UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 1:16-CV-21199-CMA/O'Sullivan

ANDREA ROSSI, *et al.*,

Plaintiffs,

v.

THOMAS DARDEN, *et al.*,

Defendants,
_____/

PLAINTIFFS' *DAUBERT* MOTION TO STRIKE
AND EXCLUDE DEFENDANTS' EXPERTS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

Exhibits

INTRODUCTION

Defendants failed to provide a written report in compliance with the requirements of Fed. R. Civ. P. 26(a)(2)(B), and therefore the Expert Disclosure of Joseph A. Murray ("Murray Disclosure") should be stricken, and he should be excluded from testifying as an expert witness in this matter. Further, both of Defendants' purported experts – Joseph A. Murray ("Murray") and Rick A. Smith ("Smith") – should be excluded from testifying as expert witnesses because their opinions fail to meet *Daubert* standards.

STATEMENT OF FACTS

Procedure.

The Court's Order Setting Trial and Pre-Trial Schedule, Requiring Mediation, and Referring Certain Matters to Magistrate Judge [ECF No. 23] ("Scheduling Order") sets the following deadlines:

- to exchange expert written summaries or reports by January 30, 2017;
- to complete all discovery, including expert discovery, by February 27, 2017; and
- to file all pre-trial motions and *Daubert* motions, including motions to strike experts by March 21, 2017.

On January 30, 2017, at 11:54 PM, Defendants served the Murray Disclosure (Murray is the "former Vice President of Engineering" for Defendant Industrial Heat, LLC) (see Murray Report p. 1) and an Expert Report of Rick A. Smith, P.E. A copy of each of the foregoing is attached hereto as Exhibits "A" and "B", respectively. The Defendants subsequently provided "supplemental documents to disclosure of Joe Murray" after the close of business on February 16, 2017, more than two (2) weeks after the disclosure deadline, and the night before Mr. Murray's deposition was to take place in North Carolina[1]. Because of such late service, the undersigned did not have the opportunity to review such "supplemental documents" before Mr. Murray's deposition. Such "supplemental documents" consisted of various graphs and video simulations created by Mr. Murray.

The Murray Disclosure includes one sentence setting forth the "qualifications" of Mr. Murray; simply that "Mr. Murray's educational background includes an ABD [all but dissertation] from University of Maryland, an M.S. from University of Utah and a B.S. from

[1] Murray's deposition had been noticed on December 14, 2016.

Michigan State University." (*Id.* at 3.) The disclosure fails to include a resume and/or curriculum vitae for Mr. Murray, and otherwise fails to include any supporting data and/or methodology used by Mr. Murray. Despite multiple requests by Plaintiffs' counsel, including formal requests for production, Mr. Murray has yet to provide any resume and/or curriculum vitae to date.

Substance.

The Murray Disclosure (Exhibit "A" hereto) sets forth four (4) areas in which Mr. Murray intends to testify:

(1) that the power reportedly absorbed during the testing of the E-Cat is at odds with the amount of power used at the plant (Murray Report p. 1);

(2) that there is no logical reason why the Coefficient of Performance ("COP") should be changing inversely to the amount of power inputted (*id.* at 2);

(3) that the room inside the plant would have been heated to a temperature unsuited for a human working environment (*id.*); and

(4) that the water meter used by the Expert Responsible for Validation ("ERV") would report a much higher flow of water than was actually occurring (*id.* at 3).

The Expert Report of Rick A. Smith (Exhibit "B" hereto) provides that Mr. Smith will be testifying as to three (3) conclusions:

(1) that the ERV's reports are not valid to tabulate and compute the performance of the E-Cat (Smith Report p. 21);

(2) that the E-Cat test was not properly instrumented and there was no measurement of the E-Cat's actual output (*id.*); and

(3) that, by process of elimination, the claimed energy never existed because it must have been rejected somewhere. (*id.*).

Mr. Smith indicated in deposition that he may testify as to additional conclusions not set forth in the report. [2]

Mr. Smith's Report was written with the caveat that Mr. Smith had "not yet been able to inspect the E-Cat site in Florida." Instead, the report was written based only "upon information currently available." (*Id.* at 1.)

[2] During his deposition, Mr. Smith testified that he planned on testifying to matters which had not been disclosed prior to his deposition nor are they contained within his report. Such additional matters shall be addressed below.

STANDARD

"Rule 702 [of the Federal Rules of Evidence] requires district courts to ensure 'that the expert's testimony rests on a reliable foundation and is relevant to the task at hand." *In re Denture Cream Prods. Liab. Litig.*, 795 F. Supp. 2d 1345 (S.D. Fla. 2011) (quoting *Daubert*, 509 U.S. at 597). "This 'gatekeeping' function must be performed with regard to the admissibility of both expert scientific evidence and expert technical evidence." *Id.* (quoting *United States v. Frazier*, 387 F.3d 1244, 1260 (11th Cir. 2004)). In determining admissibility, the district courts consider 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 conclusions is sufficiently reliable as determined by the sort of inquiry mandated in Daubert; and (3) the testimony assists the trier of fact, through the applications of scientific, technical, or specialized expertise, to understand the evidence or to determine a fact in issue." *Id.*

With respect to the second prong above, "District courts have substantial discretion in deciding how to test an expert's reliability." *United Food Mart, Inc. v. Motiva Enters., LLC*, 404 F. Supp. 2d 1344, (S.D. Fla. 2005) . *"Daubert instructs* courts to consider the following factors: (1) whether the expert's theory can be and has been tested; (2) whether the theory has been subjected to peer review and publication; (3) the known or potential rate of error of the particular scientific technique; and (4) whether the technique is generally accepted in the scientific community." *Id.* (Emphasis supplied). "[W]hile the inquiry is 'a flexible one,' *the focus 'must be solely on principles and methodology, not on the conclusions that they generate*.'" *In re Denture Cream Prods. Liab. Litig.*, 795 F. Supp. 2d 1345 (S.D. Fla. 2011) (Emphasis supplied). "[N]othing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the ipse dixit of the expert." *Id.*; *Gastaldi v. Sunvest Resort Cmtys., LC*, 709 F. Supp. 2d 1299 (S.D. Fla. 2010). "Rather, the trial court is free to 'conclude that there is simply too great an analytical gap between the data and the opinion proffered.'" *In re Denture Cream*, 795 F. Supp. 2d at 1350.

