

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

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

**DEFENDANTS' REPLY IN SUPPORT
OF MOTION FOR LEAVE TO FILE
FOURTH AMENDED ANSWER,
ADDITIONAL DEFENSES,
COUNTERCLAIMS AND THIRD-
PARTY CLAIMS**

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 BASS,

Third-Party Defendants.

DEFENDANTS' REPLY IN SUPPORT OF MOTION FOR LEAVE TO FILE FOURTH AMENDED ANSWER, ADDITIONAL DEFENSES, COUNTERCLAIMS AND THIRD-PARTY CLAIMS

Defendants Thomas Darden, John T. Vaughn, Industrial Heat, LLC (“IH”), IPH Inerternational B.V. (“IPH”), and Cherokee Investment Partners, LLC (collectively, “Defendants”), hereby file their reply in support of their Motion for Leave to File Fourth Amended Answer, Additional Defenses, Counterclaims and Third-Party Claims ([D.E. 124]). In support thereof, Defendants state as follows:

INTRODUCTION

Plaintiffs’ and Third Party-Defendants’ responses, though filed separately, essentially argue the same points – that Defendants’ proposed Fourth Amended Answer, Additional Defenses, Counterclaims, and Third-Party Claims (“4th Amended AACT”) is untimely and futile. As explained below, the proposed 4th Amended AACT is timely because Defendants sought leave to file it only after the Court entered its order dismissing, for the first and only time, certain claims against Third-Party Defendants in Defendants’ 3rd Amended AACT [(D.E. 117)]. Furthermore, contrary to Plaintiffs’ and Third-Party Defendants’ arguments, the proposed 4th Amended AACT effectively addresses and cures all deficiencies identified by the Court with respect to the 3rd Amended AACT.

LEGAL ARGUMENT

I. The Proposed 4th Amended AACT is not futile.

A. *The proposed 4th Amended AACT sufficiently alleges that Third-Party Defendants made false representations about the Plant’s performance.*

The proposed 4th Amended AACT alleges that J.M. Products (“JMP”), James Bass (“Bass”), Henry Johnson (“Johnson”), Fulvio Fabiani (“Fabiani”) and United States Quantum Leap, LLC (“USQL”) made false representations about the Plant’s performance for purposes of

misleading IH and IPH into believing that the Plant was performing at a high level, which would make it more believable that the Plant was achieving a high Coefficient of Performance (“COP”). 4th Amended AACT ¶ 142. COP is a ratio of the power being generated by the Plant versus the power being used by the Plant (e.g., if the Plant produced six times more power than went into it, it would have a COP of 6.0). As the 4th Amended AACT explains, the false statements by JMP, Johnson and Bass about the power being generated by the Plant that JMP was allegedly using for a commercial purpose, and USQL and Fabiani’s false statements about the power being provided to the Plant go directly to both sides of this COP equation. 4th Amended AACT ¶¶ 142, 146.

In addition, without any explanation, Plaintiffs claim that the power data represented by USQL and Fabiani matches the actual power usage shown by Florida Power & Light (“FPL”), thereby contradicting an allegation in the 4th AACT. Plaintiffs attach two exhibits that purportedly support this argument, but there is no comparison between the exhibits; in fact, the FPL data is only shown on a monthly basis. Tellingly, Fabiani and USQL do not themselves make such an argument.

Attached as Exhibit A is a chart comparing the power data represented by USQL and Fabiani to the actual power usage shown by FPL, which produced daily records of power usage. These charts show that the power data represented by USQL and Fabiani was false, as alleged in the proposed 4th Amended AACT. *See* 4th Amended AACT ¶ 142. This is by no means a conclusory allegation. To the contrary, this is a factual allegation supported by direct evidence that Plaintiffs and Third Party Defendants manipulated the results of the purported testing of the Plant at the Doral Location. Moreover, Counter-Plaintiffs should not be required to prove their claim in their pleading. That is not standard on whether an amendment would be futile. An

amendment is futile only where “no set of facts can be proved ... that would constitute a valid and sufficient claim.” *UltraTech Intern., Inc. v. Swimways Corp.*, 3:05-CV-134-J-25MCR, 2009 WL 8590873, at *4 (M.D. Fla. Mar. 3, 2009).

As a result of Fabiani and USQL’s manipulation and false reporting of the power usage data, IH and IPH continued to spend money on the Plant’s operation in Florida. Similarly, Johnson, Bass and JMP reported that the Plant was producing power at a high level and that JMP was satisfied with the production. Had IH and IPH known Fabiani, USQL, Johnson, Bass and JMP were providing false information about the Plant’s production of power, they could have discontinued the Plant’s operation and not wasted substantial time and resources.

