UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

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

ANDREA ROSSI, *et al.*,

Plaintiffs,

v.

THOMAS DARDEN, *et al.*,

Defendants.

PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION FOR LEAVE TO FILE FOURTH AMENDED ANSWER, ADDITIONAL DEFENSES, COUNTERCLAIMS AND THIRD-PARTY CLAIMS

Plaintiffs ANDREA ROSSI ("ROSSI") and LEONARDO CORPORATION ("LEONARDO"), by and through their undersigned counsel, hereby file their response in opposition to Defendants THOMAS DARDEN ("DARDEN"), JOHN T. VAUGHN ("VAUGHN"), INDUSTRIAL HEAT, LLC ("IH"), IPH INTERNATIONAL B.V. ("IPH"), and CHEROKEE INVESTMENT PARTNERS, LLC's ("CHEROKEE") (collectively, "Defendants"), Motion for Leave to File Fourth Amended Answer, Additional Defenses, Counterclaims and Third-Party Claims ("Motion") [ECF No. 124], and state as follows:

Introduction

On January 27, 2017, the Defendants filed their Motion seeking leave to file their **fifth** iteration of their Answer, Affirmative Defenses, Counterclaims and Third Party Claims. As indicated in the Motion, the proposed Fourth Amended Answer, Additional Defenses, Counterclaims and Third-Party Claims ("Proposed Fourth Amendment"), "does not contain any new legal theories, new causes of action, or any new allegations to the Answer, Additional

Defenses or Counterclaims…." Rather, the Proposed Fourth Amendment merely sets forth baseless and conclusory allegations, which are contradicted by available evidence obtained throughout the months of discovery in this matter, in an effort to fabricate causes of action. The Defendants' effort is futile, and the Motion should be denied.

Procedural History

On July 1, 2016, this Court entered its Order Setting Trial and Pre-Trial Schedule, Requiring Mediation, and Referring Certain Matters to Magistrate Judge ("Scheduling Order") [ECF No. 23]. The Scheduling Order stated, *inter alia*, that the deadline to file motions to amend pleadings or join parties was August 11, 2016, the deadline to exchange expert witness summaries or reports is January 30, 2017, and the deadline to complete discovery is February 27, 2017. The Court has subsequently indicated that such deadlines shall not be extended. *See* Order dated January 17, 2017 [ECF No. 121].

On August 6, 2016, Defendants filed their Answer and Additional Defenses to Plaintiffs' Complaint (which included Counterclaims and Third Party Claims). [ECF No. 29]. On August 11, 2016, Defendants filed their Amended Answer, Additional Defenses, Counterclaims and Third Party Claims. In response, on August 30, 2016, Plaintiffs served Defendants with a Safe Harbor Letter and Proposed Motion for Sanctions pursuant to Rule 11 predicated upon the frivolous and baseless claims contained within that pleading. On September 15, 2016, before the Court could rule upon Plaintiffs' Motion to Dismiss Counterclaim, Defendants requested this Court's leave to file their Second Amended Answer, Additional Defenses, Counterclaims and Third-Party Claims [ECF No. 45]. This Court granted the unopposed motion and granted Defendants leave to file an amended pleading [ECF No. 47]. On September 19, 2016, Defendants filed their Second Amended Answer, Additional Defenses, Counterclaims and Third-Party Claims [ECF No. 50].

In response thereto, on September 29, 2016, Plaintiffs filed their Motion to Dismiss Defendants second amended pleading. [ECF No. 56]. Thereafter, on October 11, 2016, Third-Party Defendants J.M. PRODUCTS, INC. ("J.M. PRODUCTS"), HENRY JOHNSON ("JOHNSON") and JAMES A. BASS ("BASS") filed their Motion to Dismiss Counter-Plaintiffs' Second Amended Counterclaim and Third-Party Claims [ECF No. 61] and Third-Party Defendants FULVIO FABIANI ("FABIANI") and UNITED STATES QUANTUM LEAP, LLC ("QUANTUM LEAP") Motion to Dismiss Counts IV and V of the Second Amended Counterclaims and Third-Party Claims and Memorandum of Law [ECF No. 60]. The Third-Party Defendants then filed a *Combined* Motion to Dismiss Counts III, IV, and V of Counter-Plaintiffs' Second Amended Counterclaims and Third-Party Claims, and Incorporated Memorandum of Law [ECF No. 69] on October 20, 2016. Accordingly, as of October 2016, Defendants have been on notice of all arguments relevant to their Motion and this Court's Order precipitating the Motion.

