UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

ANDREA ROSSI, et al.,	)	
	)	
Plaintiffs,	)	
v.	)	No. 16-cv-21199-CMA (JJO)
	)	
THOMAS DARDEN, et al.,	)	
	)	
Defendants.	)	
	)	

DEFENDANTS' MOTION TO EXCLUDE
THE OPINIONS AND TESTIMONY OF DR. K. WONG

Defendants hereby move to exclude all opinions and testimony of Plaintiffs' expert, Dr. Kau-Fui Vincent Wong ("Dr. Wong").

INTRODUCTION

Count I of Plaintiffs' Complaint alleges that Defendants Industrial Heat, LLC and IPH International, B.V. breached a License Agreement they entered with Plaintiffs Andrea Rossi ("Rossi") and Leonardo Corporation ("Leonardo") by failing to make an $89 million payment that became due upon Plaintiffs' alleged completion of a year-long "guaranteed performance" test. This alleged test involved Plaintiffs' operating a device – a plant containing a series of e-cat reactors (the "E-Cat Plant") – that Plaintiffs claim continually produced steam representing over one megawatt ("1 MW") of power at a warehouse located in Doral, Florida (the "Doral Facility") from February 2015 through February 2016. They further claim a report prepared by Fabio Penon demonstrates that the E-Cat Plant had a "Coefficient of Performance" ("COP") – defined as the amount of energy produced by the E-Cat Plant divided by the amount of energy consumed by the Plant – that was "often greater than sixty (60)," meaning it was producing more than sixty times the energy it was consuming. *See* Compl. ([D.E. 1]) ¶ 73.

To support their claim and to address certain of Defendants' criticisms of their claim, Plaintiffs retained Dr. K. Wong as a rebuttal expert. Dr. Wong provided his rebuttal expert report on February 13, 2017 ("Wong Report"). *See* Ex. 1, a true and correct copy of the Wong Report. He was deposed by Defendants on February 27, 2017. *See* Wong Dep. Tr. (excerpts of which are attached here to as Composite Ex. 2).

Dr. Wong sets forth four general opinions in his report. In Opinion #1, he states that "[t]he Coefficient of Performance is a criterion that is suitable to determine the way the E-Cat Plant functions." Ex. 1 at 4. This opinion is speculative, unreliable, and based upon insufficient facts and incorrect assumptions. First, Dr. Wong's deposition testimony makes clear that he lacks the requisite knowledge to provide competent and reliable testimony on the function or performance of the E-Cat Plant because he testified that he knows "nothing" about the E-Cat Plant or how it functions. Second, Dr. Wong testified that his opinion as to the suitability of the COP criterion was not based on any scientific principle. Rather, he simply employed "something that, arm's length, the party, Dr. Rossi and defendants, decided to use. I used that definition." Ex. 2 at 78:3-24. Dr. Wong's testimony and opinion on this issue will not assist the finder of fact in this case and creates a potential for prejudice and confusion that outweighs any probative value that it may have.

In Opinion #2, Dr. Wong claims that "[t]here are clear and logical explanations for an inverse relationship between the amount of power input into a device and the COP of that device. In fact, not only are such explanations logical, they should be expected from the way the E-Cat Plant was operated." Ex. 1 at 4. Again, Dr. Wong testified that he has no knowledge of how the E-Cat Plant was operated and, as a result, cannot provide competent and reliable testimony on this issue. Moreover, Dr. Wong's "opinion" amounted to nothing more than the application of

simple math based on a premise he simply assumed – without any basis – to be true. According to Dr. Wong, the parties' License Agreement says that COP was to be measured by "energy output" divided by "energy input." *Id*. at 5. He then opines, applying simple math, that "if the energy output (numerator) of the plant is approximately constant," then decreasing the denominator will increase the COP number. *Id*.

