

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA**

TERESE THOMAS, MELANIE GERARD,
JOLIE HAMILTON, DEBORAH
MANNING, AND ELIZABETH NELSON,
individually and on behalf of all others
similarly situated,

Plaintiffs,

v.

IT'S A NEW 10, LLC d/b/a IT'S A 10
HAIRCARE,

Defendant.

CASE NO. 1:22-cv-22149-KMM
(consolidated with 1:23-cv-20503)

**JOINT MOTION TO AMEND SCHEDULING ORDER OR, IN THE ALTERNATIVE,
TO STAY THE CASE PENDING RESOLUTION OF THE MOTION TO DISMISS**

Plaintiffs Terese Thomas, Melanie Gerard, Jolie Hamilton, Deborah Manning, and Elizabeth Nelson (“Plaintiffs”) and Defendant It’s a New 10, LLC d/b/a It’s A 10 Haircare (“Defendant” or “IANT”), hereby jointly move the Court to extend the schedule in this case previously set in the Pretrial Scheduling Order (D.E. 63) by a brief, reasonable amount of time, as set forth below.

The Parties understand this Honorable Court’s desire to maintain the current schedule and submit that they have detailed herein a good faith basis for the requested extension of the schedule, which has been impacted by the partial stay of discovery in this case, the complexity of this multi-state class action, as well as IANT’s recently filed Motion to Dismiss Plaintiffs’ Consolidated Class Action Complaint (D.E. 72).

Relevant Procedural Background of the Consolidated Action

1. Plaintiff Thomas, a resident of Wisconsin, filed the Thomas Action on July 13, 2022, alleging, in a putative class action complaint (D.E. 1, the “Thomas Action”), that IANT made

misrepresentations regarding the ability of one of its haircare product lines, the Potion 10 Miracle Repair Products (the “Miracle Repair Products”), to “repair” hair and asserting various Wisconsin law claims (warranty, consumer protection) related thereto. The Court entered a scheduling Order in the Thomas Action on November 23, 2022 (D.E. 32). Among other matters, trial was set for the trial calendar commencing July 31, 2023.

2. Thereafter, Plaintiffs Melanie Gerard, Jolie Hamilton, Deborah Manning, and Elizabeth Nelson filed a separate action on February 8, 2023 (the “Gerard Action”). Plaintiffs in the Gerard Action are residents of Washington State, Virginia, Massachusetts, and Illinois. The Gerard Action is also a putative class action and raises similar legal (warranty, consumer protection under the respective laws of the Gerard Plaintiffs’ states of residence) and factual claims related to IANT’s alleged misrepresentations as to the Miracle Repair Products.

3. On March 2, 2023, the Parties filed a Joint Motion to Consolidate the Thomas and Gerard Actions and enter a schedule for the consolidated action, which the Court granted on March 8, 2023. (D.E. 61).

4. The Court entered a scheduling order in the consolidated action on March 21, 2023. Among other matters, trial was set for the trial calendar commencing December 4, 2023.

Status of Party and Third Party-Discovery

5. On November 16, 2022, prior to consolidation of the Thomas and Gerard Actions, Plaintiffs served Defendant with discovery requests, including Requests for Production and Interrogatories.

6. As discussed below, given the order partially staying discovery in this action, Defendant provided written responses and objections to those discovery requests, and the Parties are currently meeting and conferring on the propriety of those responses. Defendant intends to begin producing documents and other responsive materials shortly.

7. On November 17, 2022, Plaintiffs also served several third-party retailers with subpoenas requesting marketing and sales data relevant to class certification and trial. Plaintiffs served these subpoenas based upon independent research of Defendant's top retailers, and prior to receiving any discovery from Defendant confirming the same, in order to gather the data as soon as possible. Plaintiffs believe that the data requested from these retailers is relevant to the damages and consumer surveys that Plaintiffs have informed Defendant they intend to design and field for class certification, and to their ultimate calculation of damages and liability expert opinions.

8. On December 2, 2022, following service of the retailer subpoenas, Defendant moved to stay discovery pending disposition of its Motion to Dismiss (D.E. 34).

9. On December 15, 2022, Plaintiffs responded in opposition to Defendant's motion to stay discovery, citing the prejudice that they would suffer if they were unable to obtain discovery necessary and relevant to class certification (D.E. 39).

