

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

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.

CASE NO. 1:16-cv-21199-CMA

INDUSTRIAL HEAT, LLC and IPH
INTERNATIONAL B.V.,

Counter-Plaintiffs,

v.

ANDREA ROSSI and LEONARDO
CORPORATION,

Counter-Defendants,

and

J.M. PRODUCTS, INC.; HENRY
JOHNSON; FABIO PENON; UNITED
STATES QUANTUM LEAP, LLC;
FULVIO FABIANI; and JAMES A. BASS,

Third-Party Defendants.

**UNOPPOSED MOTION FOR
LEAVE TO FILE SECOND
AMENDED ANSWER,
ADDITIONAL DEFENSES,
COUNTERCLAIMS AND THIRD-
PARTY CLAIMS**

UNOPPOSED MOTION FOR LEAVE TO FILE SECOND AMENDED ANSWER, ADDITIONAL DEFENSES, COUNTERCLAIMS AND THIRD-PARTY CLAIMS

Defendants Thomas Darden, John T. Vaughn, Industrial Heat, LLC (“Industrial Heat”), IPH International, B.V. (“IPH”), and Cherokee Investment Partners, LLC (collectively, “Defendants”), pursuant to Federal Rule of Civil Procedure (“Rule”) 15(a)(2), hereby seek leave to file their proposed Second Amended Answer, Additional Defenses, Counterclaims and Third-Party Claims (“2d Amended AACT”). Counsel for the other parties to this action that have appeared in this case have stated that they do not oppose the filing of the 2d Amended AACT. In support of this motion, Defendants state:

INTRODUCTION

The proposed 2d Amended AACT does not add new defenses or causes of action, does not add new parties, and does not change Defendants’ theory of the case. Rather, the proposed 2d Amended AACT constitutes a good faith effort to resolve certain issues raised by Plaintiffs Andrea Rossi and Leonardo Corporation (collectively, “Plaintiffs”) in connection with the Amended Answer, Additional Defenses, Counterclaims and Third-Party Claims (“1st Amended AACT”). As discussed below, good cause exists for the amendment, and pursuant to the liberal amendment policy of Rule 15, the requested amendment should be permitted.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiffs filed their Complaint in April 2016. [D.E. 1]. Defendants filed a motion to dismiss the Complaint [D.E. 17], which the Court granted in part and denied in part on July 19, 2016. [D.E. 24].

On August 6, 2016, Defendants filed their Answer, Additional Defenses, Counterclaims and Third-Party Claims (the “AACT”). [D.E. 29]. A few days later, Defendants filed the 1st

Amended AACT [D.E. 30], adding a new party, adding a new exhibit, and otherwise making a handful of revisions to the AACT.

In response to the 1st Amended AACT, Plaintiffs filed a Motion to Strike Defendants' Affirmative Defenses, or Alternatively, for a More Definite Statement (the "Motion to Strike") [D.E. 39] and a Motion to Dismiss Defendants' Amended Counterclaims Against Plaintiffs (the "Motion to Dismiss") [D.E. 41]. The Motion to Strike contends, among other things, that Defendants' additional defenses do not contain sufficient detail to give Plaintiffs "fair notice" as to the bases for the additional defenses, and the Motion to Dismiss argues, among other things, that the counterclaims of Industrial Heat and IPH are deficient for various reasons.

Defendants now seek leave to file the proposed 2d Amended AACT, which seeks to address various issues raised by Plaintiffs, either in their recently filed motions or elsewhere. The 2d Amended AACT primarily (a) provides more detailed allegations in support of the additional defenses that were raised in the 1st Amended AACT, drawing largely from allegations that already existed in the 1st Amended AACT but were not specifically referenced or identified in the additional defenses, (b) drops Industrial Heat as a counter-plaintiff on the second counterclaim for breach of contract, (c) changes the last third party defendant from John Doe a/k/a James Bass simply to James Bass, and drops the allegations that James Bass was either an alias or a fictitious person, (d) drops failure to pay taxes as a basis for a current claim of breach of contract, and (e) adds as an exhibit an amendment to an assignment agreement that was included as an exhibit to the 1st Amended AACT.