In Opinion #3, Dr. Wong claims that "[u]nder the conditions described at the Doral Facility, it was more than possible to expel 1MW of heat energy without rendering the Doral Facility 'unsuited for a human working environment.'" Dr. Wong's deposition testimony revealed that this opinion is based entirely upon the purported existence of a heat exchanger located on the second floor of the Doral Facility during the operation of the E-Cat Plant. However, Dr. Wong testified that the alleged heat exchanger was not present when he visited the Doral facility. In fact, he testified that he never saw any photographs of the heat exchanger; he never saw any diagrams of the heat exchanger; he never even saw any documentary support at all for the existence of the alleged heat exchanger. The only information Dr. Wong received about the existence of a heat exchanger were oral representations made by Plaintiff Andrea Rossi and Rossi's counsel. Dr. Wong's reliance on the oral, self-serving, and unsupported representations of Rossi to form the basis of this opinion renders it useless to a jury.

Similarly, in Opinion #4, Dr. Wong states that "[u]nder the conditions observed and described at the Doral Facility, it was more than possible to expel 1MW heat energy [sic] from the Doral Facility consistent with the amount of energy reported in Penon's report." First, the "conditions" observed by Dr. Wong at the Doral Facility are, as admitted by Dr. Wong, not the same conditions that existed at the time the E-Cat Plant was in operation in 2015-2016. Second, as described above, Dr. Wong's reliance on Plaintiff Rossi's oral representations as the sole basis

for his opinion that a heat exchanger existed at the Doral Facility renders his opinion (and the methodology used to reach that opinion) unreliable. Accordingly, Defendants respectfully request that Dr. Wong's testimony and opinions be excluded.

LEGAL STANDARD

Admission of expert testimony is governed by Rule 702 of the Federal Rules of Evidence, which states:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
>
> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
>
> (b) the testimony is based on sufficient facts or data;
>
> (c) the testimony is the product of reliable principles and methods; and
>
> (d) the expert has reliably applied the principles and methods to the facts of the case.

The party offering expert testimony has the burden of demonstrating, by a preponderance of the evidence, that Rule 702's requirements are satisfied. *McCorvey v. Baxter Healthcare Corp.*, 298 F.3d 1253, 1257 (11th Cir. 2002); *see also Allison v. McGhan Med. Corp.*, 184 F.3d 1300, 1306 (11th Cir. 1999) (quoting *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 592 n.10) ("The burden of laying the proper foundation for the admission of expert testimony is on the party offering the expert, and the admissibility must be shown by a preponderance of the evidence.").

The importance of this Court's "critical 'gatekeeping' function" with respect to expert testimony "cannot be overstated." *U.S. v. Frazier*, 387 F.3d 1244, 1260 (11th Cir. 2004) (*en banc*) (citing *Daubert*, 509 U.S. at 579; *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137 (1999)). It "inherently require[s] the trial court to conduct an exacting analysis of the *foundations* of expert opinions to ensure they meet the standards for admissibility under Rule

702." *Frazier*, 387 F.3d at 1260 (citation and internal quotation marks omitted). Courts regularly exclude opinions that are based on unsupported or faulty assumptions. *Furmanite America, Inc. v. T.D. Williamson, Inc.*, 506 F.Supp.2d 1126, 1129-30 (M.D. Fla. 2007) (explaining that expert testimony must be based upon "knowledge, meaning more than "subjective belief or unsupported assumptions.") (internal quotation marks omitted). "District courts are charged with this gatekeeping function to ensure that speculative, unreliable expert testimony does not reach the jury under the mantle of reliability that accompanies the appellation 'expert testimony." *Legg v. Voice Media Group, Inc.*, No. 13-62044-CIV-COHN, 2014 WL 1767097, at *1 (S.D. Fla. May 2, 2014) (citing *Rink v. Cheminova*, *Inc.*, 400 F.3d 1286, 1291 (11th Cir. 2005) (citing *Daubert*, 509 U.S. at 589)).

To fulfill its gatekeeper role, the district court "'must engage in a rigorous inquiry' to decide whether (1) the expert is qualified to testify competently regarding the matters he intends to address; (2) the methodology by which the expert reaches his conclusion is sufficiently reliable …; and (3) the testimony assists the trier of fact, through the application of scientific, technical, or specialized expertise, to understand the evidence or to determine a fact in issue." *Id.* at *1 (citing *Rink*, 400 F.3d at 1292). In addition, even if an expert otherwise qualifies, the Court must determine whether the probative value of the testimony "is substantially outweighed by its potential to confuse or mislead the jury." *Frazier*, 387 F.3d at 1263. "While there is inevitably some overlap among the basic requirements — qualification, reliability, and helpfulness — they remain distinct concepts and the courts must take care not to conflate them." *Id*. at 1260.