I. Defendants Failure to Abide by Fed R. Civ. P. 26(a)(2)(B) Necessitates Striking the Murray Disclosure

Fed. R. Civ. P. 26(a)(2)(B) provides a party's disclosure of a witness whom may be offered to provide expert testimony must be accompanied by a written report containing:

(i) a complete statement of all opinions the witness will express and the basis and reasons for them;
(ii) the facts or data considered by the witness in forming them;
(iii) any exhibits that will be used to summarize or support them;
(iv) the witness's qualifications, including a list of all publications authored in the previous 10 years;
(v) a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition; and
(vi) a statement of the compensation to be paid for the study and testimony in the case.

See Fed. R. Civ. P. 26(a)(2)(B).

Notwithstanding the requirements of Fed. R. Civ. P. 26(a)(2)(B), Defendants failed to provide any written report prepared by Mr. Murray on or before January 30, 2017, as required by this Court's Scheduling Order, or any time thereafter. In fact, at his deposition, Mr. Murray not only testified that he had prepared a report, but also that he would have to refer to his report to be able to answer some of the questions asked. (See Murray Trans. 224: 10-22; 227: 2-16). Mr. Murray was ultimately unable to answer several questions as he did not bring his report with him to the deposition. *See Id.* As a result of Defendants' failure to provide Plaintiffs with a copy of Mr. Murray's report, Plaintiffs were unable to prepare for effective cross examination of Mr. Murray at deposition. "Rule 26(a)'s expert disclosure requirement is intended to provide opposing parties reasonable opportunity to prepare for effective cross examination and perhaps arrange for expert testimony from other witnesses." *Access 4 All, Inc. v. Bamco VI, Inc.*, 2012 U.S. Dist. LEXIS 190940, *3 (S.D. Fla. Jan. 6, 2012)(internal quotations omitted).

The "Eleventh Circuit recognizes that "[b]ecause the expert witness discovery rules are designed to allow both sides in a case to prepare adequately and to prevent surprise, … compliance with the requirements of Rule 26 is not merely aspirational." *Managed Care Solutions, Inc. v. Essent Healthcare, Inc.*, 2010 U.S. Dist. LEXIS 54148, 2010 WL 1837724 (S.D. Fla. May 3, 2010) (quoting *Cooper v. Southern Co.*, 390 F.3d 695, 728 (11th Cir. 2004), overruled on other grounds by *Ash v. Tyson Foods, Inc.*, 546 U.S. 454 (2006)). In *Managed Care Solutions*, Judge O'Sullivan held that the failure to disclose an expert's qualifications is harmful and prejudicial where the discovery deadline has passed and where the deadline for dispositive motions is imminent. *Id.* The Court further stated that "[t]he purpose of the expert witness disclosure requirements is thwarted by the partial expert disclosure in that whatever opinions

and/or testimony that would be given" will necessarily be a surprise to the opposing party(ies), who have been "deprived of the opportunity to determine whether rebuttal experts are necessary" and "deprived of the opportunity to investigate the qualifications" of the expert as well as the bases for his opinion. *Id.* Such prejudice exists in this case. Plaintiffs were deprived of the opportunity to investigate Mr. Murray's qualifications and any basis for his opinions as well as the opportunity to determine whether a rebuttal witness would be necessary based upon such opinions. In *Managed Care Solutions*, Judge O'Sullivan granted the Motion to Strike Expert Disclosures, and the same result is justified here. *See Id.*

Moreover, the Murray Disclosure fails to include the requisite information set forth in Rule 26(a)(2)(B) including, but not limited to (a) the basis and reasons for each of Mr. Murray's opinions; (b) the facts or data considered by the witness in forming them; (c) any exhibits that will be used to summarize or support them; (d) the witness's qualifications, including a list of all publications authored in the previous 10 years; or (e) statement of the compensation to be paid for the study and testimony in the case. Additionally, the document was neither prepared nor signed by Mr. Murray. (See Murray Trans. 243: 9-19). Accordingly, the Murray Disclosure is insufficient to replace the requisite expert report. Defendants' failure to provide such required information has been further exacerbated by failing to produce such information in discovery. Specifically, Plaintiffs requested:

a. "Industrial Heat, LLC's entire employment file for Joseph Murray" in Plaintiff, ANDREA ROSSI's, First Request for Production to Defendant, INDUSTRIAL HEAT, LLC, served on August 26, 2016; and

b. The entire personnel file for Joseph Murray" in Plaintiff, ANDREA ROSSI's, Second Request for Production to Defendant INDUSTRIAL HEAT, LLC, served on August 29, 2016.

On February 10, 2017, INDUSTRIAL HEAT, LLC served its Supplement to its Amended Responses and Objections to Plaintiff ANDREA ROSSI's Second Request for Production. There, INDUSTRIAL HEAT, LLC indicated that it "will conduct a reasonable search for and produce any resume or CVs of Joseph Murray…." Notwithstanding the foregoing, to date, the Defendants have failed to provide any such resume and/or *Curriculum Vitae.* The law is clear, "[i]f a party fails to disclose the identity of a witness pursuant to Rule 26(a), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at trial, unless the failure was substantially justified or is harmless." *Managed Care Solutions* at 9.

"The sanction of exclusion is automatic and mandatory unless the sanctioned party can show that its violation of Rule 26(a) was either justified or harmless." *Valdes v. Miami-Dade Cnty.*, 2015 U.S. Dist. LEXIS 151024, *11-12, 2015 WL 6829055 (S.D. Fla. Nov. 6, 2015). Here, Defendants' failure was neither justified nor harmless. Accordingly, the Murray Disclosure should be stricken, and Mr. Murray's testimony excluded for failure to satisfy the requirements set forth in Fed. R. Civ. P. 26(a)(2)(B).

