

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 1:16-cv-21199-CMA/O'Sullivan

ANDREA ROSSI, *et al.*,

Plaintiffs,

v.

THOMAS DARDEN, *et al.*,

Defendants.

**PLAINTIFFS' MOTION FOR LEAVE TO FILE ANSWER AND AFFIRMATIVE
DEFENSES TO DEFENDANTS' INDUSTRIAL HEAT, LLC
AND IPH INTERNATIONAL, B.V.'S COUNTERCLAIM OUT OF TIME**

Plaintiffs, Andrea Rossi ("Rossi") and Leonardo Corporation ("Leonardo") (collectively "Plaintiffs"), pursuant to Fed. R. Civ. P. 6(b)(1)(B), move this Court for an entry of an order accepting Plaintiffs' Answer and Affirmative Defenses to Defendants Industrial Heat, LLC. ("IH") and IPH International, B.V.'s ("IPH") Third Amended Answer, Affirmative Defenses, Counterclaim and Third Party Claims ("Counterclaim") (D.E. 89), that was filed out of time. In support of this Motion, Plaintiffs state:

1. On November 23, 2016, Defendants Cherokee Investment Partners, LLC, IPH International B.V., Thomas Darden, John T. Vaughn, Industrial Heat, LLC (collectively "Defendants") filed their Third Amended Answer Additional Defenses, Counterclaims and Third Party Claims. (D.E. 78).

2. Thereafter, on November 29, 2016, Plaintiffs filed a Motion for Extension of Time to File Response/Reply/Answer as to D.E. 78.

3. On November 29, 2016, the Court granted Plaintiffs' Motion for Extension of Time to File a Response to the Counterclaim, and ordered that the "Plaintiffs Andrea Rossi and Leonardo Corporation, have seven (7) days from the Court' order on Third-Party Defendants' Motion to Dismiss file their answers and affirmative defenses." (D.E. 82).

4. The Order referred to in the Court's November 29, 2016 Order (D.E. 82) was entered on December 5, 2017. *See* D.E. 83.

5. Thereafter, without leave of the Court, on November 23, 2016, Defendants filed their Third Amended Answer, Affirmative Defenses, Counterclaim and Third party Claims (D.E. 78)¹ while the Third-Party Defendants' Motion to Dismiss was still pending.

6. Believing that the Third Amended Counterclaims and Third Party Claims were a nullity by virtue of the Counterclaims and Third Party Claims being amended without leave of this court, Defendants did not believe that a response to the Third Amended Counterclaim was required. *See Continental Illinois Nat'l Bank & Trust Co. v. Four Ambassadors*, 599 F. Supp. 534, 1984 U.S. Dist. LEXIS 22067 (S.D. Fla. 1984).

7. The Order referred to in the Court's November 29, 2016 Order (D.E. 82) was entered on December 5, 2017, finding that the Third Party Defendant's Motion to Dismiss the Second Amended Counterclaim and Third Party Claims was rendered moot by the filing of the Defendants Third Amended Counterclaim and Third Party Claims. *See* D.E. 83.

8. In light of the Court's recognition of the Third Amended Counterclaim on December 5, 2016, Plaintiffs believed, perhaps mistakenly, that Plaintiffs had fourteen (14) days from this Court's acceptance of the Third Amended Counterclaim in which to file their Response

¹ This Court hand granted Defendants leave to amend their Answer only (DE: 67, ¶2).

to Defendants Third Amended Answer and Affirmative Defenses to Complaint, Counterclaim, and Third Party Claims.

9. Notwithstanding the above, Plaintiffs were unsure as to the effect of the Defendants' third amended pleading on the deadline imposed by the Court to respond to the Defendants Second Amended Counterclaim which but for the Third Amended Counterclaim would have been due on December 12, 2016. As a result of Plaintiffs' uncertainty, Plaintiffs strived to have their response to Defendants Third Amended Pleading prepared by that date.

10. Due to a confluence of other deadlines and scheduling issues, as well as due to the length and complexity of the facts alleged, Plaintiffs were unable to complete their Response by December 12, 2016, and on December 14, 2016 Plaintiffs filed their Answer and Affirmative Defenses to Defendants IH and IPH's Third Amended Answer, Affirmative Defenses, Counterclaim and Third Party Claims (D.E. 89).

11. At all times, including after December 12, 2016, Plaintiffs' counsel was diligently and energetically endeavoring to complete their Response.

12. Plaintiffs respectfully request that this Court accept Plaintiffs' Answer and Affirmative Defenses to Defendants IH and IPH's Third Amended Answer, Affirmative Defenses, Counterclaim and Third Party Claims (D.E. 89), filed on December 14, 2016.

13. Plaintiffs do not seek this leave out of bad faith for the purpose of delaying this case.

14. Plaintiffs' note the relatively small nature of the delay, and do not believe judicial proceedings will be negatively impacted, or that any party has been unduly prejudiced.

15. Undersigned counsel has communicated with counsel for Defendants, who object to the requested relief.

WHEREFORE, for all the foregoing reasons, Plaintiffs, Andrea Rossi and Leonardo Corporation, respectfully request that this Motion be granted.

Dated: December 23, 2016.

Respectfully submitted,

/s/Brian W. Chaiken

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served by in the manner specified below on December 23, 2016 on all counsel or parties of record on the attached Service List.

/s/Brian W. Chaiken

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