"[A] judge assessing a proffer of expert scientific testimony under Rule 702 should also be mindful of other applicable rules." *Daubert*, 509 U.S. at 595. "Rule 703 provides that expert opinions based on otherwise inadmissible hearsay to be admitted only if the facts or data are 'of

the type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject.'" *Id.* Assumptions used to support an expert's conclusions should be reasonably certain and not based upon a party's self-serving assertions. *See In re Sherwood Investment Overseas Ltd., Inc.*, 2015 WL 4486470, at *30 (M.D. Fla. 2015). "Assumptions based solely on a plaintiff's testimony are inherently suspect." *Id.*; *see also Stinson Air Center, LLC v. XL Speciality Ins. Co.*, 2005 WL 5979096, at *3 (holding that an expert's methodology for forming an opinion is unreliable where it is "based solely upon representations of a party with an interest in the outcome of the lawsuit" without any independent corroboration).

ARGUMENT

I. This Court should exclude the opinion and testimony of Dr. Wong regarding Opinion #1 and Opinion #2.

Dr. Wong's first opinion is that "[t]he Coefficient of Performance is a criterion that is suitable *to determine the way the E-Cat Plant functions*." Ex. 1 at 4 (emphasis added). Dr. Wong's second opinion is that "[t]here are clear and logical explanations for an inverse relationship between the amount of power input into a device and the COP of that device. In fact, not only are such explanations logical, they should be expected from the *way the E-Cat Plant was operated*." *Id.* According to Dr. Wong, COP per the parties' License Agreement was to be measured by "energy output" divided by "energy input."[1] *Id*. at 5. He then opines: "If the energy output (numerator) of the plant is approximately constant, the equation dictates that the

[1] To the extent Dr. Wong intends to testify as to what was required of the parties under the terms of the License Agreement or interpret the terms of the License Agreement, such testimony should be excluded as an impermissible legal conclusion. *See Ramjeawan v. Bank of Am. Corp.*, No. 09-20963-CIV, 2010 WL 1645097, at *1 (S.D. Fla. Apr. 21, 2010) (explaining that expert opinion testimony regarding the meanings of contractual provisions is inadmissible).

COP of the E-Cat will increase when the plant draws less electrical power (denominator decreases)." *Id*.

A. **Dr. Wong's testimony about Opinion #1 and Opinion #2 would not be helpful to the jury because it is speculative, unreliable, and based on insufficient facts and incorrect assumptions.**

1. **Dr. Wong cannot testify competently regarding "the way the E-Cat Plant functions" or "the way the E-Cat Plant was operated."**

Dr. Wong testified without equivocation that he has absolutely no knowledge about of how the E-Cat works:

> Q: Tell me, what do you understand the E-Cat Plant to be that you saw at the Doral warehouse?
>
> A: Nothing.
>
> Q: I'm sorry. The E-Cat Plant is nothing? You've lost me a little bit. What—what is—
>
> A. I don't know anything about it. I didn't see it in action. I don't think anybody gave me any effort to explain what it is was. I did ask. I didn't get an answer.
>
> ….
>
> A. Another reason was because I never claimed to be an expert, and they didn't want an expert in that.

Ex. 2 at 76:14-77:4. Dr. Wong also confirmed at his deposition that he has no idea whether the purported energy produced by the E-Cat Plant is derived from a chemical process, nuclear process, or some other process:

> Q: In terms of – the E-Cat units that are to be producing energy, did you talk to Andrea Rossi about that process at all?
>
> A. No.
>
> Q: Did you talk about whether it was a chemical process or not?
>
> A: No.

Q: Did you talk about whether it was a nuclear process or not?

A: No.