II. Defendants Failure to Abide by Fed R. Civ. P. 26(a)(2)(B) Necessitates Striking the Supplemental Expert Report of Rick A. Smith, P.E. and Excluding Related Testimony

During the deposition of Mr. Rick A. Smith on February 27, 2017, Mr. Smith disclosed that in addition to those matters set forth in his report, he had formed another opinion not previously disclosed that "the E-cat never produced superheated steam." (Smith Trans. 126: 2-9). Thereafter, on March 20, 2017 at 8:47 p.m, the day before the original deadline to file dispositive motions and nearly two months after the deadline to make expert disclosures pursuant to Rule 26(a)(2)(B), Defendants' served their Supplemental Expert Report of Rick A. Smith, P.E ("Smith's Supplemental Report") upon Plaintiffs. Smith's thirty (30) page Supplemental Report includes, *inter alia*, six (6) additional conclusions not previously disclosed including that:

(1) There was no steam flow from the E-Cat;

(2) There is no physical evidence of a heat exchanger and cooling fans;

(3) The data reported by Fabio Penon "must be viewed with extreme skepticism";

(4) The produced energy numbers in Penon's report are incorrected and, therefore, his entire report is invalid;

(5) Any steam flow numbers in the Penon report are fictitious and the whole report must be invalidated;

(6) Penon's steam temperature numbers are not valid and, therefore, the whole report is invalid.

Due to the fact that Mr. Smith's failed to disclose his fourth opinion (stated above) until the day of his deposition and because Smith's Supplemental Report was served the day prior to the dispositive motion deadline (and well after the discovery and expert disclosure deadlines), the Plaintiffs have been deprived of the opportunity to (a) investigate these new conclusions; (b)

determine whether a rebuttal expert is necessary; (c) depose Mr. Smith regarding such matters; and/or (d) adequately address the conclusions in this Motion. Plaintiffs are substantially prejudiced by this untimely disclosure as it is unable to evaluate such new opinions in light of the pending Summary Judgment and Daubert motion deadlines. "The sanction of exclusion is automatic and mandatory unless the sanctioned party can show that its violation of Rule 26(a) was either justified or harmless." *Valdes v. Miami-Dade Cnty.*, 2015 U.S. Dist. LEXIS 151024, *11-12, 2015 WL 6829055 (S.D. Fla. Nov. 6, 2015).

III. Mr. Murray's Testimony Fails to Satisfy the *Daubert* Standard

As stated above, according to the Murray Disclosure, Mr. Murray intends to offer testimony regarding (a) his comparison of the power sold by Florida Power and Light Company ("FP&L") to the power absorbed by the plant; (b) the inverse relationship of power input to the E-Cat plant to and the coefficient of power; (c) the heat simulations he conducted; and (d) the tests he conducted regarding water flow. *See Exhibit "A"* hereto. For each such opinion, the Court must apply the Daubert standard set forth above.

A. Murray's Comparison Between FP&L and Energy Absorbed By the E-Cat

Plaintiffs request this Court exclude all of Mr. Murray's testimony and any report or disclosure relating to Mr. Murray's comparison between power reportedly sold by FP&L and the power reported by Penon and Fabiani respectively as absorbed by the E-cat including, but not limited to, the graphs affixed to the Murray Disclosure. As a preliminary matter, the conclusions drawn by Mr. Murray with respect to this issue are not relevant evidence which would otherwise be admissible in this case. Secondly, Mr. Murray's testimony and conclusions are unreliable in that (a) the data relied upon by Mr. Murray was both insufficient and of questionable accuracy, (2) such testimony and conclusions are not the product of reliable principals and methods, nor are they likely to assist the trier of fact to understand the evidence or to determine a fact that is at issue in this case.

"To be admissible, expert testimony must "assist the trier of fact to understand the evidence or to determine a fact in issue . . . ." *United States v. Masferrer*, 367 F. Supp. 2d 1365, 1373, 2005 U.S. Dist. LEXIS 7580, *20, 18 Fla. L. Weekly Fed. D 482 (S.D. Fla. 2005). As evidenced by the pleadings in this matter, the issue of whether Penon and Fabiani's data was consistent with the data provided by FP&L is not relevant to any of the underlying claims. The

underlying contract, upon which Plaintiffs base their breach of contract claim, provides in relevant part, that the E-Cat must meet certain performance standards as determined by an independent Expert Responsible for Validation ("ERV"). *See* License Agreement Sections 4 & 5. Dr. Fabio Penon was selected by the parties as the ERV. *See* IH-00089766. Accordingly, Dr. Penon's measurements are the sole and only measurements which are relevant to the issues raised in Plaintiffs case.

In their Fourth Amended Counterclaim, Defendants allege that Penon's measurements and/or data had been manipulated. *See* Countercl. ¶¶ *89-91*.. Plaintiffs acknowledge that if Mr. Murray were opining that some type of manipulation had occurred, then perhaps his testimony could have satisfied this prong of the *Daubert* standard, but that is not the case. Mr. Murray's "conclusion" was merely that the FP&L data was "at odds" with the data recorded by Dr. Penon and Mr. Fabiani respectively. *See* Exhibit "A." In fact, Mr. Murray expressly testified that he had no reason to believe that either Dr. Penon or Mr. Fabiani had done anything to manipulate the results of the test. (Murray Trans. 252: 8-10; *see also* 340: 4-9). Accordingly, Mr. Murray's testimony on this matter is not relevant to the matters at issue in this case and is therefore inadmissible.