During the pendency of the foregoing Motions to Dismiss, the Defendants filed their Third Amended Answer, Additional Defenses, Counterclaims and Third-Party Claims ("Third Amended Answer") [ECF No. 78] on November 23, 2016. The Third Amended Answer, however, did not address any of the deficiencies raised by the Motions to Dismiss. As such, the Third-Party Defendants filed their *Combined* Motion to Dismiss Counts III, IV, and V of Counter-Plaintiffs' Third Amended Counterclaims and Third-Party Claims, and Incorporated Memorandum of Law [ECF No. 90] on December 19, 2016, once again raising the same arguments.

On January 17, 2017, this Court entered an Order [ECF No. 120] on Third-Party Defendants' *Combined* Motion to Dismiss Counts III, IV, and V of Counter-Plaintiffs' Third Amended Counterclaims and Third-Party Claims ("Order") [ECF No. 90]. The Order found, in pertinent part, that:

a. Count IV for violation of the Florida Deceptive and Unfair Trade Practices Act ("FDUPTA") must be dismissed as to FABIANI and QUANTUM LEAP because the Defendants "do not attribute any specific deceptive statements or acts to FABIANI or QUANTUM LEAP." The Court further stated that, at most, the Defendants "suggest in conclusory fashion the failure to provide information was tantamount to affirmatively misrepresenting the nature of the operations at the facility."

b. Count IV must also be dismissed as to JOHNSON, J.M. PRODUCTS, and BASS because Defendants failed to "plausibly allege causation between JOHNSON's, J.M. PRODUCTS's, and BASS's complained-of deceptive acts and actual damages in the form of service payments, expense reimbursements, and equipment costs." Specifically, the Court found that although Defendants allege that JOHNSON, J.M. PRODUCTS, and BASS may have contributed to the "scheme" to induce moving the Plaint to Florida, "none directly resulted in" the Defendants' damages.

c. Count V for Breach of Contract must be dismissed as to FABIANI and QUANTUM LEAP because Defendants "do not provide the actual writing in which the Quantum Leap Agreement was renewed." The Court also expressly disregarded e-mail correspondences alluding to any such renewal.

Memorandum of Law

"Ordinarily, if the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, leave to amend should be freely given." *Lelieve v. Orosa*, No. 10-23677-CIV-ALTONAGA/Simonton, 2011 U.S. Dist. LEXIS 124585, 2011 WL 5103949 (S.D. Fla. Oct.

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27, 2011). A district court need not allow an amendment, however, "(1) where there has been undue delay, bad faith, dilatory motive, or repeated failure to cure deficiencies by amendments previously allowed; (2) where allowing amendment would cause undue prejudice to the opposing party; or (3) where amendment would be futile." *Espinoza v. Countrywide Home Loans Servicing, L.P.*, No. 14-20756-CIV-ALTONAGA/O'Sullivan, 2014 U.S. Dist. LEXIS 107263, 2014 WL 3845795, at *20 (S.D. Fla. 2014); *see also Lelieve v. Orosa*, No. 10-23677-CIV-ALTONAGA/Simonton, 2011 U.S. Dist. LEXIS 124585, 2011 WL 5103949 (S.D. Fla. Oct. 27, 2011) ("The Court may deny leave to amend where the amendment would be futile.")

Where there are no set of facts that could revive a party's theories for relief, any further amendment would be futile. *Espinoza v. Countrywide Home Loans Servicing, L.P.*, No. 14-20756-CIV-ALTONAGA/O'Sullivan, 2014 U.S. Dist. LEXIS 107263, 2014 WL 3845795, at *20 (S.D. Fla. Aug. 5, 2014). Similarly, where a party has had multiple opportunities to compile the requisite allegations, and where that party is clearly informed of the deficiencies of the allegations, amendment is futile if the amended pleadings contain the same fatal defects. *Garcia v. Neb. Student Loan Program*, No. 15-20716-CIV-ALTONAGA/O'Sullivan, 2015 U.S. Dist. LEXIS 184623, at *11 (S.D. Fla. July 1, 2015); *see also Lomax v. Wal-Mart Stores East*, No. 09-20901-CIV-ALTONAGA/Brown, 2009 U.S. Dist. LEXIS 98346, 2009 WL 3415561 (S.D. Fla. Oct. 19, 2009) (holding that Court had already provided ample opportunity to amend allegations and amended pleading still suffered same deficiencies, and, as such, further amendment was futile).