Id. at 83:11-20. Dr. Wong, having received absolutely no information from anyone about the technology underlying the E-Cat Plant, seeks to explain to a jury that measuring COP is "suitable to determine the way the E-Cat Plant functions." He also seeks to provide an opinion that an inverse relationship between power input and COP "should be expected from the way the E-Cat Plant was operated." He should not be permitted to do so. Dr. Wong plainly admitted that he has no idea how the E-Cat Plant was operated, he never observed it in operation, and was provided no information that would enable him to understand the E-Cat Plant or its underlying technology. One of the crux issues in this litigation is whether the E-Cat technology "works" and, more specifically, whether Dr. Rossi demonstrated that it "works" at a level sufficient to trigger an $89 million payment. Dr. Wong's complete lack of knowledge and understanding of what the E-Cat technology is and what it purports to accomplish makes him unqualified to opine on the appropriate methodology to "determine the way the E-Cat Plant functions."

2. **Dr. Wong's opinion that the COP criterion is "suitable" to evaluate the E-Cat Plant is not based on science, but only what he was told was agreed to between Rossi and Defendants.**

Dr. Wong's Opinion #1 states that COP "is a criterion that is suitable to determine the way the E-Cat plant functions." In his deposition, he explained that this was not a scientific conclusion, but only a statement as to what he understood was agreed to between Rossi and Defendants:

Q. You have an opinion about a COP, which you have defined as the power or energy coming out of the system over the power or energy coming into a system.

…

Q. Is that correct?

…

A. The way you phrased it, I defined it. I used something that, arm's length, the party, Dr. Rossi and defendants, decided to use. I used that definition.

Ex. 2 at 78:5-24.

Q. All right. So let's see if we can just be clear here for this purpose. For purposes of your report, you accepted, as the formula for determining COP, the energy output divided by the energy input?

A. Correct.

Id. at 79:7-11.

Q. Okay. This is -- the COP -- this formula of COP is the energy -- is the energy into a plant versus -- the energy into the E-Cat plant versus the energy coming out of the E-Cat plant, correct?

A. As defined by Rossi.

Id. at 87:11-15.

Q. We talked about this earlier today. This is a COP formula that you were told to use which was just dividing the energy output of the E-Cat plant by the energy input of the E-Cat plant; is that correct?

A. Correct.

Id. at 150:18-23.

There is no application of scientific or engineering principles here to determine "suitability." Dr. Wong simply accepted a basic mathematical formula provided to him by the parties to this litigation that hired him. *See Advanced Drainage Sys., Inc. v. Quality Culvert, Inc.*, No. 2:12-1121, 2015 WL 1299368, at *8 (S.D. Oh. Mar. 23, 2015) (explaining that "[e]xpert testimony is not necessary to assist jurors with basic arithmetic."); *Richard Parks Corrosion Tech, Inc. v. Plas-Pak Indus., Inc.*, No. 3:10-cv-437(VAB), 2015 WL 5708541, at *7 (D. Conn. Sept. 29, 2015) (excluding expert's testimony because his calculations amounted to

nothing more than "simple math" and "were not based upon his own perceptions" but rather "upon the limited universe of facts counsel asked him to consider.").

3. **Dr. Wong's methodology in assessing the accuracy of Penon's calculations is based upon insufficient facts and is therefore not reliable.**

Dr. Wong also opines in his Report that "the *data collected* by Penon is consistent with this basic [COP] equation" he was told to use. Ex. 1 at 5 (emphasis added). This commentary is puzzling and any testimony along these lines would only serve to confuse a jury. This opinion cannot be about the methodology that Penon used in his report to calculate COP because Dr. Wong admitted that he had not seen that methodology prior to his deposition. Ex. 2 at 65:13-66:1-25. Dr. Wong testified that he never received and did not review the first five pages of Penon's report, which set forth the equations Penon purportedly utilized to calculate 1) the energy produced by the plant; 2) the energy absorbed by the plant; and 3) the energy multiple. *See id.*; Ex. 3 (a true and correct copy of the Penon report which was marked as Exhibit 4 to Wong's Deposition). In fact, the entirety of Penon's reported methodology for assessing the performance of the E-Cat Plant is contained in the first five pages of his report. *See* Ex. 3. But Dr. Wong did not review or consider that methodology when formulating his opinions and conclusions. Ex. 2 at 65:13-66:1-25.