As to the second issue raised above, Mr. Murray's testimony fails to satisfy the reliability prong of the *Daubert* test. "Rulings on admissibility under *Daubert* inherently require the trial court to conduct an exacting analysis of the proffered expert's methodology."*McCorvey v. Baxter Healthcare Corp.*, 298 F.3d 1253, 1256 (11th Cir.2002). The "[f]actors to ascertain reliability are "(1) whether the expert's methodology can be tested; (2) whether the expert's scientific technique has been subjected to peer review and publication; (3) whether the method has a known rate of error; [and] (4) whether the technique is generally accepted by the scientific community." *Valencia v. Sanborn Mfg. Co.*, 2005 U.S. Dist. LEXIS 47653, *17, 2005 WL 5957819 (S.D. Fla. Aug. 10, 2005) To arrive at his first conclusion, that "the data generated by Fabio Penon ("Penon") and Fulvio Fabiani ("Fabiani") pertaining to the power absorbed during the testing of the E-Cat plant… is at odds with the amount of power used at Doral location," Mr. Murray simply compared the two sets of test data with the FP&L power usage report. (Murray Report p. 1.) Specifically, Mr. Murray had Dr. Penon and Fabiani's test data input into a computer analysis software and then he visually compared the graphs generated by such software to the data from FP&L." (See Murray Trans. 250: 5 to 251: 6). Mr. Murray's opinion was based solely upon his

review and analysis of the graphs prepared by Industrial Heat as Mr. Murray testified that he did not apply any scientific, technical and/or other specialized methodology to arrive at his conclusions. (See Murray Trans. 259: 8-16). Furthermore, Mr. Murray offers no opinion and/or explanation as to why or how the different data sets are at odds, nor does Mr. Murray provide any scientific or technical application to explain such alleged difference between the data sets. (See Murray Trans. 282: 16 to 283: 6).

Notably, the test data underlying the graphic illustrations upon which Mr. Murray allegedly analyzed was mostly transcribed into the "analytical software" by hand by Industrial Heat, LLC's employees. (See Murray Trans. 248: 1 to 249: 20). When asked whether there could have been any mistakes and/or typos in the data input by the Industrial Heat employees, Mr. Murray testified that he did not know. (See Murray Trans. 249: 16-18).[3]

"[T]he trial court's gatekeeping function requires more than simply 'taking the expert's word for it.'" *McClain v. Metabolife Int'l, Inc.*, 401 F.3d 1233 (11th Cir. Ala. 2005); *see also Battle v. Gold Kist, Inc.*, 2008 U.S. Dist. LEXIS 102316 (M.D. Fla. Sept. 2, 2008) ("Reliability cannot be established by the mere ipse dixit of an expert."). "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." *United States v. Frazier*, 387 F.3d 1244 (11th Cir.Ga. 2004). Absent a recognized and replicable methodology, theory, or technique, Mr. Murray's *ipse dixit* analysis of the computer generated graphs fails to satisfy the reliability prong of the Daubert test. *See Valencia v. Sanborn Mfg. Co.*, 2005 U.S. Dist. LEXIS 47653, *10-11, 2005 WL 5957819 (S.D. Fla. Aug. 10, 2005) .

Lastly, Mr. Murray's testimony is not likely to assist the trier of fact, through the application of scientific, technical or specialized expertise, to understand the evidence or to determine a fact at issue in this case. *See City of Tuscaloosa v. Harcros Chemicals, Inc.*, 158 F.3d 548, 562 (11th Cir. 1998). Even if it were relevant to the matters at issue in this case, Mr. Murray's "opinion" that the FP&L data is "at odds" with the Penon data and the Fabiani data, without more, fails to assist the trier of fact to understand the evidence or determine a fact in issue as it fails to provide any explanation or opinion as to why such alleged inconsistency exists.

[3] Despite the obvious concern with having a party's employees preparing the data input, Defendants never produced such underlying data allegedly input into the "analytical software" despite a clear responsibility to do so in accordance with Fed. R. Civ. P. Rule 26(a)(2)(B). As such, Plaintiffs have been deprived the opportunity to determine the accuracy or reliability of the same.

Simply put, any juror can compare the data sets with one another and determine if they are consistent and Mr. Murray offers no specialized or scientific explanation as to why any such inconsistencies may exist or how the alleged inconsistency explains any matter in dispute in this case. Expert testimony is not admissible, relevant or helpful if it is not beyond the understanding of the average lay person. *Geter v. Galardi South Enters.*, 2015 U.S. Dist. LEXIS 59927 (S.D. Fla. May 7, 2015).

For the reasons set forth above, Defendants testimony with respect to his comparison of the FP&L records with the Penon and Fabiani records are properly excluded under Daubert.

B. Inverse Relationship of Power Input and Coefficient of Power

Pursuant to the Murray Disclosure, Mr. Murray intends to testify that "there is no logical reason why the COP should be changing inversely to the amount of power inputted…" To arrive at such conclusion, Mr. Murray "compared the reported power input to the E-cat plant reported by Penon against the reported coefficient of power ("COP") reported by Penon. When ask what theory and/or methodology he applied to form his opinion, Mr. Murray testified that "the methodology was to review the data provided, analyze it, and to look at the, the time history of the energy absorption provided by Mr. Penon and Mr. Fabiani." (Murray Trans. 301: 17 to 302: 3). Moreover, Mr. Murray testified that he did not rely upon any written documents or theories in arriving at his conclusion, and that he was unaware of any publications that would support his views with respect to the aforementioned opinion. (Murray Trans. 300: 24 to 301: 7).

As with Mr. Murray's first opinion, Mr. Murray's testimony regarding the above matters fails to satisfy the reliability element of the *Daubert* test. Assuming, arguendo, that Mr. Murray is qualified to opine as to the relationship between the "coefficient of power" and the power absorbed by the E-cat, Mr. Murray fails to identify any reasonable or accepted methodology, theory and/or scientific approach to support his mere conclusory claim that "there is no logical reason why COP should be changing inversely to the amount of power inputted." *Id.* "In *Daubert*, the Supreme Court suggested a non-exhaustive list of several factors to consider in determining if a specific methodology is reliable under Rule 702: whether the methodology can and has been tested; whether the methodology has been subjected to peer review and publication; the known or potential rate of error and the existence and maintenance of standards controlling operation of the methodology; and whether the methodology has gained general acceptance in the scientific community." *In re Denture Cream Prods. Liab. Litig.*, 795 F. Supp. 2d 1345, 1349,

2011 U.S. Dist. LEXIS 65550, *25, 85 Fed. R. Evid. Serv. (Callaghan) 681, CCH Prod. Liab. Rep. P18,924 (S.D. Fla. 2011). It is clear that the methodology applied by Mr. Murray, described as "review the data, analyze it, and look at the, the time history of the energy absorption provided by Mr. Penon and Mr. Fabiani," was purely subjective and is solely connected to the data reported by Penon and Fabiani by the *ipse dixit* of Mr. Murray. (*See* Murray Trans. 301: 17 to 302: 3). "Nothing in either ***Daubert*** or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert." Cordoves v. Miami-Dade County, 104 F. Supp. 3d 1350, 1360, 2015 U.S. Dist. LEXIS 63067, *16 (S.D. Fla. 2015).