10. Plaintiffs argued, in part, that in order for the Court to have sufficient time to rule on class certification prior to trial, briefing on Plaintiffs' motion for class certification would need to be completed in sufficient time for the Court to rule on class certification and for the parties to provide notice to the class and an opportunity to opt-out prior to trial. As this Honorable Court acknowledged in *Schaevitz v. Braman Hyundai, Inc.*, No. 1:17-cv-23890-KMM, 2019 WL 3890219, at *2 (S.D. Fla. May 8, 2019), in a class action matter, the plaintiff should move for class certification at "an early practicable time" as required under Rule 23(c)(1)(A) of the Federal Rules of Civil Procedure, and a trial in a class action can only occur following a ruling on class certification, which requires significant discovery and notice to the class in the event a class is certified. *Id.* ("Trial is set to begin in less than two months, and '[w]ere the class certified, notice would have to be given, followed by a period allowing class members to opt out. Considerable discovery would have to take place regarding the class members, discovery which Defendants did

not conduct as the action was not a class action. All remaining deadlines would have to be reset, and the trial delayed.”) (quoting *Gaisser v. Portfolio Recovery Assocs., LLC*, No. 08-60177-CIV, 2009 WL 10666810, at *3 (S.D. Fla. Mar. 2, 2009)).

11. On January 6, 2023, the Court issued an order on Defendant’s Motion to Stay Discovery (D.E. 52), denying Defendant’s Motion to Stay Discovery in part, staying Defendant’s obligation to respond to Plaintiffs’ requests for production until February 6, 2023, and requiring Defendant to respond to only a limited number of Interrogatories. In addition, the Court required Plaintiffs to reissue third-party subpoenas with limited scope.

12. On January 19, 2023, consistent with the Court’s Order, Defendant responded to the interrogatories the Court instructed Defendant to answer. The Parties are currently meeting and conferring on the propriety of those responses. Defendant has also served discovery (document requests and interrogatories) on Plaintiffs, which responses have not yet come due. Upon receipt of Plaintiffs’ responses, Defendant will confer as needed with Plaintiffs.

13. Subject to the Court’s January 6, 2023 Order (D.E. 52), and following meet and confer discussions with Defendant on the scope of the subpoenas, Plaintiffs reissued the third-party subpoenas on April 6, 2023, and represent that they are currently working with the retailers regarding discovery responses.

14. On February 1, 2023, Defendant filed an Unopposed Motion to Extend the Partial Stay of Discovery by 21 days based on the new plaintiffs and claims included in Plaintiffs’ then forthcoming Amended Consolidated Complaint, which the Court granted on February 2, 2023, extending the partial stay of discovery to February 27, 2023. (D.E. 57).

15. Following expiration of the stay of discovery on February 27, 2023, the Parties met and conferred regarding search terms and document production, and Defendant intends to begin producing documents and other responsive materials shortly.

16. On March 31, 2023, following the Court's order consolidating the Thomas and Girard cases, Plaintiffs filed their Amended Consolidated Complaint including Plaintiffs from both the Thomas and Girard Actions. (D.E. 64).

17. Defendant responded to the Amended Consolidated Complaint on April 21, 2023 with its Motion to Dismiss (D.E. 72).

Status of Expert Reports

18. Plaintiffs represent that they have retained several experts in this case and have been conferring with them on the information required for their expert opinions.

19. Once Plaintiffs receive Defendant's discovery responses, and the responses from third-party retailers regarding relevant sales data, they intend to continue preparing their expert reports, including the design and fielding of damages and/or consumer surveys.

20. The surveys and related analyses that Plaintiffs intend to run will, based on prior experience in other matters, cost in excess of \$100,000.00–\$150,000.00, and the retail sales data that Plaintiffs have requested from Defendant as well as third-party retailers in the subpoenas is highly relevant and essential to these analyses. Thus, Plaintiffs desire this essential data before assuming the substantial costs of designing and fielding these surveys.

21. In addition, once the relevant data is received, Plaintiffs and their experts will need to analyze the information and design and field the damages and other consumer surveys, all of which likely will take approximately eight to ten weeks to perform and complete reports. Thus, these efforts are incredibly and necessarily time-consuming and expensive, and require two months or more to conduct after the data is received.

22. If Plaintiffs proceed along these lines, Defendant will run counter surveys, and the ultimate schedule includes rebuttal reports. That process likely would take Defendant eight to ten weeks to perform and complete reports, as well as a significant financial commitment.

