

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION**

<b>MATT MALKAMAKI,</b>	)	Case No. 03 CV 0286
	)	
Plaintiff,	)	Judge Nugent
	)	
v.	)	
	)	<b>DEFENDANT CATERPILLAR</b>
<b>SEA RAY BOATS, INC., et al.,</b>	)	<b>INC.'S MOTION FOR</b>
	)	<b>PROTECTIVE ORDER</b>
Defendants.	)	

Defendant Caterpillar Inc. (“Caterpillar”) moves this Court under Rule 26(c) of the Federal Rules of Civil Procedure for a Protective Order preventing plaintiff from taking depositions of fact witnesses after the deadline for discovery and dispositive motions.

This case has a long and increasingly complicated procedural history. Plaintiff filed this action against defendants Sea Ray and MarineMax in January 2003. More than a year later, plaintiff amended his complaint (in February 2004) to add Caterpillar as a defendant. Because the parties were unable to complete fact discovery by the original deadline of June 30, 2004, the Court extended that deadline to October 1, 2004. (*See* Case Management Order, July 6, 2004, attached as Exhibit A.) By that same Order, the Court set November 1, 2004 as the deadline for dispositive motions. (*See id.*)

During the summer, Caterpillar responded to all of plaintiff’s discovery requests, inspected the engines at issue in this matter, and conducted all of the depositions necessary to defend its case. In contrast, plaintiff filed a motion to compel discovery against Sea Ray and MarineMax, based on an on-going discovery dispute. In response, those three parties worked out an agreement to complete document production by mid-November. This Court allowed those parties to resolve their discovery dispute, but did not change the discovery deadline, the

dispositive motion deadline, or the trial date. (*See* Order, September 23, 2004, attached as Exhibit B.)

Despite having received all of the service reports for plaintiff's engines on July 1, 2004, plaintiff waited until October 15, 2004 to schedule the deposition of third-party witness Nick Maltickek (a technician from independent dealer Ohio CAT who serviced plaintiff's engines). (*See* email from Dan Haude to Nicole Wilson, Karl Bekeny, and Rob Hanna dated October 15, 2004, attached as Exhibit C.<sup>1</sup>) After noting that the fact discovery deadline had already passed on October 1, in the spirit of cooperation, Caterpillar did not oppose plaintiff's notice of Mr. Maltickek's deposition for October 29, provided that plaintiff did not object to Caterpillar's supplementing its motion with any information learned in Mr. Maltickek's deposition. (*See* email from Nicole Wilson to Dan Haude dated October 25, 2004, attached as Exhibit D.) However, plaintiff has now informed Caterpillar that he is postponing that deposition until *after* the November 1<sup>st</sup> deadline for dispositive motions – i.e., until after he has reviewed Caterpillar's Motion for Summary Judgment.

Prior to filing this motion, Caterpillar in good faith conferred with plaintiff (and defendants Sea Ray and MarineMax) in an effort to resolve the dispute without court action. Caterpillar has tried to accommodate plaintiff by offering to attend Mr. Maltickek's deposition on October 28, 29, or 30 (Saturday), or even November 1, prior to the filing of its Motion for Summary Judgment. (*See* letter from Nicole Wilson to Dan Haude, October 27, 2004, attached as Exhibit E; email from Nicole Wilson to Dan Haude, October 27, 2004, attached as Exhibit F.) Plaintiff's counsel, however, has informed Caterpillar that plaintiff is entitled to an extension,

---

<sup>1</sup> At the deposition of Karl Oreskovich on September 24, 2004, Mr. Cannon informed counsel for Caterpillar and for Sea Ray and MarineMax that he would call them that afternoon to discuss scheduling Mr. Maltickek's deposition. Mr. Haude's October 15<sup>th</sup> e-mail was the next mention of the deposition by any party.

and that the deposition will occur on November 3, 2004 regardless of whether Caterpillar attends. (See email from Dan Haude to Nicole Wilson, October 27, 2004, attached as Exhibit G.)

This Court set a discovery deadline of October 1, 2004. Further, under Rule 26(c) of the Federal Rules of Civil Procedure, this Court may restrict plaintiff's discovery to protect Caterpillar from "annoyance, embarrassment, oppression, or undue burden or expense." Here, Caterpillar is unduly burdened, and simply put, it is patently unfair for plaintiff to continue fact discovery beyond the date when Caterpillar outlines in its dispositive motion the shortcomings of plaintiff's case. Plaintiff must be aware that in every case management schedule set by this and other courts, discovery is set to conclude prior to the filing of dispositive motions. Neither the schedule nor the rules were created so that parties could delay the taking of depositions until 22 months after filing the lawsuit, four weeks after the close of discovery, and days after reviewing their opposing party's motion for summary judgment. Caterpillar offered reasonable accommodations up to a month after the close of discovery, but plaintiff has failed to take advantage of those accommodations. Accordingly, Caterpillar moves this Court for an Order prohibiting plaintiff from deposing Mr. Maltickek, or any fact witness, after November 1, 2004. See *Knoll v. American Telephone & Telegraph Co.*, 176 F. 3d 359 (6<sup>th</sup> Cir. 1999) (holding that this bench did not err in granting protective order to prevent depositions after the filing of dispositive motions of witnesses identified during the six month discovery period) (a copy of the decision is attached as Exhibit H for the Court's convenience).

Respectfully submitted,

/s/ Nicole K. Wilson

Kip T. Bollin (0065275)

Kip.Bollin@Thompsonhine.com

Nicole K. Wilson (0074261)

Nicole.Wilson@Thompsonhine.com

**THOMPSON HINE LLP**

3900 Key Center  
127 Public Square  
Cleveland, OH 44114-1216  
(216) 566-5500 (phone)  
(216) 566-5800 (fax)  
*Attorneys for Defendant Caterpillar Inc.*

**CERTIFICATE OF SERVICE**

A copy of the foregoing Defendant Caterpillar Inc.'s Motion for Protective Order was filed electronically on October 28, 2004. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

/s/ Nicole K. Wilson \_\_\_\_\_  
Attorney for Defendant Caterpillar Inc.