Dr. Wong also did not even review all of the data purportedly collected by Penon and contained in the Appendices to his report:

Q. Did you review any material that came along with that disclosure, if you recall?

A. If there was, it would be the same, I think, as part of Penon's report. The whole data thing, I think, was showing up at different places, I think. Once I recognize that it was whole bunch of repeated stuff, I said --

Q. Don't need to look at the details of that?

A. Exactly, from a human point of view.

Ex. 2 at 64:13-21. Nor did he make any attempt to determine the accuracy of the data:

> Q. You did not attempt to analyze the calculations or the numbers in there to determine if any of them were accurate or consistent or inconsistent or anything of that nature?
>
> A. Not in that sense. I did go and mark – I think it was in Murray's report, Joseph Murray's report, to see that it was consistent with 24 hours, that the 1 megawatt was a very prominent number coming up. 1 megawatt heat generation was recorded a lot, a lot, so it's not unreasonable. I wasn't there when the data was taken.

Id. at 66:12-22.

In fact, all that this opinion by Dr. Wong means is that he was told to use a COP formula of energy output divided by energy input, and the Penon data contained numbers for both energy output and energy input. That is the functional equivalent of a person being told to calculate sales minus cost and then being provided a spreadsheet that has sales numbers and cost numbers. The data in the spreadsheet is "consistent" with figuring out the equation "sales minus costs," but it does not require an expert in accounting, math or engineering to reach that conclusion.

4. **Dr. Wong's Opinion # 2 is nothing more than the application of simple math to a process he does not understand.**

Dr. Wong opines that "an inverse relationship between the amount of power input" into the E-Cat Plant and the COP of that Plant "should be expected from the way the E-Cat plant was operated." Ex. 1 at 4. This is because, he opines, "*if* the energy output (numerator) of the plant is approximately constant," then decreasing the denominator will increase the COP number. *Id.* at 5 (emphasis added).

As noted above, Dr. Wong admitted that he knew nothing about how the E-Cat Plant operated and was not claiming to be an expert on how the E-Cat Plant operated. *See supra* p. 7. His assumption of "energy output (numerator) from the plant [being] approximately consistent"

is based on nothing more than looking at the Penon report appendices and recognizing that the numbers in the energy output column of those appendices was largely the same:

> Q. What is your basis for the assumption that if the energy output of the plant is approximately constant?
>
> A. Because I look at the data and I said -- that was the part I focused. You look and saw it as producing 1 megawatt and that is the output, 1 megawatt.

Ex. 2 at 152:4-10. This is nothing more than an exercise in reading and recognizing numbers; it has nothing to do with the application of any scientific or engineering methodology. (In fact, Dr. Wong admitted that he did not even read all the numbers in the Penon report: "[O]nce [he] recognize[d] that it was whole bunch of repeated stuff," he stopped reading the numbers. *Id*. at 64:13-21.)

The remainder of Dr. Wong's Opinion # 2 does involve a scientific methodology, but it is a methodology any juror can readily understand without an expert: For a formula of numerator divided by denominator, if the numerator is "approximately constant," then changing the denominator changes the outcome of the formula. This is, as Dr. Wong admitted, just simple math:

> Q. … If the numerator is always ten, then if you change the denominator, you're going to change what numerator divided by denominator equals?
>
> A. Correct.
>
> Q. So if the denominator becomes two, then the formula equals five. If the denominator becomes five, the formula equals two.
> It's just that basic of math, correct?
>
> A. Right.

Ex. 2 at 151:20-152:3.

Jurors are fully capable of looking at whatever numbers appear in the Penon report and deciding if they appear "consistent." They are equally capable of understanding the simple math

that if A divided by B equals C, if B is decreased, C is increased – for example, if $100 is split between 4 people, each gets $25, but if $100 is split between 2 people, each gets $50. No expert is needed to explain this.

5. **Dr. Wong's testimony as to Opinion #1 and Opinion #2 will not assist the trier of fact in understanding the evidence.**

Any opinions offered by Dr. Wong as to the soundness of Penon's methodology for measuring the E-Cat Plant's performance, including the accuracy of his calculations, will not be helpful to a jury and should be precluded. Dr. Wong's failure to obtain any knowledge relating to the underlying E-Cat technology, his failure to review the methodology Penon used to create his report, and his failure to analyze Penon's report to determine if it is accurate render Opinion #1 and Opinion #2 useless to a jury.

