JOHN J. O'SULLIVAN  
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

On behalf of the Plaintiffs:

PERLMAN BAJANDAS YEVOLI & ALBRIGHT, PL  
283 Catalonia Ave.  
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Coral Gables, FL 33134  
BY: JONATHAN ANNESSER, ESQ.  
BY: ROBERT BERNSTEIN, ESQ.



1 that.

2 MR. PACE: And I mean, Your Honor, there is 22  
3 different topics of inquiry.

4 THE COURT: There is a lot to do when you have a  
5 30(b)6. You are supposed to come to me ahead of time and  
6 you're supposed to say we want to protect the order, Judge.

7 We do not want him to be able to ask the same  
8 questions of Industrial Heat as he is asking of IPH, as he is  
9 asking of Cherokee, or we want to present one witness who is  
10 going to represent all three of them.

11 And you know, develop some scheme where the guy could  
12 then testify and say, yeah, okay, I'm done on IH. Now what  
13 other questions do you want to ask me about?

14 IPH I'll answer those and whatever questions you want  
15 to ask me on Cherokee and I will answer those, but nobody came  
16 ahead of time and said, hey, I want a protective order and I do  
17 not want them to answer this.

18 Just because you file an objection to a 30(b)6, that  
19 does not do anything. You have to answer the questions and be  
20 prepared.

21 MR. PACE: I understand, Your Honor.

22 I don't know if it is because for a protective order,  
23 I think it has to be to prevent -- I'm not so sure that it is  
24 to -- I'm not sure that there is a right answer.

25 I mean, we tried to resolve it by the mechanism that

1 make some kind of showing to me that it is timely and that  
2 there is some substance to it.

3 MR. PACE: I understand.

4 THE COURT: And that I might want briefing on it.

5 MR. PACE: I understand Your Honor's instruction.

6 THE COURT: Okay. Good.

7 Anything else?

8 MR. PACE: No, Your Honor.

9 THE COURT: All right. Good.

10 COURTROOM DEPUTY: I think there should be more than  
11 one or. That's all I'm saying.

12 THE COURT: Yes, why don't you guys do the order.  
13 Well, the Defendant would do it on everything except for the  
14 issue on the 30(b)6.

15 Well, I will tell you what. We will do the order on  
16 your 30(b)6. It is pretty clear that you get to re-depose them  
17 on those issues for which he either did not know the answer, or  
18 he referred to Mr. Vaughn as having the response, Mr. Vaughn or  
19 some other person.

20 MR. ANNESSER: Your Honor, just to make sure so we go  
21 into it fully clarified. It's those issues and followups. We  
22 don't have to ask the same questions and limited by that. We  
23 can follow up on --

24 THE COURT: Right. What would normally be followed  
25 up. And the other one, you are going to do need to do the

1 order on the rest of the stuff on your side of it.

2 MR. PACE: We will, Your Honor.

3 THE COURT: How much time do you want?

4 MR. PACE: Well --

5 THE COURT: I'm in no rush. The order is in effect  
6 right now. So you guys know what my ruling is.

7 MR. PACE: Could we have until the end of next week,  
8 Friday of next week?

9 THE COURT: Yes.

10 MR. PACE: Thank you, Your Honor.

11 THE COURT: I also want to set a time for when you are  
12 going to give them the written deposition questions and when  
13 they are going to provide you with the records and when you are  
14 going to do the two 30(b)6.

15 I think on the other one on JMP, did I order that by  
16 next Friday?

17 THE COURTROOM DEPUTY: Yes.

18 THE COURT: But we need to know when you are going to  
19 re-depose his two clients. I mean, Cherokee and IPH, when are  
20 you going to do that?

21 MR. ANNESSER: Your Honor, I think, let's see.

22 The original depositions were done down here in Miami  
23 and presumptively we will do the same again. It's whenever  
24 they can get them down here.

25 THE COURT: How much time do you want?