B. *The proposed 4th Amended AACT sufficiently alleges damages suffered by IH and IPH as a result of the Plant being moved to Florida.*

Plaintiffs are misguided in their argument that the 4th Amended AACT seeks to allege that false representations by Third-Party Defendants about the Plant’s power usage and production are the bases for damages IH and IPH suffered as a result of moving the Plant to Florida. Plaintiffs’ Opp. at 8. This is not the point made in the 4th Amended AACT. Rather, the point is that IH and IPH incurred expenses after the Plant was moved to Florida that they would not have incurred had they not been deceived by the Third Party Defendants Johnson, Bass and JMP that the Plant was operating in Florida to provide power to a real customer that was using the power in a manufacturing or production process. These expenses included all maintenance on the Plant during the time it was in Florida, an expense which, would have been borne by Rossi and Leonardo had the Term Sheet never been entered into. 4th Amended AACT ¶ 144.

C. *The 4th Amended AACT’s breach of contract claims against USQL and Fabiani sufficiently cures a technical deficiency but does not change the substance of the claim.*

This breach of contract claim against USQL and Fabiani has been part of this litigation since Defendants filed their original AACT. The contract extension identified in the proposed 4th Amended AACT contains nearly identical provisions to the contract attached to the original AACT. USQL and Fabiani have certainly been aware of the extension, and in fact IH produced the signed extension in discovery in November 2015 (before USQL and Fabiani filed the consolidated motion to dismiss). Fabiani and USQL's argument that they would "have to seek discovery about this other contract and the circumstances surrounding the negotiation of the contract" is without merit. First, Fabiani and USQL have not served a single discovery request in this litigation. Second, Fabiani and USQL have had access to all discovery produced by Defendants in this litigation. Defendants have produced all of its communications with Fabiani, which would include documents related to the negotiation of the contract extension.

Plaintiffs' argument that no consideration existed for Fabiani's joinder in the USQL agreement has already been rejected by the Court. *See* January 17, 2017 Order page 14[(D.E. 120)]. Plaintiffs now seek to revive this argument by claiming that Fabiani's joinder to the contract extension lacked consideration. This argument is without merit. Fabiani's joinder to the extension was executed on the same date he executed the extension. As the Court ruled previously, it is plausible that the Joinder was "part and parcel" of the extension and Fabiani, as sole member of USQL, reaped the benefits bestowed on the company pursuant to the extension of the USQL agreement. And if the joinder were signed before the contract extension, that would clearly demonstrate it was an inducement to IH entering the contract extension.

II. **Purported Delay**

The proposed 4th Amended AACT is not the result of delay, dilatory motive, or repeated failure to cure deficiencies.

Plaintiffs and Third-Party Defendants argue that the proposed 4th Amended AACT is untimely and Defendants have had the opportunity to cure deficiencies through prior amendments. This argument lacks merit. First, Plaintiffs and Third-Party Defendants take aim at the 3rd Amended AACT as the pleading that should have been the mechanism for curing the deficiencies identified by the Court in its order dismissing certain claims against Third-Party Defendants. However, the 3rd Amended AACT was filed pursuant to the Court's order of October 14, 2016 ([D.E. 67]), which directed Defendants to amend their *Additional Defenses* within a specific time (seven days) after the Court ruled on Plaintiffs' motion to dismiss. The Court's order did not permit Defendants to alter their Answer, nor did it permit IH or IPH to alter their Counterclaims or Third-Party Claims. Defendants complied with the Court's order. Doing so does not deprive IH or IPH from amending their Third-Party Claims to address the Court's first order finding any deficiency in those claims. *See Bryant v. Dupree*, 252 F.3d 1161, 1163 (11th Cir. 2001) (A prior amendment filed as matter of course does not preclude a party from having another opportunity to amend to cure pleading deficiencies identified by the court in ruling on a motion to dismiss).

Second, Plaintiffs and Third-Party Defendants seem to suggest that Third Party Defendants' motion to dismiss, which was only granted in part, placed Defendants "on notice" that certain allegations or claims in the 3rd Amended AACT were deficient. Plaintiffs and Third-Party Defendants cite no authority for the proposition that a party's unwillingness to yield to an opposing party's position as to the sufficiency of a pleading somehow amounts to undue delay. To the contrary, Defendants are entitled to assert arguments supporting the sufficiency of their pleadings and, even where the Court finds a pleading insufficient, leave is liberally granted

to amend the pleadings to cure deficiencies. Indeed, this Court partially granted Third Party Defendants' motion to dismiss *without prejudice*.

CONCLUSION

For the foregoing reasons, Defendants' motion should be granted.

Dated: January 31, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on January 31, 2017, 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 or parties of record.

/s/ Erika S. Handelson

Erika S. Handelson