B. **Dr. Wong's testimony about Opinion #3 and Opinion #4 would not be helpful to the jury because it is speculative, unreliable, and based on insufficient facts and incorrect assumptions.**

Dr. Wong's Opinion #3 and Opinion #4 relate to the issue of whether the purported excess heat generated by the E-Cat Plant was effectively removed or dissipated from the Doral Facility, such that the facility would not have become unbearably hot during the E-Cat Plant's operation. Dr. Wong opined that a heat exchanger located on the second floor of the Doral Facility caused the heat purportedly generated by the E-Cat Plant to be expelled through open windows on the second floor of the facility. Dr. Wong's Opinion #3 and Opinion #4 are completely speculative and based upon unreliable information provided solely and exclusively by Rossi or Rossi's counsel. Dr. Wong's deposition testimony reveals that he was provided no credible information that a heat exchanger was present and functional during the operation of the E-Cat Plant at the Doral Facility. These opinions and any testimony by Dr. Wong regarding dissipation of heat should be excluded under *Daubert*.

Even assuming that Dr. Wong is sufficiently qualified to be an expert in this case with respect to his proffered opinions, qualifications "are by no means a guarantor of reliability." *U.S. v. Frazier*, 387 F.3d 1244, 1261 (11th Cir. 2004) (quoting *Quiet Tech. DC 8, Inc. v. Hurel-Dubois UK Ltd*., 326 F.3d 1333, 1341 (11th Cir. 2003)); *see also Eberli v. Cirrus Design Corp*., 615 F. Supp. 2d 1357, 1362 (S.D. Fla. 2009). "If admissibility could be established merely by the *ipse dixit* of an admittedly qualified expert, the reliability prong would be, for all practical purposes, subsumed by the qualification prong." *Id*. Before admitting expert testimony, the Court "must find that it is properly grounded, well-reasoned, and not speculative." *Id*. at 1262 (quoting Fed. R. Evid. 702 2000 advisory committee's notes (2000)).

"When an expert opinion is not supported by sufficient facts to validate it in the eyes of the law, or when indisputable record facts contradict or otherwise render the opinion unreasonable, it cannot support a jury's verdict." *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp*., 509 U.S. 209, 242 (1993). The Court must determine whether the reasoning or methodology used by the expert, even if valid, "properly can be applied to the facts in issue." *Daubert*, 509 U.S. at 592-93. "The consideration has been aptly described … as one of fit." *Id*. at 593 (citation and internal quotation marks omitted). Plaintiffs have the burden of proving reliability by a preponderance of the evidence, *McCorvey*, 298 F.3d at 1257, and cannot do so here because Dr. Wong's "methodology" for his opinions was not properly supported by sufficient facts.

1. **Dr. Wong lacks sufficient information to testify competently about heat dissipation during the operation of the E-Cat Plant at the Doral Facility.**

Dr. Wong's Opinion #3 states: "Under the conditions described at the Doral Facility, it was more than possible to expel 1MW of heat energy without rendering the Doral Facility

'unsuited for a human working environment." Ex. 1 at 4. Dr. Wong's Opinion #4 states "Under the conditions observed and described at the Doral Facility, it was more than possible to expel 1MW heat [sic] energy from the Doral Facility consistent with the amount of energy reported in Dr. Penon's report." *Id.* Both opinions completely rely upon Plaintiff Rossi's oral, self-serving, representation to Dr. Wong that a heat exchanger was present and operational during the operation of the E-Cat Plant. Both opinions are also grounded in Wong's conclusion that this heat exchanger, which he has never seen or examined, was capable of dissipating a substantial amount of heat.

In fact, Dr. Wong openly admitted that he does not dispute the opinion of one of Defendants' experts (which is also shared by Defendants' other expert) that if the alleged heat exchanger was not operating at the Doral Facility, it would have been an unsuitable human working environment:

> Q. My question to you is, if the heat exchanger didn't exist, wouldn't that warehouse have become unbearably hot?
>
> …
>
> A. The reactor reacts, generates heat, even though it's insulated.
>
> Dr. Rossi did tell me it was 1,500 degrees centigrade inside, at least in one spot. But the control room, I believe, is where – the one that was padlocked was there, human beings would sit, including Dr. Rossi, to take data, is probably air conditioned.
>
> That reactor room would be the hottest.
>
> Q. The reactor room would be the hottest and then it would go out to the rest of the warehouse?
>
> A. Whoever would be in the reactor room would be dead first, if it's not in the control room.
>
> Q. Sorry. Say that for me again.