23. Following production of these reports, the Parties would then require two to three weeks to review the reports and conduct expert depositions.

24. Once fact and expert discovery is complete, the Parties intend to engage in class certification briefing. Moreover, as discussed above, and as this Honorable Court acknowledged in *Schaevitz*, 2019 WL 3890219, at *2, a trial in a class action can only occur following a ruling on class certification, which requires significant discovery and notice to the class in the event a class is certified. *Id.* (“Trial is set to begin in less than two months, and ‘[w]ere the class certified, notice would have to be given, followed by a period allowing class members to opt out. Considerable discovery would have to take place regarding the class members, discovery which Defendants did not conduct as the action was not a class action. All remaining deadlines would have to be reset, and the trial delayed.’”) (quoting *Gaisser*, 2009 WL 10666810, at *3).

25. Thus, while the Parties have been actively litigating this case in good faith, they will not be able to adequately prepare for and defend against class certification, and ultimately a trial following a ruling on class certification, without the substantial completion of the discovery that has been served and a concomitant reasonable extension of the current trial and pretrial deadlines.

Legal Standard

“District courts have ‘unquestionable’ authority to control their own dockets.” *Smith v. Psychiatric Solutions, Inc.*, 750 F.3d 1253, 1262 (11th Cir. 2014) (internal citation omitted). “This authority includes ‘broad discretion in deciding how best to manage the cases before them.’” *Id.* (internal citation omitted). Moreover, once a scheduling order is entered, it “may be modified only for good cause and with the judge's consent.” Fed. R. Civ. P. 16(b)(4). To establish good cause, the party seeking the extension must establish that the schedule could not be met despite the party’s diligence. *Ashmore v. Sec’y, Dep’t of Transp.*, 503 F. App’x 683, 685 (11th Cir. 2013); *see also Sosa v. Airprint Sys., Inc.*, 133 F.3d 1417, 1419 (11th Cir. 1998).

As shown herein, the Parties have been actively engaged in litigation and discovery. However, good cause exists to amend the scheduling order given the current status of discovery, the significant outstanding discovery relevant to class certification and the Parties' respective experts' opinions, the complexity of this case (which involves a consumer class action alleged on behalf of multiple consumers from multiple states), and due process considerations of a trial on the merits, which cannot occur until the Court issues a ruling on class certification.

**Good Cause Exists to Amend the Scheduling
Order to Extend the Deadline for Discovery and Class Certification**

As discussed above, Plaintiffs initially served party discovery on November 16, 2022, and third-party discovery on November 17, 2022, but have not received any documents responsive to these requests because of the partial stay in this action and requirement that Plaintiffs reissue the third-party subpoenas. This discovery is a precursor for nearly every other phase of this litigation, including corporate representative and fact witness depositions, expert reports, class certification, dispositive motions, and ultimately a trial.

The stay of discovery only recently expired on February 27, 2023. Although the Parties are working in good faith to undertake and complete discovery, they are continuing to meet and confer on search terms, and thus Defendant has not yet produced any responsive documents. In addition, Plaintiffs have yet to receive any responses to their third-party subpoenas, which were issued to retailers that Plaintiffs found through independent research, and not Defendant's document production, which may reveal additional relevant third parties once documents are produced.

As further described herein, Plaintiffs intend to design and field a damages survey and also to either field consumer surveys or retain relevant subject matter marketing experts, all of whom require the outstanding discovery in order to adequately prepare their reports. Plaintiffs and their experts will need eight to ten weeks following receipt of this discovery to design and field their survey(s) (which also require retention of a vendor to program the questionnaire, provide the

respondent sample and collect the survey data). Similarly, Defendants will run counter-surveys which will take an equivalent amount of time to accomplish.

In addition, the Parties cannot adequately conduct their respective named plaintiff and/or corporate representative deposition(s) until document production is substantially complete so that their counsel can authenticate the other side's documents and otherwise question the witnesses about issues and documents relevant to this dispute.