In the matter *sub judice*, the Defendants' Proposed Fourth Amendment is prejudicial and untimely. Even if the Proposed Fourth Amendment were not untimely, the amendment is futile in that the Defendants have had ample opportunity to engage in discovery and obtain the facts necessary to allege their cause(s) of action; the Defendants have been clearly informed of the

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deficiencies of the allegations as a result of the Court's January 17, 2017 Order; and, notwithstanding the foregoing, the Proposed Fourth Amendment contains the same deficiencies present in the prior pleading.

The Proposed Fourth Amendment is Prejudicial and Untimely

First, it is worthy to note that the Proposed Fourth Amendment is the Defendants' fifth iteration of their pleading. Defendants argue that this is the "first time the Court has dismissed any of IH or IPH's affirmative claims." *See* Motion p. 2. However, the Defendants have amended their pleadings time and time again, and now try for the fifth time notwithstanding the fact that: (1) the deadline to file amended pleadings expired more than five months ago; (2) the deadline to exchange expert witnesses expires today; (3) the deadline to propound written discovery expired one week ago; and (4) the deadline to conduct all discovery expires in less than one month.

Moreover, the Defendants had ample time to address the arguments raised in the Third-Party Defendants' motions to dismiss. The Third-Party Defendants filed their motions in October of 2016, and the Defendants even filed their Third Amended Answer with knowledge thereof. By the Defendants own choice, however, the Defendants failed and/or otherwise opted not to address such arguments therein. Rather, the Defendants now attempt to correct the deficiencies of their pleadings beyond the time allowed by the Court, and with precious little time remaining for the parties to properly conduct discovery. Based upon such untimeliness and prejudice, the Defendants' Motion should be denied.

The Proposed Fourth Amendment is Futile

The Proposed Fourth Amendment contains the same deficiencies present in the previous iteration of the pleading, and/or the Defendants have manufactured baseless and conclusory

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allegations to try to skirt by the glaring deficiencies indicated in the Court's Order. Specifically, the Defendants set forth the following "new" allegations:

1. QUANTUM LEAP and FABIANI provided false electrical input data for the Doral Plant, thereby subjecting QUANTUM LEAP and FABIANI to a FDUPTA claim. *See* Proposed Fourth Amendment ¶ 142.
2. Defendants would not have incurred damages but for JOHNSON's, J.M. PRODUCTS's and BASS's scheme to induce the Plant's move to Florida. *See* Proposed Fourth Amendment ¶ 144.
3. Defendants renewed the Quantum Leap Agreement in or about July of 2015, which is purportedly indicated in Exhibit 28 to the Proposed Fourth Amendment, and purportedly acknowledged in an e-mail exchange between FABIANI and IH. *See* Proposed Fourth Amendment ¶ 150 and Exhibit 28.

FDUPTA (Count IV)

To state a claim for a FDUPTA violation, a plaintiff must show: (1) a deceptive act or unfair practice; (2) causation; and (3) actual damages. *See Medimport S.R.L. v. Cabreja*, 929 F. Supp. 2d 1302, 1319 (S.D. Fla. 2013) (quoting *Blair v. Wachovia Mortg. Corp.*, No. 5:11-CV-566-OC-37TBS, 2012 WL 868878, at *3 (M.D. Fla. Marc. 14, 2012)). "[A] deceptive act occurs when 'there is a representation, omission, or practice that is likely to mislead the consumer acting reasonably in the circumstances, to the consumer's detriment.'" *Gavron v. Weather Shield Mfg., Inc.*, 842 So. 2d 773, 777 (Fla. 2003)).

QUANTUM LEAP and FABIANI. First, the Defendants allege that QUANTUM LEAP and FABIANI provided false electrical input data for the Plant, and the Defendants imply that providing such false information is sufficient to include QUANTUM LEAP and FABIANI in their

FDUPTA 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.