A. Somebody in the reactor would be suffering first and I assume it's Dr. Rossi in the beginning. If it is the control room -- I believe it's the control room where all the computers are would be feeling, very, very uncomfortable.

Q. Let's exclude the control room. I'm just asking for the warehouse, the whole warehouse.

If there is 1 megawatt hour per hour of steam that's being produced in this warehouse and there is not a -- the heat exchanger that Dr. Rossi told you about, wouldn't that warehouse have become unbearably hot?

A. I'm a little wary about opining because I know Murray opined on that and calculated marble and everything.

Q. You're getting a little bit to my point. I'm trying to understand.

When you take issue with Joe Murray's opinion, it sounds to me like the only issue you're really taking with Joe Murray's opinion is you're saying there was a heat exchanger and that he's not accounting for the heat exchanger?

I need a verbal response.

A. Yes.

Q. You're, otherwise, not taking issue with Joe Murray's opinion because you haven't evaluated his opinion.

Solely the issue of does a heat exchanger exist or not exist, correct?

…

A. Correct.

Ex. 2 at 146:20-149:19.

2. **Dr. Wong's reliance on Plaintiff Rossi's uncorroborated oral representations renders his opinions unreliable.**

Dr. Wong's report states: "This expert has been *informed* that a heat exchanger was located in the second floor room at the Doral Facility." Ex. 1 at 4 (emphasis added). The report then describes the heat exchanger as being made of 22 pipes, each of which was purportedly 10 meters long. *Id.* The total surface area of the heat exchanger as stated in Dr. Wong's report was approximately 103 square meters. *Id.* Dr. Wong's report also states that the heat exchanger was

housed in an encasement made of "wood panel insulation with rock wool shaped for thermal and acoustic insulation." *Id.* The dimensions of the encasement were purportedly approximately 10 meters long, 6.5 meters wide, and 1 meter tall. *Id.* The heat exchanger also purportedly included two air flow fans that could move 25,000 cubic meters of air per hour. *Id.*

Dr. Wong testified that he visited the Doral Facility on February 10, 2017 and February 13, 2017 to meet with Rossi and Rossi's attorneys. Ex. 2 at 46:14-25; 47:1-4. During those meetings, Rossi told Dr. Wong about a heat exchanger that was allegedly located on the second floor of the facility during the operation of the E-Cat Plant. *Id.* at 50:2-6. Dr. Wong testified at his deposition that during both of his visits to the Doral Facility, he never saw the pipes, encasement, or fans that comprised this alleged heat exchanger. *Id*. at 70:7-27; 99:4-17. In fact, Dr. Wong has never even seen a diagram, sketch, drawing, rendering, photograph or any other documentary evidence that a heat exchanger was present and operable during the purported testing in Doral. *Id.* at 101:12-21. Dr. Wong has never seen any receipts, invoices, or other evidence reflecting the purchase of materials necessary to build the heat exchanger. *Id.* 99:21-23; 101:9-25; 102:1-6. As an example of Dr. Wong's testimony in this regard, he admitted:

> Q. Going back to your report. You've got 22 steel pipes, approximately 10 meters each, interior dimension, .15-meter.
>
> You have never seen those steel pipes, correct?
>
> A. No.
>
> Q. Dr. Rossi told you about those steel pipes, correct?
>
> A. Yes.
>
> Q. Has anyone else told you about those steel pipes?
>
> A. I discuss with counsel.
>
> Q. Okay. Other than counsel and Dr. Rossi, has anyone else told you about those steel pipes?

A. No.

Q. Did you ask to see the steel pipes?

A. No.

Q. Do you know what happened to the steel pipes?

A. No.

Q. Did you see any receipts for the purchase of the steel pipes?

A. No.

Ex. 2 at 99:1-23.