Furthermore, as with Mr. Murray's first opinion, Mr. Murray's opinion regarding the inverse relationship between power input to the Plant and the Coefficient of Power does not "assist the trier of fact to understand the evidence or to determine a fact in issue . . . ." United States v. Masferrer, 367 F. Supp. 2d at 1373 (S.D. Fla. 2005). As discussed above, the sole issues before the Court with respect to the results of the Guaranteed Performance test are (1) whether the Expert Responsible for Validation ("ERV") determine that the E-cat met or exceeded the performance standards set forth in the agreement,[4] and (2) whether any of the Defendants manipulated the results of the Guaranteed Performance Test performed by the ERV. Accordingly, Mr. Murray's conclusion does not lend technical, scientific or specialized knowledge that could assist the trier of fact with either issue. Even if the inverse relationship between COP and energy absorbed by the plant were somehow instructive as to the matters at issue in this case (it is not), Mr. Murray's opinion is simply that he has no explanation as to why such relationship is inverse. (See Murray Disclosure). For the reasons set forth above, Mr. Murray's second conclusion fails to satisfy the reliability prong of the *Daubert* test and does not otherwise assist the trier of fact in determining any matter at issue in this case.

[4] Notably, the License Agreement does not provide for any manner in which to contest, challenge, or appeal the ERV's test results. To permit any other expert to opine as to the results or the operation of the E-Cat during the Guaranteed Performance Period undermines the plain language of the License Agreement. Had the parties desired multiple experts to opine as to the test and its results, as opposed to one ERV selected as a neutral arbiter of the test, they could have contracted accordingly.

C. Heat Simulations and Water Flow Testing:

Lastly, the Murray Disclosure discloses two additional areas of expected testimony[5] labeled as "Heat Simulations" and "Water Flow." (*See* Murray Disclosure). Specifically, Defendants state that "Mr. Murray will testify as to the heat simulations he ran to recreate thermal conditions inside the Doral Location" and that "the room would have been heated to a temperature unsuited for a human working environment." *Id.* Notwithstanding the fact that the Murray Disclosure instructs the reader to "*See Thermal Simulations,"* no such simulations were provided by Mr. Murray. Similarly, the disclosure provides that "Mr. Murray will be testifying as to the tests he conducted on the water flow into the E-cat plant" and what such water flow test purportedly showed. *Id.* Mr. Murray testified that he was able to opine, based upon his water flow testing, "that the flow meter was improperly sized and it was operated below its minimum operating point." As with the alleged heat simulations, Mr. Murray's expert disclosure instructs the reader to "*See Water Flow Test Results,"* but again, no such results were produced.

As a preliminary matter, neither the "heat simulations" nor the "water flow tests" would serve to assist the trier of fact to understand any matter at issue in this case, or to understand any evidence which may be relevant in this matter. *See Daubert,* Supra. While Defendants have sought to identify what they perceive to be flaws in the testing protocol and measurement devices, the propriety and/or reliability of the protocol and devices are not at issue in this case.[6] To the extent Defendants seek to offer such testimony to infer that there was some type of manipulation or other nefarious activities taken on behalf of the Plaintiffs and/or Third-Party Defendants, Mr. Murray expressly states that he does not draw that conclusion. (Murray Trans. 340: 4-12). In summary, Mr. Murray testified that he believed the problems with the Penon test data were "a combination of poor test plan, poor documentation, and a completely inadequate selection of the sensors used for this system," none of which constitutes a breach of the License Agreement or would lend support to any cause of action or defense asserted by Defendants in this matter.

[5] While listed in the "Summary of Opinions" section of the Disclosure, these sections do not disclose opinions, but rather reflect observations made by Mr. Murray during simulations and/or tests prepared by Mr. Murray.

[6] Pursuant to the License Agreement, the ERV was solely responsible for validation of the Guaranteed Performance Test. The propriety and/or accuracy of the measurement equipment or test protocol are not at issue in this case. Any objection to the test plan or measurement equipment used has been waived as Defendants failed to raise such matters before or even during the Guaranteed Performance test.

Further, Plaintiffs have been substantially prejudiced by Defendants' failure to provide Plaintiffs any of the relevant underlying data, test plan, test procedures or other data relevant to the simulations and/or tests carried out by Mr. Murray. In fact, when asked whether the Plaintiffs could properly evaluate his test relating to water flow without being provided the test data, Mr. Murray responded "I don't believe you could." (Murray Trans. 338: 11 to 339:8). Similarly, when asked whether Plaintiffs could properly evaluate his test without being provided with a copy of the test plan, Mr. Murray again stated "I don't believe you could." *Id.*

As with the water flow tests, Plaintiffs were unable to determine what formulas, methodology and/or underlying data was used in conducting the heat simulations testified to and referenced by Mr. Murray. Mr. Murray testified that he input data into a software program called OpenFOAM which uses "heat transfer equations" that are coded into the program to create a simulation. (Murray Trans. 325: 3 to 326: 3; *see also* 328: 1-7). Mr. Murray was unable to specifically describe or provide what equations were used with respect to his simulations. *Id.* In fact, Mr. Murray testified that all of the data he input into the OpenFOAM simulation software, and all of the assumptions that he made, were not provided to Plaintiffs despite Mr. Murray's intention to present such simulations during the trial in this cause. (Murray Trans. 320: 17 to 321: 5). Of the limited assumptions Mr. Murray was able to testify about, it became evident that his assumptions were not based upon actual conditions during the test as Mr. Murray never inquired of those persons who were present during the test. (Murray Trans. 306: 11 to 310: 18). Accordingly, even the limited information provided to Plaintiffs regarding the heat simulations created by Mr. Murray demonstrates that the underlying data input into the OpenFOAM software is unreliable at best as it was not based upon actual conditions at the testing facility.