The Defendants' allegation is manufactured for the sole purpose of attempting to create a cause of action against QUANTUM LEAP and FABIANI, and the available evidence expressly contradicts such allegation. *See* Exhibit 1 and Exhibit 2, attached hereto. Moreover, even if the Defendants allegation that FABIANI and QUANTUM LEAP manipulated the electrical input data provided to Counter Plaintiffs while the Plant was operating at the Doral Location (¶142) was true (it is not), the Defendants fail to allege how the purported differences in data directly plausibly caused any of the claimed actual damages resulting from Counter Plaintiffs' "allowing the Plant to be moved to Florida". ¶144. In fact, logic dictates that the alleged manipulation of data while the Plant was in Florida would have necessarily had to occur after the expenses of moving the plant to Florida had been incurred. Accordingly, such expenses could not, under any circumstances, have resulted from the alleged manipulation by FABIANI and QUANTUM LEAP. Moreover, the Defendants merely conclude, without any specificity or particular facts, that because there is different data, there must have been manipulation and deception by FABIANI and QUANTUM LEAP. The Defendants' conclusory allegation fails to establish any direct causation as to the claimed damages or the results provided by the independent evaluator, and, as such, amendment is futile.

JOHNSON, J.M. PRODUCTS and BASS. Second, the Defendants' allegation that no damages would have resulted but for JOHNSON's, J.M. PRODUCTS's and BASS's "scheme" to

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induce the Plant's move to Florida is not only conclusory and baseless, but fails to even address the concerns set forth in the Court's Order. Specifically, the Order states 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…. The Florida location may have made it more difficult to monitor its operations, but it was ROSSI's and LEONARDO's alleged manipulation of the Plant's operations and deception about its ability to achieve 'Guaranteed Performance' that caused the identified damages."

Defendants' Proposed Fourth Amendment attempts to divert the Court's attention away from the above-stated deficiency by concluding—without any relevant support—that expenses "would not have been incurred" but for the purported "scheme." The same fact remains true, however, that the Defendants have not alleged—and cannot allege—how JOHNSON, J.M. PRODUCTS and/or BASS directly caused Defendants "to believe the Plant was performing at the promised productivity rate" and, hence, Defendants have not alleged—and cannot allege—how JOHNSON, J.M. PRODUCTS and/or BASS directly caused Defendants to incur damages. As a result, the Proposed Fourth Amendment would be futile.

Breach of Contract (Count V)

Finally, the Defendants propose to amend Count V by attaching a purported renewal to the Quantum Leap Agreement. *See* Fourth Proposed Amendment ¶ 150 and Exhibit 28. Notably, Exhibit 28 (the alleged Technical Consulting Agreement dated September 1, 2015) is not signed by all parties nor is there any indication that it was ever signed by IH. Notwithstanding, the Counter-Plaintiffs ask the Court to infer that Third Party Defendants FABIANI and/or QUANTUM LEAP's February 1, 2016 e-mail acknowledging some unspecified "contract to monitor E-cat plant in Miami" referred to the unsigned September 1, 2015 Technical Consulting

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Agreement. Interestingly, Defendants never specifically state that the agreement referenced in FABIANI's February 1, 2016 e-mail was accepted and agreed to by Industrial Heat, LLC.

Moreover, the proposed amendment as to FABIANI is futile. In this Court's January 17, 2017 Order, this Court considered FABIANI's argument that no consideration existed for his Joinder in the Quantum Leap Agreement. [ECF No. 120]. This Court reasoned that "it is plausible that the requirement of the Joinder was part and parcel of the Quantum Leap Agreement and Fabiani, as the sole member and manager of Quantum Leap, reaped the benefits." (internal quotations omitted). *Id.* Unlike the original Quantum Leap Agreement considered by the Court, on the face of the alleged "renewal" of the Technical Consulting Agreement, it demonstrates that the alleged Joinder was signed by Fulvio Fabiani on July 7, 2015, nearly a month before the date upon which the Technical Consulting Agreement was allegedly entered into. Accordingly, FABIANI's execution of the alleged Joinder could not have been "part and parcel" with the execution of the agreement by Industrial Heat, LLC and therefore lacked independent consideration. Unlike the prior alleged agreement, the Court cannot infer consideration without more information where the parties' signature substantially predated the other parties entering into the agreement.

Lastly, the Defendants' Breach of Contract claim is not a compulsory counterclaim. The claim includes unnecessary parties and includes two agreements that have no bearing on the claims underlying this matter. As such, the claim would require the parties to engage in additional discovery, with almost no time remaining. Accordingly, the claim should be brought in a separate action in order to be properly litigated.

WHEREFORE, Plaintiffs ANDREA ROSSI and LEONARDO CORPORATION, respectfully request 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.

Dated: January 30, 2017.

Respectfully submitted,

/s/ John W. Annesser

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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 January 30, 2017, on all counsel or parties of record on the attached Service List.

/s/ John W. Annesser
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