

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

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

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.

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

Counter-Plaintiffs,

v.

ANDREA ROSSI and LEONARDO
CORPORATION,

Counter-Defendants,

v.

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

Third-Party Defendants.

**THIRD-PARTY DEFENDANTS J.M. PRODUCTS, INC., HENRY JOHNSON, AND
JAMES A. BASS' RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION FOR
LEAVE TO FILE FOURTH AMENDED ANSWER, ADDITIONAL DEFENSES,
COUNTERCLAIMS AND THIRD-PARTY CLAIMS**

Third-Party Defendants, J.M. Products, Inc. (“JMP”), Henry Johnson (“Johnson”), and James A. Bass (“Bass”) (collectively, the “Third-Party Defendants”), by and through their undersigned counsel, hereby file their response in opposition to the Motion for Leave to File Fourth Amended Answer, Additional Defenses, Counterclaims and Third-Party Claims (the “Motion”) [ECF No. 124] filed by Thomas Darden, John T. Vaughn, Industrial Heat, LLC (“IH”), IPH International, B.V. (“IPH”), and Cherokee Investment Partners, LLC (collectively, “Defendants”). In support thereof, Third-Party Defendants state as follows:

BRIEF PROCEDURAL HISTORY

1. On July 1, 2016, this Court entered its Order [ECF No. 23] setting trial and pre-trial schedule (the “Scheduling Order”) establishing, *inter alia*, the following deadlines: (i) August 11, 2016. All motions to amend pleadings or join parties are filed; (ii) January 30, 2017. Parties exchange expert witness summaries or reports; and (iii) February 27, 2016. All discovery, including expert discovery, is completed.

2. On August 5, 2016, Defendants filed their Answer, Additional Defenses, Counterclaims and Third-Party Claims.

3. On August 11, 2016, Defendants filed their Amended Answer, Additional Defenses, Counterclaims and Third-Party Claims.

4. On September 19, 2016, Defendants filed their Second Amended Answer, Additional Defenses, Counterclaims and Third-Party Claims.¹

5. On October 11, 2016, Third-Party Defendants and United States Quantum Leap, LLC and Fulvio Fabiani each filed a Motion to Dismiss Counter-Plaintiffs’ Second Amended

¹ Plaintiffs filed a Motion to Dismiss and, in response, Defendants subsequently filed an Unopposed Motion for Leave to File Second Amended Answer, Additional Defenses, Counterclaims and Third-Party Claims.

Answer, Additional Defenses, Counterclaims and Third-Party Claims [ECF Nos. 61 and 60, respectively].

6. On October 13, 2016, this Court entered its Order [ECF No. 62] denying both motions to dismiss and requiring all third-party defendants to file a combined motion.

7. On October 20, 2016, Third-Party Defendants, along with United States Quantum Leap, LLC (“USQL”) and Fulvio Fabiani (“Fabiani”), filed their Combined Motion to Dismiss Counts III, IV, and V of Counter-Plaintiffs Second Amended Counterclaims and Third-Party Claims [ECF No. 69], which was then fully briefed by November 17, 2016.

8. On November 23, 2016, Defendants filed their Third Amended Answers, Additional Defenses, Counterclaims and Third-Party Claims [ECF No. 78]² pursuant to this Court’s Orders [ECF Nos. 67, 76] on Plaintiffs’ Motion to Strike [ECF No. 54].

9. On December 5, 2016, this Court entered its Order [ECF No. 83] denying third-party defendants’ motion [ECF No. 69] as moot due to the filing of the Defendants Third Amended Answer, Additional Defenses, Counterclaims and Third-Party Claims.

10. On December 19, 2016, third-party defendants filed their Combined Motion to Dismiss Counts III, IV, and V of Counter-Plaintiffs’ Third Amended Counterclaims and Third-Party Claims [ECF No. 90], which was then fully briefed.

11. On January 17, 2017, this Court entered its Order [ECF No. 120] dismissing Count IV as to all third-party defendants and Count V as to United States Quantum Leap, LLC and Fulvio Fabiani.

² Defendants third amended pleading did not address any of the deficiencies noted in third-party defendants’ motion to dismiss [ECF No. 69] despite the fact that it had been fully briefed.