"The advisory committee's note to Rule 702 instructs that "[t]he trial judge in all cases of proffered expert testimony must find that it is properly grounded, well-reasoned, and not speculative before it can be admitted." *Tampa Bay Water v. HDR Eng'g, Inc.*, 2011 U.S. Dist. LEXIS 80735, *14, 2011 WL 3101803 (M.D. Fla. July 25, 2011). Notably, Mr. Murray has testified that, based upon the information disclosed to date, Plaintiffs cannot properly investigate the same:

Q: Can I properly evaluate your test, sir, without knowing the test plan?

A: I don't believe you can.

Q: Okay. Can I properly assess your test, your testing without being provided the test data?

A: I don't believe you could.

[…]

Q: Can I adequately evaluate your test data without seeing any information regarding how it was performed, how it was run, the test data, the assumptions made, the slope, the flow rate of the water?

…

A: Only to the equivalent extent as I can read Italian and interpret and this.

Q: Okay. So your answer is –

A: So the answer would be no.

Q: No.

A: Yeah.

Q: Okay. So, so you, you understand that I'm sitting here today and I'm, my hands are tied. I can't really evaluate whether what you did was proper or not?

A: Uh-huh.

(Murray Trans. 338 – 39.)

For the foregoing reasons, Mr. Murray should be excluded from offering any expert opinion testimony including, but not limited to, testimony about any comparisons, tests or simulations prepared by Mr. Murray. Notwithstanding the Defendants failure to disclose all of the requisite information required by Rule 26(a)(2)(B), Mr. Murray's testimony must be excluded on the grounds that (a) it is not based upon reliable facts or evidence, (b) Murray's methodology is both unreliable and untestable, (c) such testimony is not relevant to the proceedings in this matter, and (d) Murray's conclusions would not assist the trier of fact to understand any evidence or matter at issue in this case.

IV. Mr. Rick A. Smith Fails to Satisfy the Daubert Standard

In the Expert Report of Rick A. Smith, P.E. (the "Smith Report"), dated January 30, 2017, Mr. Smith identified three "conclusions" to which he has rendered an opinion: (1) The Penon Reports, standing alone, are not valid to tabulate and compute the performance of the E-Cat; (2) the E-Cat test setup was not properly instrumented and there was no measurement of the

E-Cat's actual output; and (3) the E-Cat never produced the energy which was claimed for it.[7] As with the Mr. Murray's conclusions above, Mr. Smith's conclusions fail to satisfy the requirements for expert testimony imposed by *Daubert.*

A. Mr. Smith's Qualifications Generally

Although Mr. Smith appears to be experienced and qualified to testify with respect to certain boiler systems, Mr. Smith is admittedly not an expert regarding nuclear engineering (see Smith Trans. 27: 20-21; 37: 4-6; 128: 23-24), nuclear boilers (see *id.* 45: 18-19), and low energy nuclear reactions (see *id.* 130: 9-20). While not dispositive, it is notable that while Mr. Smith has been offered as an expert in two prior federal cases, he has never been accepted as an expert in any federal court. (see Smith Trans. 14: 13 to 15: 24). Accordingly, to the extent Mr. Smith opines to anything beyond the realm of ordinary boilers and, specifically, within the realm of nuclear engineering/reactions, Mr. Smith's opinions should be excluded.

B. Mr. Smith's Testimony Not Based Upon Reliable Methodology

For each of his opinions in this matter, Mr. Smith relies exclusively on his own personal experience as the basis for his conclusion. In fact, Mr. Smith testified at his deposition on February 27, 2017 as follows:

> Q. Now, with respect to your opinions in this case, can you state every methodology that you've relied upon in forming your opinions?
>
> A. No, because -- and the reason for that is not that I don't have them, it's just that it's a thought process that I've developed over 40 years of being an engineer, four years undergrad, graduate degree, and everything that I've done. So it's just an ongoing process that it would take weeks to try to even sort it out.
>
> I have one, but I can't give you -- unfortunately, I can't give you the specific answer that you're looking for. It's just it's in there and that's how I think and that's how I work.
>
> Q. Okay. So there's no direct methodology you can point me to that, for example, Dr. Wong, our expert, can look at and say, yes, that methodology is correct, or, no, that methodology is incorrect based on –
>
> A. Well, you know, when you say a methodology, you know, we can wrangle some words here if you'd like, but, you know, methodology seems to be more like

[7] On March 20, 2017, the day before *Daubert* motions were due and nearly two months after expert reports were required to be served, Defendants served the "Supplemental Expert Report of Rick A. Smith, P.E." which contains six (6) additional "conclusions" not previously disclosed. The substance of such additional "conclusions" are not addressed herein as Plaintiffs have been deprived of the opportunity to review such additional conclusions, confer with Plaintiffs expert and/or otherwise examine Mr. Smith regarding such matters.

in devising an experiment to figure out A, B or C. Okay. You know, here's the methodology, we're going to do this. All right.

My methodology is just a way of thinking that engineers typically use. I would imagine -- again, never met Dr. Wong either. I would imagine his thought processes along these regards and mine are probably quite similar, same for Mr. Wark, same for Mr. Murray. Okay. I should say Dr. Wark. My bad. You know what I mean.

Q. Is there -- so there's no defined, for example, formula that you have applied in formulating -- in formulating your opinions in this case? It's a culmination of your years of experience that you've relied upon in forming your opinions?