ARGUMENT

Pursuant to Rule 15(a), a party who has already amended its pleading once as a matter of course within the appropriate time frame may amend the pleading again "only by leave of court

or by written consent of the adverse party; and leave shall be freely given when justice so requires.” *Buckner v. Campbell*, 09-22815-CIV, 2010 WL 4483431, at *1 (S.D. Fla. Nov. 1, 2010) (internal citations omitted). Rule 15(a) reflects a policy of “liberally permitting amendments.” *Id.* Thus, in construing Rule 15(a), the United States Supreme Court has held:

In the absence of any apparent or declared reason – such as undue delay, bad faith, or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of the allowance of the amendment, futility of amendment, etc. – the leave sought should, as the rules require, be “freely given.”

Foman v. Davis, 371 U.S. 178, 182 (1962) (quoting Rule 15(a)); *see also McDaniel v. Bradshaw*, 10-cv-81082, 2011 WL 1827731, at *2 (S.D. Fla. May 12, 2011) (quoting *Foman*).

When a motion to amend a pleading is filed after a scheduling order deadline, courts also consider Rule 16. *See Sosa v. Airprint Sys., Inc.*, 133 F.3d 1417, 1418 (11th Cir. 1998). “Under Rule 16, deadlines in the scheduling order ‘may be modified only for good cause and with the judge’s consent.’” *Etkin & Co. v. SBD, LLC*, 11-cv-21321, 2014 WL 12498220, at *3 (S.D. Fla. Jan. 21, 2014) (quoting Rule 16(b)(4)). Good cause exists where amendment would “promote factual accuracy in the pleadings” and “encourage clarity of the record.” *Stalley v. ADS All. Data Sys., Inc.*, 8:11-cv-1652-T-33TBM, 2013 WL 2432204, at *3 (M.D. Fla. June 4, 2013). If good cause for an amendment after the scheduling order deadline is shown under Rule 16, then the instruction in Rule 15 to “freely give leave when justice so requires” should be followed. *Etkin & Co.*, 2014 WL 12498220, at *3.

Although the time to amend pleadings set forth in the Order Setting Trial and Pre-Trial Schedule, Requiring Mediation and Referring Certain Matters to Magistrate Judge (the “Scheduling Order”) [D.E. 23] expired on August 11, 2016, good cause exists to permit Defendants to file their 2d Amended AACT. The 2d Amended AACT does not add new

defenses or causes of action and does not change Defendants' theory of the case. Rather, the changes reflected in the 2d Amended AACT are designed and intended (a) to ensure the pleadings are factually accurate, (b) to reflect a good faith effort to resolve certain issues raised by Plaintiffs either in their Motion to Strike, Motion to Dismiss, or elsewhere, and (c) to remove certain allegations or legal theories that Industrial Heat or IPH are not pursuing.

Defendants believe that the following facts are also relevant to the Court's analysis under Rule 15(a) and 16(b)(4), and further support the Court granting Defendants leave to file the 2d Amended AACT. First, the parties that have made appearances in this case, including Plaintiffs, do not oppose the Court granting the relief sought by this motion (after having been provided a redline of the changes proposed between the 1st Amended AACT and the 2d Amended AACT). Second, all of those parties, as well as Defendants, are scheduled to meet to discuss a joint motion to the Court to modify the Scheduling Order in light of the additional parties and claims that have been added to this case since the Court entered the Scheduling Order. Third, the changes to the 2d Amended AACT are intended to resolve at least some of the issues raised in the Motion to Strike and Motion to Dismiss, mooted those motions as filed and freeing the Court from having to rule on arguments in the motions that are more readily resolved by the straightforward changes contained in the 2d Amended AACT.

In these circumstances, the liberal amendment policy of Rule 15 should be followed. There is no undue delay, bad faith, dilatory motive, repeated failure to cure deficiencies, or undue prejudice to the opposing party. The case is still in the beginning stages, and discovery has only just begun. No documents have been exchanged and no depositions have been taken. Based on the foregoing, Rules 15 and 16 support granting Defendants' motion for leave to amend.

WHEREFORE Defendants respectfully requests leave to file the proposed 2d Amended AACT, which is attached hereto as Exhibit A.¹

Dated: September 15, 2016.

Respectfully submitted,

/s/ Christopher R. J. Pace

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Attorneys for Defendants/Counter-Plaintiffs

¹ To avoid unnecessarily lengthening this filing and filling the Court's docket with duplicate copies, the only exhibit to the 2d Amended AACT that is being filed with this motion is the one new exhibit being added to the 2d Amended AACT. That exhibit (Exhibit No. 27) is the amended and restated assignment and assumption agreement, which is an amendment of the assignment and assumption agreement attached as Exhibit 7 to the 1st Amended AACT.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on September 15, 2016, 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/ Christopher R. J. Pace

Christopher R.J. Pace