

**UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF FLORIDA  
MIAMI DIVISION**

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

No. 16-cv-21199-CMA (JJO)

**DEFENDANTS’ MOTION TO STRIKE PLAINTIFFS’ EXHIBIT LIST**

Defendants Thomas Darden, John T. Vaughn, Industrial Heat, LLC (“IH”), IPH International, B.V. (“IPH”), and Cherokee Investment Partners, LLC (collectively, “Defendants”) hereby request that the Court strike the exhibit list filed by Plaintiffs Andrea Rossi and Leonardo Corporation (“Plaintiffs”) as part of the Supplement to Pretrial Stipulation [D.E. 289], and in support state as follows:

**INTRODUCTION**

On the morning of May 5, 2017, the court-ordered deadline for filing exhibit lists, Plaintiffs for the first time provided Defendants with a list of the exhibits they intend to use at trial. The initial list provided by Plaintiffs contained 365 documents, over 100 more documents than Defendants’ exhibit list. As the day progressed, Plaintiffs’ list *doubled in size* to a staggering 731 documents, with their final list containing only slightly fewer – 685 – documents. Despite due diligence, Defendants were not able to review and provide objections to each of the listed documents in advance of the deadline. Plaintiffs’ bad faith in providing an excessive exhibit list, which was akin to a document dump on Defendants only hours before the filing

deadline, has prejudiced Defendants. The Court should strike Plaintiffs' exhibit list as a sanction.

### **ARGUMENT**

The Court may impose sanctions under its inherent authority, by statute, or under the Federal Rules of Civil Procedure. *Ulysse v. Waste Mgmt. Inc.*, 11-CV-80723, 2014 WL 11429061, at \*2 (S.D. Fla. Jan. 10, 2014). "The Court has inherent power to manage its proceedings and to control the conduct of those who appear before it. This includes the power to sanction parties and lawyers, as well as to 'achieve the orderly and expeditious disposition of cases.'" *Id.* (citing *Byrne v. Nezhat*, 261 F.3d 1075, 1106 (11th Cir. 2001)). The power to impose sanctions may only be invoked upon a finding of bad faith. *Id.* "Bad faith exists when the Court finds that a party or attorney knowingly or recklessly raises a frivolous argument, delays or disrupts the litigation, or hampers the enforcement of a court order." *Id.* (citing *Allapattah Servs., Inc. v. Exxon Corp.*, 372 F. Supp. 2d 1344, 1373 (S.D. Fla. 2005)). "Such sanctions include the power to strike pleadings or defenses, discipline lawyers, punish for contempt, assess attorneys' fees and costs, and dismiss a lawsuit." *Id.*

Where a party acts in bad faith by submitting a useless exhibit list which delays and disrupts the litigation as a result, sanctions are warranted. *See Ulysse v. Waste Mgmt. Inc. of Florida*, 11-CV-80723, 2013 WL 12177856, at \*1 (S.D. Fla. Nov. 4, 2013). For example, in *Ulysse*, the court struck the plaintiff's exhibit list as a sanction, finding that by identifying every document which may relate to plaintiff's claims, the plaintiff "may as well have provided no list at all." *Id.* The *Ulysse* court explained, a party "cannot escape his duty to produce—in good faith—a realistic list of the witnesses and exhibits he actually plans to present at trial. [A party] may not attempt to hide a needle in a haystack." *Id.*

Here, Plaintiffs' document dump exhibit list should be stricken as a sanction for Plaintiffs' bad faith conduct. Pursuant to the Court's Scheduling Order [D.E. 23] the deadline for the parties to submit their exhibit lists was originally April 18, 2017. On April 13, 2017, Plaintiffs sought, and the court granted a two-week extension of this and other deadlines, making the new deadline to submit exhibit lists May 2, 2017 [D.E. 257; D.E. 260]. On May 1, 2017, Defendants provided their exhibit list to Plaintiffs for review. Plaintiffs did not provide their exhibit list to Defendants, but instead, sought another extension of the deadline to submit exhibit lists until May 5, 2017. Defendants agreed that they would not oppose this request for an additional extension on the condition that Plaintiffs would provide Defendants a copy of their exhibit list no later than Tuesday, May 2, 2017. This would have given both Plaintiffs and Defendants sufficient time to review the documents, meet and confer, and make any necessary objections to the opposing party's exhibit list in advance of the May 5 deadline. The court granted Plaintiffs' second request for an extension [D.E. 274]. Nonetheless, Plaintiffs did not provide Defendants with a copy of their exhibit list on May 2 as agreed upon. In fact, Plaintiffs did not provide a copy of their exhibit list on Wednesday, May 3 or on Thursday, May 4. It was not until counsel for Defendants followed up for the *third time* seeking Plaintiffs' exhibit list on Thursday, May 4 that Plaintiffs requested yet another extension of time [D.E. 284]. The Court denied Plaintiffs third request for an extension [D.E. 286].

