

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

CASE NO. 16-21199-CIV-ALTONAGA/O’Sullivan

ANDREA ROSSI, et al.,

Plaintiffs,

v.

THOMAS DARDEN, et al.,

Defendants.

ORDER

THIS CAUSE came before the Court on Defendants, Thomas Darden; John T. Vaughn; Industrial Heat, LLC; IPH International B.V.; and Cherokee Investment Partners, LLC’s (collectively, “Defendants[’]”) Motion for Leave to File Fourth Amended Answer . . . (“Motion”) [ECF No. 124], filed January 27, 2017, well after the August 11, 2016 deadline for amending pleadings (*see* Order . . . (“Scheduling Order”) [ECF No. 23]). Defendants’ proposed Fourth Amended Answer . . . (“Fourth Amended Answer”) [ECF No. 124-1] is attached as Exhibit A to the Motion.

Given the pre-trial deadlines implicated by the Motion, and as Defendants indicated the Motion was opposed (*see* Mot. 6), the Court ordered expedited briefing (*see* Order [ECF No. 125]). On January 30, 2017, three separate responses were filed by, respectively, Third-Party Defendants, Fulvio Fabiani and United States Quantum Leap, LLC (*see* Response . . . [ECF No. 126]); Third Party Defendants, J.M. Products, Inc., Henry Johnson, and James A. Bass (collectively, “Third-Party Defendants”) (*see* Response . . . [ECF No. 127]); and Plaintiffs, Andrea Rossi and Leonardo Corporation (collectively, “Plaintiffs”) (*see* Response . . . [ECF No. 128]). Defendants filed their Reply . . . [ECF No. 129] on January 31, 2017.

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Defendants seek leave to file an amendment in order to provide additional facts and exhibits to remedy the deficiencies addressed in the Court's Order ("January 20, 2017 Order") [ECF No. 120], dismissing Counts IV and V of the third-party claims. The proposed amendment to the Answer is limited to these counts and does not raise new legal theories. (*See* Mot. 2).

Under Federal Rule of Civil Procedure 16(b)(4), a scheduling order "may be modified only for good cause and with the judge's consent." *Id.* This good cause standard precludes modification unless the schedule cannot be met despite the diligence of the parties seeking the extension. *See, e.g., Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 609 (9th Cir. 1992) ("If [a] party was not diligent, the [good cause] inquiry should end." (alterations added)); *Roberson v. BancorpSouth Bank, Inc.*, Civ. Act. No. 12-0669-WS-N, 2013 WL 4870839, at *2 (S.D. Ala. Sept. 12, 2013) ("Diligence, not lack of prejudice, is the touchstone of the Rule 16(b)(4) inquiry.").

Defendants' initial Answer . . . [ECF No. 29] and Amended Answer . . . [ECF No. 30] were filed by the Scheduling Order's August 11, 2016 deadline to amend. Despite diligence on the part of Defendants, they could not have met that deadline with respect to this latest Fourth Amended Answer given the multiple rounds of motions to dismiss and the issues finally resolved by the January 20 Order. Thus, the Court finds good cause for permitting a late amendment. Moreover, Defendants' amendment is narrowly tailored to address the deficiencies identified in the January 20 Order, and, as revised, sufficiently cures those deficiencies to properly allege claims for relief. As such, the amendment is not futile.


Therefore, after review of the Fourth Amended Answer, the Motion, and related briefing, it is

ORDERED AND ADJUDGED as follows:

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1. The Motion [ECF No. 124] is **GRANTED**.
2. Defendants are directed to file their Fourth Amended Answer as a separate docket entry by **February 1, 2017**.
3. Plaintiffs and Third-Party Defendants will respond with answers within the time permitted by the Federal Rules. The Court will not entertain further motions to dismiss for failure to state claims for relief; the objections raised in the Responses [ECF Nos. 126, 127 & 128] are preserved.

DONE AND ORDERED in Miami, Florida this 1st day of February, 2017.



CECILIA M. ALTONAGA
UNITED STATES DISTRICT JUDGE

cc: counsel of record