For these reasons, the Parties respectfully request that this Honorable Court extend the following pre-trial deadlines as follows:

Deadline or Event	Current Scheduled Date	Proposed Scheduled Date
Deadline to furnish initial disclosures pursuant to Fed. R. Civ. P. 26.	Served.	Completed
Deadline to amend the pleadings or join additional parties.	Consolidated Amended Complaint filed on March 31, 2023 [ECF No. 64].	Completed
Deadline to select a mediator and to schedule a time, date and place for mediation.	Mediation Conducted on October 3, 2022. <i>See</i> ECF No. 33.	Completed
Expert Disclosures	July 27, 2023	October 20, 2023
Discovery Deadline	August 25, 2023	November 22, 2023
Deadline for Plaintiffs' Motion for Class Certification.	Not set.	December 22, 2023
Deadline for Defendant's opposition to class certification and expert reports.	Not set.	February 9, 2024
Deadline for Plaintiff's reply in support of class certification and class certification rebuttal reports.	Not set.	February 23, 2024
Hearing on Plaintiff's motion for class certification.	To be set by the Court.	To be set by the Court.
Any and all pretrial motions, including motions for summary	September 15, 2023.	To be set by the Court.

Deadline or Event	Current Scheduled Date	Proposed Scheduled Date
judgment, merits <i>Daubert</i> motions, and motions in limine.		
Deadline to file joint pretrial stipulation, witness lists, and exhibit lists in accordance with S.D. Fla. L.R 16.1(d) and (e). The Parties shall also file final proposed jury instructions or conclusions of law (for non-jury trials).	October 6, 2023.	To be set by the Court.
Pre-trial Conference	November 21, 2023	To be set by the Court.
Calendar Call	November 30, 2023	To be set by the Court.
Two-week trial period commences.	December 4, 2023.	To be set by the Court.

This request is not being made for purposes of delay, and the requested extension would not prejudice the Court or any Party.

Alternative Request to Stay the Litigation Pending Resolution of the Motion to Dismiss

Alternatively, given the due process considerations involved in obtaining a ruling on class certification prior to trial, and the discovery remaining in this action, the Parties are amenable to a stay of this case until the Court issues a ruling on Defendant's Motion to Dismiss.

DATED: April 25, 2023

Respectfully submitted,

/s/ Rachel Soffin

Rachel Soffin

MILBERG COLEMAN BRYSON

PHILLIPS GROSSMAN PLLC

FL Bar No 18054

800 S. Gay Street, Suite 1100

Knoxville, TN 37929

T 865-247-0080

F 865-522-0049

rsoffin@milberg.com

Melissa S. Weiner (admitted *pro hac vice*)

PEARSON WARSHAW LLP

328 Barry Avenue S., Suite 200

Wayzata, MN 55391

T (612) 389-0600

mweiner@pwfirm.com

Harper T. Segui (admitted *pro hac vice*)

MILBERG COLEMAN BRYSON

PHILLIPS GROSSMAN PLLC

825 Lowcountry Blvd., Suite 101

Mt. Pleasant, SC 29464

T 919-600-5000

hsegui@milberg.com

Erin Ruben (admitted *pro hac vice*)

MILBERG COLEMAN BRYSON

PHILLIPS GROSSMAN PLLC

900 W. Morgan Street

Raleigh, NC 27603

T 919-600-5000

eruben@milberg.com

/s/ Allen Pegg

Allen P. Pegg

Robert C. Leitner

Daniela Carreras

HOGAN LOVELLS US LLP

600 Brickell Avenue

Suite 2700

Miami, Florida 33131

Telephone: (305) 459-6500

Facsimile: (305) 459-6550

allen.pegg@hoganlovells.com

robert.leitner@hoganlovells.com

daniela.carreras@hoganlovells.com

Robert B. Miller

ROBERT B. MILLER LAW, LLC

960 Alton Road

Miami Beach, FL 33139

Telephone: 305-384-7322

Facsimile: 305-430-6065

bob@robertbmillerlaw.com

Attorneys for Plaintiff & Proposed Classes

CERTIFICATE OF SERVICE

I hereby certify that on the 25th of April 2023, a true and correct copy of the foregoing was served by electronic mail to the following counsel of record:

Allen P. Pegg
Robert C. Leitner
Daniela Carreras
HOGAN LOVELLS US LLP
600 Brickell Avenue
Suite 2700
Miami, Florida 33131
Telephone: (305) 459-6500
Facsimile: (305) 459-6550
allen.pegg@hoganlovells.com
robert.leitner@hoganlovells.com
daniela.carreras@hoganlovells.com

Robert B. Miller
ROBERT B. MILLER LAW, LLC
960 Alton Road
Miami Beach, FL 33139
Telephone: 305-384-7322
Facsimile: 305-430-6065
bob@robertbmillerlaw.com

Counsel for Defendant

/s/ Rachel Soffin

Rachel Soffin