A. All of the above. I've used some formulas in talking about, you know, the heat rejected by a power plant, okay, that's a calculation. You know, the definition of COP, that's a calculation. All right. So there are formulas I used.

But, you know, your -- the answer to your question is yes. And not to be a wise guy, but it's a combination of both. (…)

Q. Can you identify any literature that would support the theory or methodology that you've applied in this case?

A. The whole body of mechanical engineering work related to thermodynamics.

Q. But there's no specific literature that you would point me to?

A. I'm going to reiterate my answer, sir. (Smith Trans: 151: 9 to 153: 22).

and;

Q. Does your methodology or theory have a known error rate?

A. How could it? It's qualitative, not -- it's quantitative in some regards, qualitative in another. (Smith Trans: 155: 15-18).

"Daubert instructs courts to consider the following factors: (1) whether the expert's theory can be and has been tested; (2) whether the theory has been subjected to peer review and publication; (3) the known or potential rate of error of the particular scientific technique; and (4) whether the technique is generally accepted in the scientific community." *United Food Mart, Inc.,* 404 F. Supp. 2d 1344. "[I]f admissibility could be established merely by ipse dixit of an admittedly qualified expert, the reliability prong would be, for all practical purposes, subsumed by the qualifications prong." *Battle v. Gold Kist, Inc.*, 2008 U.S. Dist. LEXIS 102316 (M.D. Fla.

Sept. 2, 2008) (quoting *United States v. Frazier*, 387 F.3d 1244, 1261 (11th Cir. Ga. 2004)). "An expert's unexplained assurance that his opinion rests upon accepted scientific methodology is insufficient to establish reliability." *Id.* The Smith Report begins with a lengthy, text book summation of the First and Second Laws of Thermodynamics. (Smith Report pp. 2-9.) Mr. Smith, however, does not apply such Laws to his conclusions (except to conclude via "process of elimination" that heat produced by the E-Cat must have been rejected somewhere). Accordingly, Mr. Smith's testimony and report must be excluded in their entirety.

C. Mr. Smith's First "Conclusion": The Penon Report

In addition to the above, Mr. Smith's first "conclusion" fails to satisfy the remaining *Daubert* requirements. Addressing the first prong of the three-party inquiry mandated in *Daubert,* it is evident that Mr. Smith is not qualified to opine as to the propriety or validation of the Penon Report. Namely, Mr. Smith is unfamiliar with, and has not experience with, nuclear engineering (see Smith Trans. 27: 20-21; 37: 4-6; 128: 23-24), low energy nuclear reactions (see *id.* 130: 9-20), test plans for low energy nuclear reactions (*See id.* 157: 1-5*),* and/or the nature of the reaction underlying the E-Cat (see *id.* 130: 17-19). Notwithstanding his lack of expertise or knowledge in those fields, Mr. Smith purports to offer his opinion with respect to the contents of Mr. Penon's report regarding the performance of the E-cat. *See* Smith Report at 10. A review of the Smith Report with regard to his first conclusion shows that it is nothing more than a summary and explanation of the contents of the Penon report without providing any basis for his ultimate conclusion as discussed above. *Id.*

Importantly, Mr. Smith's first conclusion fails to satisfy the third prong required by *Daubert* that the testimony "assists the trier of fact, through the application of scientific, technical, or specialized expertise to understand the evidence or determine a fact in issue. *Hendrix ex rel. G.P. v. Everflo Co.*, 609 F.3d 1183, 1194 (11th Cir. 2010). Specifically, Mr. Smith's conclusions regarding the Penon report are not relevant to any matter at issue in this case. As discussed above, the License Agreement did not provide for any challenge or reconsideration of the ERV's findings.

D. Mr. Smith's Second Conclusion: The E-Cat Test Was Insufficient

The Plaintiffs re-assert the argument above regarding Mr. Smith's qualifications to opine regarding matters pertaining to the E-cat the testing thereof and incorporate the same herein with respect to Mr. Murray's second conclusion. Mr. Smith's second conclusion states that the "test

setup was not properly instrumented and there was no measurement of the E-Cat's actual output." *Smith Report* at 21. Specifically, Mr. Smith testified that in his opinion, "it is not possible to accurately measure the output of the E-Cat" using Penon's test plan. *Id.* at 13. As with his first opinion, Mr. Smith's conclusion is not based upon reliable methodology, theories or techniques as discussed above.

Moreover, even if Mr. Smith were qualified and had based his opinions on sound and reliable methodologies, such testimony would not assist the trier of fact in understanding or deciding an issue in this case. Specifically, the test plan and procedures employed by the ERV were agreed upon by the parties prior to the initiation of the test. Accordingly, Mr. Smith's conclusions regarding the propriety of the test plan employed by the ERV is not relevant to the instant action. "Whether testimony assists the trier of fact 'goes primarily to relevance. Expert testimony which does not relate to any issue in the case is not relevant and, ergo, non-helpful." *Geter v. Galardi South Enters.*, 2015 U.S. Dist. LEXIS 59927, 2015 WL 2155721 (S.D. Fla. May 7, 2015). Notably, Mr. Smith was advised by the Defendants that the test plan had been agreed to as evidenced by his testimony as follows:

> Q: Okay. And did anyone ever tell you in this case that the defendants, Ms. – I'm sorry, Industrial Heat and IPH International B.V. agreed to that test plan?
>
> A: They have, yes.
>
> Q: They did tell you that?
>
> A: They did, yes.
>
> Q: Okay. So you were aware that that was an agreed-to test plan?
>
> A: I am aware of that.

(Smith Trans. 108: 13-22). Clearly, the time to question the veracity of the ERV's test plan has long since come and gone. Defendants have not asserted any legal basis to now challenge the propriety of the test plan where they failed to do so at any time during the year long test, nor have they raise such issue in their pleadings. Accordingly, Mr. Smith's testimony relating to the propriety and/or instrumentation of the test plan must be excluded.

