

**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.)

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

Industrial Heat, LLC (“Industrial Heat”) and IPH International B.V. (“IPH”) hereby respond to the renewed motion for leave to file answer and affirmative defenses out of time (“Motion”) by Andrea Rossi and Leonardo Corporation (“Plaintiffs”). Docket Entry (“D.E.”) 98.

While Plaintiffs purport to present “excusable neglect” for their untimely answer pursuant to Federal Rule of Civil Procedure 6(b)(1)(B), Plaintiffs’ explanation is fatally flawed and erroneously attempts to attribute the source of their error to Industrial Heat and IPH. Inaccurately shifting blame is not excusable neglect, or even good cause, for Plaintiffs filing an untimely answer.

First, Plaintiffs claim that Industrial Heat, IPH and their co-defendants in this action (collectively, “Defendants”) did not have permission from the Court to file their Third Amended Answer, Additional Defenses, Counterclaims and Third Party Claims (the “3rd Amended AACT”). Motion at 2. But, as Plaintiffs know, Defendants clearly had such permission from the Court’s October 14, 2016 Order, which stated that “Defendants shall have seven (7) days from the Court’s order on Plaintiffs’ Motion to Dismiss ... (‘Motion to Dismiss’) [ECF No. 41] to amend their Answer in accordance with this Order.” D.E. 67.

Second, Plaintiffs suggest that the 3rd Amended AACT exceeded the scope of the Court’s October 14 Order. Motion at 2 & n.1. But the 3rd Amended AACT reflects precisely what the Court directed in the October 14 Order – it removed two defenses that the Court struck (the second and tenth defense), it removed a phrase from a third defense that the Court struck, and it clarified a fourth defense as directed by the Court. D.E. 78.¹

¹ The clarified defense is the sixth defense in the 3rd Amended AACT. This was the seventh defense in the earlier version of the AACT addressed in the Court’s October 14 Order. The defense moved up to the sixth place in the 3rd Amended AACT after the second defense (which the Court struck) was removed. D.E. 78, at pp. 23-24.

Third, Plaintiffs' position that they thought the 3rd Amended AACT was a "nullity" and therefore "did not believe that a response to the [3rd Amended AACT] was required" (Motion at 2) cannot be accurate. On November 29, Plaintiffs moved for additional time to answer the 3rd Amended AACT. In that motion, they noted that the 3rd Amended AACT was filed on November 23 and their answer, absent an extension, was due on November 30. D.E. 80, 81. If Plaintiffs believed the 3rd Amended AACT was somehow a nullity, this would have been reflected in their November 29 motion. It was not so reflected because Plaintiffs never believed that the 3rd Amended AACT was a nullity, but in fact admitted that they were required to answer the 3rd Amended AACT. D.E. 80, 81.

Fourth, in light of the foregoing, Plaintiffs had no basis to believe that they "had fourteen (14) days from this Court's acceptance of the [3rd Amended AACT] in which to file" their answer to the 3rd Amended AACT. Motion at 2-3. They admitted back on November 29 that their answer was due the following day, November 30, when they asked the Court for additional time to answer. The Court granted Plaintiffs such additional time on November 29, but only to "seven (7) days from the Court's order on Third-Party Defendants' Motion to Dismiss." D.E. 82. Plaintiffs admit in the Motion that they knew the "Order referred to in the Court's November 29, 2016 Order was entered on December 5." Motion at 2. Therefore, they knew that their answer was due December 12.

Undersigned informed Plaintiffs' counsel on December 13, 2016 that Plaintiffs had not answered the 3rd Amended AACT by the required deadline. Plaintiffs filed their answer the following day.

For the foregoing reasons, the Motion should be denied.

Dated: December 28, 2016

Respectfully submitted,

/s/ Christopher R. J. Pace

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on December 28, 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 of record for the parties.

s/ Christopher R. J. Pace

Christopher R.J. Pace