

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

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

ANDREA ROSSI and LEONARDO  
CORPORATION,

Plaintiffs,

v.

THOMAS DARDEN; JOHN T. VAUGHN;  
INDUSTRIAL HEAT, LLC; IPH INTER-  
NATIONAL B.V.; and CHEROKEE  
INVESTMENT PARTNERS, LLC,

Defendants.

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INDUSTRIAL HEAT, LLC and IPH INTER-  
NATIONAL 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.

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**DEFENDANTS, FULVIO FABIANI AND UNITED STATES QUANTUM LEAP, LLC,  
RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION FOR LEAVE  
TO AMEND THE THRID PARTY CLAIMS**

Defendants, United States Quantum Leap, LLC ("USQL") and Fulvio Fabiani ("Fabiani"), by and through undersigned counsel hereby responds in opposition to the

Defendants' Motion for Leave to File Fourth Amended Answer, Additional Defenses, Counterclaims and Third-Party Claims, and state as follows:

1. By Order dated January 17, 2017, this Court dismissed certain portions of the Third-Party Claims filed by the Defendants. [ECF No. 120]. The Court dismissed the claims originally filed against USQL and Fabiani, which were set forth in Counts IV and V of the third amended pleading.

2. On January 28, 2017, Defendants filed their Motion for Leave to amend the claims against USQL and Fabiani [ECF No. 124].

3. Contrary to the arguments raised by the Defendants in the Motion for Leave, this effort to amend should have been attempted many months ago when the Defendants were put on notice by the Third-Party Defendants of the deficiencies within the original allegations of the Third-Party Claims. This is especially true given that the Pre-Trial Schedule [ECF No. 23] set the deadline for the amendment of pleadings and to add parties as August 11, 2016.

4. On October 11, 2016, USQL and Fabiani filed their motion to dismiss the Third-Party Claims [ECF No. 60]. Although the Court required the Third-Party Defendants to consolidate their respective motions to dismiss [ECF No. 62], the arguments and reasoning remained the same. The Defendants had the opportunity to amend their claims at that time. Indeed, on November 23, 2016, the Defendants filed their Third Amended Answer and Affirmative Defenses, Counterclaim and Third Party Complaint [ECF No. 78]. By this time the issues for dismissal of the Third Party Claims had been fully briefed. However, the Third Amended Pleading failed to address any of the arguments that had been raised by the Third Party Defendants.

5. Because the Defendants filed the Third Amended Pleading, the Court was left with no alternative but to deny the Joint Motion to Dismiss as moot [ECF No. 83] which then required the Third Party Defendants to refile the Joint Motion to Dismiss [ECF No. 90] on December 19, 2016. The arguments presented again remained the same as those from October 11<sup>th</sup>. The Defendants did in fact delay in acknowledging potential defects with their Third Party Claims when viewed against the Pre-Trial Order and the looming deadlines. The Defendants made a calculated tactical decision in not addressing the arguments presented by the Third Party Defendants and attempt to cure the deficiencies with the Third Party Claims.

6. In addition to the unreasonable delay in attempting to cure the deficiencies with the Third Party Claims, the proposed amendment would be futile. Defendants make the conclusory allegation that USQL and Fabiani provided false electrical input data for the Plant, and that providing such false information is sufficient to lump USQL and Fabiani back into the FDUTPA claim. In support thereof, Defendants argue that electrical power data from Florida Power and Light (“FPL”) “show that often more power was being used at the Doral Location than being reported by USQL for the Plant, but sometimes less power was being used at the entire Doral Location than being reported by Fabiani and USQL just for the Plant.” *See* Fourth Proposed Amendment ¶ 142. There is also no mention by the Defendants as to why this allegation was withheld from the originally pled allegations.

7. This one purported fact is insufficient to maintain a FDUTPA claim against USQL and Fabiani. Even if the Defendants allegation were true, the Defendants fail to allege how the purported differences in the electrical input data plausibly caused any of the claimed actual damages. This Court has already held that “[t]o plead the second element of a FDUTPA claim, a plaintiff must show causation, stating how an alleged deceptive or unfair practice

actually resulted in damage. . . At the time of trial, the plaintiff need not prove reliance on deceptive acts, but “causation must be direct, rather than remote or speculative.” (See ECF No. 120 at pg. 9). Rather, the Defendants merely conclude, without any specificity or particular facts, that because there is different data, there must have been manipulation and deception by USQL and Fabiani. The Defendants’ conclusory allegation fails to establish any direct causation as to the claimed damages based on the readings by USQL and Fabiani, as opposed to the results provided by the independent evaluator, and, as such, amendment is futile.

8. Defendants’ also seek to amend the breach of contract claim against USQL and Fabiani. First, this claim is not a compulsory counterclaim to the underlying action between the Plaintiff and Defendant. The Court has not dismissed this claim with prejudice and such claim could be brought independently. This is important because, USQL and Fabiani would necessarily move to dismiss or for more specificity due to a number of deficiencies in the amended Third Party Claim. Namely that the agreement attached to the proposed amended pleading is to be effective more than a year after the original termination and that it is not signed by Industrial Heat as required for an extension of the original agreement.

9. Also, allowing the amendment sought by the Defendants would prejudice USQL and Fabiani, as these parties have not been on notice that they would have to seek discovery about this other contract and the circumstances surrounding the negotiation of the contract, the execution by Fabiani and the lack of execution by Industrial Heat. Allowing amendment at this juncture of this action would fail to afford USQL and Fabiani the due process opportunity to properly address the claim asserted by the Defendants.

WHEREFORE, for the foregoing reasons this Court should deny the Defendants' Motion for Leave to Amend the Third Party Claims against United States Quantum Leap, LLC and Fulvio Fabiani.

Respectfully submitted this 30<sup>th</sup> day of January, 2017.

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*/s/ Rodolfo Nunez*

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing was served on all counsel on the attached Service List by the electronic filing of the foregoing document with the Clerk of Court using CM/ECF on October 11, 2016.

/s/ Rodolfo Nunez  
Rodolfo Nuñez, Esq.

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