12. On January 17, 2017, this Court entered its Order [ECF No. 121] denying Defendants' motion to extend pre-trial deadlines and holding that all pre-trial deadlines set forth in the Scheduling Order remain intact.

ARGUMENT

13. Defendants' Motion is untimely by nearly six months as the deadline for amending pleadings or adding parties expired on August 11, 2016.

14. In addition, Defendants have been on notice of the arguments against their third-party claims since October of 2016 and have unnecessarily delayed in requesting leave to amend. In fact, Defendants had the opportunity to address such arguments in November of 2016 when they filed their *third* amended pleading one week after third-party defendants' combined motion to dismiss Defendants' second amended pleading had been fully briefed. Instead, Defendants made a strategic decision to leave their third-party claims untouched and third-party defendants again moved to dismiss same, raising the same arguments as in the prior motion to dismiss.

15. Furthermore, any amendment to the pleadings at this stage would be prejudicial to Third-Party Defendants as the deadline to exchange expert witnesses expires tonight, the deadline to conduct all discovery expires in just four weeks, and several other pre-trial deadlines are fast-approaching.

16. Lastly, it is important to note that the fifth iteration of Defendants' pleading still contains the same deficiencies as the previous iterations.

17. With respect to JMP and Johnson, this Court held that Defendants "suffered damages as a result of a scheme that engendered the belief the Plant was performing at the rate specified in the License Agreement" caused by Plaintiffs' alleged manipulation of the Plant's operations and deception about the Plant's ability to achieve "Guaranteed Performance." *See*

ECF No. 120. Defendants attempt to cure this deficiency by stating that JMP and Johnson stated that the Plant was providing 1MW of energy created the false impression that the Plant was operating at “at the rate specified in the License Agreement” and that certain expenses would not have been incurred but for the relocation of the Plant to Florida. The fact remains that Defendants have not, and cannot, allege that JMP or Johnson made any representations as to the rate, or COP, at which the Plant was operating. Furthermore, adding the words “but for” to the allegations does not cure the deficiency noted by this Court that Defendants fail to plausibly allege causation as to JMP and Johnson. Accordingly, Defendants have not, and cannot, allege that Defendants alleged actual damages “directly flow” from JMP or Johnson’s alleged actions.

18. With respect to Bass, Defendants do not actually make any new allegations and instead attempt to lump Bass in with JMP and Johnson. Given that Defendants do not, and cannot, add any allegations to attempt to cure the deficiencies as to Bass, the amendment would be futile. The alleged actual damages did not “directly flow” from any of the allegations against Bass.

19. With respect to USQL and Fabiani’s inclusion in the FDUTPA claim, Defendants attempt to cure the lack of facts supporting their inclusion by making the conclusory allegation that USQL and Fabiani provided false electrical input data for the Plant. Notwithstanding the fact that this allegation suffers from the same deficiency noted in this Court’s Order [ECF No. 120] (conclusory allegation), Defendants still fail to allege how this false data plausibly caused any of the alleged actual damages.

20. With respect to the breach of contract claim against USQL and Fabiani, it is important to note that it is not a compulsory counterclaim with respect to the underlying action and such claim could be brought independently. The inclusion of this claim at this stage of the

proceedings would be extremely prejudicial as it expands the scope of discovery unnecessarily with nearly no time remaining to conduct such discovery. Accordingly, this claim should be brought in a separate action where it may be properly resolved on the merits.

WHEREFORE, Third-Party Defendants J.M. Products, Inc., Henry Johnson, and James A. Bass respectfully request that this Court deny Defendants Thomas Darden, John T. Vaughn, Industrial Heat, LLC, IPH International B.V. and Cherokee Investment Partners, LLC's Motion for Leave to File Fourth Amended Answer, Additional Defenses, Counterclaims and Third-Party Claims [ECF No. 124], and grant any further relief the Court deems just and proper.

Respectfully submitted this 30th day of January, 2017.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on January 30, 2017, I electronically filed the foregoing with the Clerk of the Court using CM/ECF. Copies of the foregoing document will be served on all counsel of record via transmission of Notice of Electronic Filing generated by CM/ECF.

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