

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.

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**PLAINTIFFS' MOTION FOR LEAVE TO TAKE  
ADDITIONAL DISCOVERY AND PROVIDE REBUTTAL EXPERT REPORT  
CLARIFICATION OF ORDER [ECF NO. 303]**

Plaintiffs respectfully seek leave to (a) take additional discovery with respect to the Supplemental Smith Report [ECF NO. 235-10] and any additional written expert report for Joseph A. Murray as set forth in the Court's Order [ECF No. 303] ("*Daubert* Order") (b) submit their own rebuttal expert report and (c) submit a written *Daubert* motion in response to such reports.

**Background**

The *Daubert* Order (p. 7) finds that Defendants' Murray was required to prepare an expert report and that Murray's Disclosure [ECF No. 215-1] is violative of Rule 26(a)(2)(B). The Court held that the appropriate sanction for such violation was to allow Defendants to serve a written expert report prepared by Murray by May 31, 2017. Further, the Court did not address Plaintiffs' Rule 26 challenge to the Supplemental Smith Report, which was served seven (7) weeks after the deadline to disclose expert witnesses and their reports (and only one day before *Daubert* Motions were due) and which contained six conclusions not previously disclosed in the original Smith Report or at his deposition. See *Daubert* Order at p. 3.

### **Prejudice to Plaintiffs**

The sanction of exclusion is automatic and mandatory unless the sanctioned party can show that its violation of Rule 26(a) was either justified or harmless." *See Managed Care Solutions, Inc. v. Essent Healthcare, Inc.*, 2010 U.S. Dist. LEXIS 54148, \*9 (S.D. Fla. May 3, 2010) (internal citations omitted). Defendants do not claim, nor has the Court found, that there is some justification for Defendants' failure to timely file either the Supplemental Smith Report or an actual expert report for Joseph Murray. Nor has the Court found that the late filing was harmless. In the event this Court permits such evidence to be offered at trial, Plaintiffs will be prejudiced in their ability to adequately cross-examine Smith and Murray and prepare their defense to those additional opinions contained in the late served Supplement to Smith Report and the yet-to-be served Murray Report. *See Cooper v. Southern Co.*, 390 F.3d 695 (11th Cir. 2004). Although the requested leave will not eliminate the prejudice to the Plaintiffs, it will at least reduce the prejudicial effect of Defendants' failure to timely produce such expert reports.

WHEREFORE, Plaintiffs respectfully requests this Court issue an Order granting them leave to:

- a. Take additional discovery with respect to the Supplemental Smith Report and any additional expert report for Joseph A. Murray (including but not limited to re-deposing both witnesses);
- b. Submit an additional rebuttal expert witness (and report) addressing the opinions contained in the Supplemental Smith Report and any additional expert report for Joseph A. Murray;
- c. Submit a written *Daubert* motion, if deemed meritorious, addressing the opinions contained in the Supplemental Smith Report and any additional expert report for Joseph A. Murray; and
- d. Such other and further relief as the Court may deem just and proper.

Dated: May 22, 2017

Respectfully submitted,

*s/ Brian W. Chaiken*

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**CERTIFICATE OF SERVICE**

**I HEREBY CERTIFY** that on May 22, 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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