When questioned during his deposition about the basis for his belief that heat exchanger existed during the purported testing in Doral, Dr. Wong admitted that he had no information to demonstrate that the heat exchanger existed other than Rossi and Rossi's counsel's oral representations. *Id.* at 102:6-14. Also, there is no information in Dr. Wong's report that would indicate when the alleged heat exchanger was installed or whether it was present and operational for the duration of the purported testing in Doral. In fact, Dr. Wong testified at his deposition that he believed there was a time during which the E-Cat Plant was in operation without a heat exchanger. *Id.* at 212:10-14.

Dr. Wong's lack of information about this alleged heat exchanger rendered him either incapable of answering, or unwilling to answer, basic questions during his deposition about the heat exchanger and its relation to the E-Cat Plant and other related equipment. For example, when asked where the pipes that carried fluid from the E-Cat Plant to the heat exchanger were located in the facility, Dr. Wong could not provide an answer. Ex. 2 at 122:12-123:6. Also during his deposition, Dr. Wong was shown a photograph of certain pipes, tubes, and valves that were part of the network of equipment used to transport fluid through the E-Cat Plant. *Id.* at 143:1-17. Defendants' counsel questioned Dr. Wong about how the use of such equipment could

impact the fluid being transported to the alleged heat exchanger. *Id.* Dr. Wong refused to answer counsel's questions on grounds that he had never seen the equipment depicted in the photographs and was not aware of the fact that such equipment existed. *Id.* at 143:6-145:2. Dr. Wong's unwillingness to answer those questions is curious given the fact that he also never saw a heat exchanger or any evidence that one existed, but issued an expert report and "conclu[ded]" that "heat was dissipated in the heat exchanger specially designed by Dr. Rossi" and "[t]he heat that could be dissipated by this heat exchanger is at least 1MW." Ex. 1 at 6.

As reflected above, Dr. Wong's Opinion # 3 and Opinion # 4 are not based either on "sufficient facts or data," or on the reliable application of scientific principles or methods to those facts. Rule 702. Dr. Wong simply accepted statements from Rossi without conducting any investigation. He opines on the operation of a heat exchanger that he admits he "did not observe," as to which he was provided no concrete evidence, and that he did not examine, test or even model. Dr. Wong's report and deposition testimony make clear that the methodology he used to reach Opinion #3 and Opinion #4 was limited to plugging numbers provided to him by Rossi into the "Fourier Equation." *See* Ex. 1 at 6-7; Ex. 2 at 54:9-55:6. There is nothing at all reliable about Dr. Wong's methodology – or, more accurately, lack of methodology. He is simply parroting the statements of a litigant, without regard to the lack of any evidentiary support for those statements.

Dr. Wong's opinions and conclusions with regards to the heat exchanger are based solely upon oral representations of Rossi and Rossi's counsel, which amount to inadmissible hearsay under the Federal Rules of Evidence. Expert opinions based on inadmissible hearsay should only be admitted if the hearsay statements are generally relied upon by experts in the field in forming their opinions. *See Daubert*, 509 U.S. at 595; Fed. R. Evid. 703. Rossi's self-serving

hearsay statements that a heat exchanger existed at the Doral Facility fall well below this requisite standard of reliability. Dr. Wong elected to assume that Rossi is being truthful and accurate about the information he provided about the heat exchanger. Courts have explicitly stated that assumptions based upon self-serving statements by parties to litigation are inherently suspect. *See In re Sherwood Investment Overseas Ltd., Inc.*, 2015 WL 4486470, at *30. Accordingly, Dr. Wong's Opinion #3 and Opinion #4 should not be presented to a jury.

CONCLUSION

Defendants respectfully request that this Court exercise its role as gatekeeper and exclude the opinions and testimony of Dr. Wong.

LOCAL RULE 7.1 CERTIFICATION

The undersigned has conferred with all parties or non-parties who may be affected by the relief sought in this motion in a good faith effort to resolve the issues raised herein and has been unable to do so.

Dated: March 22, 2017

Respectfully submitted,

/s/ Christopher R. J. Pace

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on March 22, 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/ *Christopher R. J. Pace*
Christopher R.J. Pace