Plaintiffs did not provide Defendants with a copy of their exhibit list until the morning of May 5, 2017 – *the day it was due to be filed with the court.*<sup>1</sup> The original list provided by Plaintiffs at approximately 8:40 a.m. on May 5 contained 365 documents, over 100 more

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<sup>1</sup> At that point, Plaintiffs had already been in possession of Defendants' exhibit list, containing approximately 250 entries, for nearly five days.

documents than Defendants' exhibit list. By approximately 3:27 p.m., when Plaintiffs provided a revised list, the list had doubled in size, to 731 documents. The final exhibit list filed by Plaintiffs contained only slightly fewer documents – 685. Because Plaintiffs never provided Defendants with an explanation or summary of the changes made to their exhibit lists throughout the day, without doing a document-by-document comparison, it was not possible for Defendants to know which documents were added to or deleted from the original list provided.<sup>2</sup>

Moreover, the Plaintiffs' list of approximately 700 documents is blatantly excessive as there can be no reasonable likelihood of using that many exhibits in a two-week trial.<sup>3</sup> Indeed, Plaintiffs' exhibit list contains documents that have absolutely no possible use at trial, such as #50 "Interim Progress Report Regarding the Patentability of Rossi's Energy Catalyzer with Attachment" which is a privileged document, clawed back under the parties' Stipulated Protective Order, and which Plaintiffs have been ordered by the Court to return or destroy and "not to [] use[] in this litigation" [D.E. 152]. Additionally, most of the document descriptions are either empty or are so vague that it is impossible to tell what the document is without actually locating the document by bates number and reviewing it. *See e.g.* D.E. 289, Plaintiffs' Exhibits, #10 ("R:Call"), #29 ("Industrial Heat"), #30 ("Analysis"), #42 ("Andrea Rossi"), #54 ("Andrea Rossi"), #60 ("Introduction"), #80 ("Agreements"), #83 ("Rossi"), # 85 ("Rossi") #355 (no description given), #356 (no description given) #370-375 (no description given), #425-685 (no

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<sup>2</sup> In the final version of their exhibit list, Plaintiffs distinguished between exhibits they expect to use versus those they only may use, but those distinctions were not provided to Defendants in connection with their earlier lists.

<sup>3</sup> The unreasonableness of this number is made clear by comparison to Defendants' exhibit list which contains only 251 documents.

description given). Defendants surely did not have time to locate and review all 731<sup>4</sup> documents identified by Plaintiffs. Finally, Plaintiffs include over thirty “catch-all categories” which, at least in the context of this already excessive list, are unnecessary, duplicative and contravene the purpose of providing an exhibit list. Defendants cannot possibly articulate objections to a listing entitled “[a]ny and all documents produced by the parties in this case not specifically referenced herein.” This is especially true where, as here, the parties have produced hundreds of thousands of pages of documents in discovery.

This conduct by Plaintiffs constitutes bad faith and warrants the imposition of sanctions. *See Ulysse*, 2013 WL 12177856, at \*1 (striking plaintiff’s exhibit list which listed “documents obtained through discovery” and “documents produced in response to non-party subpoenas” and ordering plaintiff to list only those documents which he seeks to introduce at trial including the date of each document as well as each document’s substance and purpose for trial); *see also Poosh v. Phillip Morris USA, Inc.*, C 04-1221 PJH, 2014 WL 6789948, at \*2 (N.D. Cal. Dec. 2, 2014) (striking plaintiff’s exhibit list containing 401 entries, some of which were composite exhibits containing thousands of pages, and ordering plaintiff to narrow exhibit list to 250 documents).

Accordingly, Defendants respectfully request that the Court strike Plaintiffs’ exhibit list. In the event the Court finds that a lesser sanction should be imposed, Defendants request that the Court: (i) strike all of Plaintiffs’ exhibits other than those to which Defendants had time to state specific objections (#1-150); or (ii) strike all of Plaintiffs’ exhibits in excess of the number of

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<sup>4</sup> Although Plaintiffs’ final list contained 685, rather than 731 documents, Plaintiffs never provided an explanation of which documents were deleted. Accordingly, in order to sufficiently object, Defendants would have needed to review all 731 documents listed.

exhibits listed by Defendants (251), and provide Defendants with sufficient time to object to Plaintiffs' exhibits.<sup>5</sup>

### **CONCLUSION**

WHEREFORE, Defendants respectfully request that this Court strike Plaintiffs' Exhibit List, or in the alternative (i) strike all of Plaintiffs' exhibits other than those Defendants had time to state specific objections to (#1-150); or (ii) strike all of Plaintiffs' exhibits in excess of the number of exhibits listed by Defendants (251), and provide Defendants with sufficient time to object to Plaintiffs' exhibits.

### **LOCAL RULE 7.1(a)(3) CERTIFICATION**

Counsel for Defendants conferred with counsel for Plaintiffs in a good faith effort to resolve the issues the issues raised herein, but were unable to do so.

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<sup>5</sup> Allowing Plaintiffs' to maintain their list of 685 documents and simply allowing Defendants' additional time to make objections is insufficient to remedy Plaintiffs' bad faith conduct, but instead would reward them for such conduct.

Dated: May 9, 2017

Respectfully submitted,

/s/ Christopher R. J. Pace

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on May 9, 2017, 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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