

**IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF ALABAMA  
NORTHERN DIVISION**

CYCLOPS VAPOR 2, LLC, *et al.*,

Plaintiffs,

v.

UNITED STATES FOOD AND DRUG  
ADMINISTRATION; STEPHEN  
OSTROFF, M.D., in his official capacity as  
Acting Commissioner of Food and Drugs;  
and THOMAS E. PRICE, M.D., in his  
official capacity as Secretary of Health and  
Human Services,<sup>1</sup>

Defendants.

Civil Action No. 2:16-cv-556-MHT-CSC

**JOINT MOTION TO AMEND SCHEDULING ORDER**

The parties jointly move the Court for a 3-month extension of all pending deadlines to allow new leadership personnel at the Department of Health and Human Services to more fully consider the issues raised in this case and determine how best to proceed. In support of this motion, the parties state as follows:

1. Plaintiffs are three companies that manufacture, distribute, or sell e-cigarettes or e-liquids. Compl. ¶¶ 8, 10. They challenge a U.S. Food and Drug Administration (“FDA”) rule that deems these products to be “tobacco products” subject to FDA regulation. *See* FDA, Deeming Tobacco Products To Be Subject to the Federal Food, Drug, and Cosmetic Act, as Amended by the Family Smoking Prevention and Tobacco Control Act; Restrictions on the Sale

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<sup>1</sup> Pursuant to Fed. R. Civ. P. 25(d), Dr. Stephen Ostroff and Dr. Thomas Price are substituted for their predecessors in office.

and Distribution of Tobacco Products and Required Warning Statements for Tobacco Products, No. FDA-2014-N-0189, 81 Fed. Reg. 28,973 (May 10, 2016) (the “deeming rule”).

2. Plaintiffs filed their motion for summary judgment on February 1, 2017. *See* Doc. No. 21. The Court previously granted a similar consent motion to extend all pending deadlines by 60 days. *See* ECF No. 30. Under the current briefing schedule, Defendants’ opposition and cross-motion are due on May 2, 2017; Plaintiffs’ reply and opposition are due on June 2, 2017; and Defendants’ reply is due on July 3, 2017. *See* ECF No. 30.

3. Due to the recent change in administrations, new leadership personnel at the Department of Health and Human Services seek additional time to more fully consider the issues raised in this case, and Defendants therefore respectfully request a 3-month extension of all pending deadlines.

4. The FDA has represented that it will defer enforcement of all future compliance deadlines under the deeming rule for e-cigarette products for 3 months, and that it plans to issue guidance to that effect. Accordingly, Plaintiffs join in this motion.

WHEREFORE, the parties respectfully request that the Court extend all pending deadlines in this case for 3 months. A proposed order is attached.

Dated: May 1, 2017

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Respectfully submitted,

JOYCE R. BRANDA  
Deputy Assistant Attorney General<sup>2</sup>

SHEILA LIEBER  
Deputy Director

/s/ Eric Beckenhauer  
ERIC B. BECKENHAUER

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<sup>2</sup> Defendants note that while, in some prior filings, Acting Assistant Attorney General Chad A. Readler was listed in the signature block as a matter of course, he has not participated in this case.

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**CERTIFICATE OF SERVICE**

I hereby certify that on May 1, 2017, I electronically filed the foregoing document with the Clerk of Court using the CM/ECF system, which will send notification of such filing to the following:

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**[PROPOSED] ORDER**

Upon consideration of the parties' joint motion to amend briefing schedule, it is hereby **ORDERED** that the motion is **GRANTED**; and it is

**FURTHER ORDERED** that the [21] scheduling order in this case is amended as follows: Defendants' opposition to Plaintiffs' motion for summary judgment and cross-motion for summary judgment shall be filed by August 2, 2017; Plaintiffs' reply in support of their motion for summary judgment and opposition to Defendants' cross-motion for summary judgment shall be filed by September 5, 2017; and Defendants' reply in support of their cross-motion for summary judgment shall be filed by October 5, 2017.

**SO ORDERED.**

Dated: \_\_\_\_\_

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CHARLES S. COODY  
United States Magistrate Judge