E. Mr. Smith's Third Conclusion: E-Cat Never Produced Energy Claimed

Finally, Mr. Smith concludes that the E-Cat never produced the energy which was claimed for it because the "energy had to be rejected somewhere, and analysis has shown, by the process of elimination, that the claimed energy never existed." (Smith Report p. 21.) As with his other opinions, this conclusion is again just another attempt to second guess the report of the ERV. As such, Mr. Smith's testimony is irrelevant to the matters in this case. In essence, Mr. Smith concludes that he did not see any means of ventilating the heat being produced by the E-Cat and, as such, the E-Cat was not producing heat. Mr. Smith arrives at this conclusion based upon photographs, information provided to him Defendants and Mr. Murray, and based upon the "process of elimination." Mr. Smith otherwise offers no methodology and/or theory upon which he arrives at this conclusion, and fails to account for additional possibilities such as the inclusion of a heat exchanger. In other words, Mr. Smith makes an analytical leap based upon his unfounded beliefs and assumptions as to the facts in this case. Such a leap would only confuse or mislead the jury.

Moreover, Mr. Smith's last opinion is based upon his "process of elimination" relating to potential means by which heat could be dispersed from the Doral facility. Amazingly, while applying his "process of elimination," Mr. Smith refused to consider alternative means of heat dispersion such as a heat exchanger based solely upon his believe that a heat exchanger was not used. (Smith Trans. 182: 17 to 185:2). Mr. Smith's failure to even consider the possibility of the existence of a heat exchanger renders his conclusion unreliable. "Proffered expert testimony generally will not help the trier of fact when it offers nothing more than what lawyers for the parties can argue in closing arguments." *Meyerson v. Walgreen Co.*, 2006 U.S. Dist. LEXIS 97267, *12, 2006 WL 5249740 (S.D. Fla. May 18, 2006). Where, as here, the expert merely applies the process of elimination to arrive at a conclusion, if such deductive reasoning could adequately be performed by a layperson, such testimony should be excluded under *Daubert. See Id.* In the instant case, a lay juror could easily deduct the existence or non-existence of a method of dissipating heat (if it were relevant to this case) by looking at photos as Mr. Smith did.

Lastly, Experts may not simply repeat or adopt the findings of other experts without investigation them. *Hendrix v. Evenflo Co.*, 255 F.R.D. 568 (N.D. Fla. 2009) (*citing In re Polypropylene Carpet Antitrust Litig.*, 93 F. Supp. 2d 1348 (N.D. Ga. 2000) (finding blind

reliance by expert on other expert opinions demonstrates flawed methodology under *Daubert*); *Tk-7 Corp. v. Estate of Barbouti*, 993 F.2d 722-33 (10th Cir. 1993) (excluding expert opinion relying on another expert's report because witness failed to demonstrate a basis for concluding report was reliable and showed no familiarity with methods and reasons underlying the hearsay report.)).

Mr. Smith opines that based upon the amount of heat claimed to be generated by the E-cat, such heat could not have dissipated into the surrounding area. To support this conclusion, Mr. Smith relied upon Mr. Murray's heat simulations and conclusions. *Smith Report* at 16. In fact, Mr. Smith testified that he was unaware of any presumptions were made by Mr. Murray in creating the relied upon simulations and that Mr. Smith did not do any simulations of his own. (Smith Trans. 296: 20 to 297: 12). It is difficult, if not impossible given Mr. Smith's lack of reliable methodology, to determine whether Mr. Smith's opinions are actually opinions, or merely regurgitations of statements and conclusions made by Mr. Murray and Mr. James Stokes. For example, Mr. Smith "opines" that "Mr. Joe Murray addressed some of his concerns to the ERV concerning the flow meter. This author shares Mr. Murray's concerns and would like to see the ERV's responses. This author also shares the other concerns Mr. Murray has about the other issues in his letter…." (Smith Report p. 14.)

Furthermore, Mr. Smith also relies heavily upon the purported "investigations" performed by Mr. Murray including: (1) "video and photo of the flow meter time lapse conducted by Joseph Murray"; (2) "[v]ideos of the heat simulation conducted by Joe Murray"; (3) "[p]hotos taken by Joseph Murray at the Doral Location"; (4)"Joseph Murray's October 31, 2016 Power Analysis"; and (5) "[t]elephone interviews with Joseph Murray." (Smith Report Ex. B.). In essence, Mr. Smith seeks to improperly invade the province of the jury. Accordingly, such testimony must be excluded.

V. Additional opinions

As discussed in part above, Mr. Smith also testified in deposition that he may testify as to additional opinions not set forth in his Expert Report. (Smith Trans. 112). The Plaintiffs request the Court summarily exclude testimony regarding any previously undisclosed opinions as admitting such testimony would severely prejudice the Plaintiffs who have been deprived of the opportunity to prepare and meet such testimony, including the retention of additional experts, if necessary.

Dated: March 22, 2017.

Respectfully submitted,

/s/John W. Annesser, Esq.
John W. Annesser, Esq. (FBN 98233)
jannesser@pbyalaw.com
Brian W. Chaiken, Esq. (FBN 118060)
bchaiken@pbyalaw.com
D. Porpoise Evans, Esq. (FBN 576883)
pevans@pbyalaw.com
PERLMAN, BAJANDAS, YEVOLI & ALBRIGHT, P.L.
283 Catalonia Avenue, Suite 200
Coral Gables, FL 33134
Telephone: 305.377.0086
Facsimile: 305.377.0781
Attorneys for Plaintiffs, Andrea Rossi and Leonardo Corporation

CERTIFICATION OF COMPLIANCE WITH LOCAL RULE 7.1(a)(3)

The undersigned counsel hereby certifies that, in compliance with Rule 7.1(a)(3), Federal Rules of Civil Procedure, that undersigned counsel has conferred with counsel for Defendants in a good faith effort to resolve by agreement the issues raised in this Motion.

/s/John W. Annesser, Esq.
John W. Annesser, Esquire

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served by in the manner specified below on March 22, 2017 all counsel or parties of record on the attached Service List.

/s/John W. Annesser, Esq.
John W. Annesser, Esquire

SERVICE LIST

Christopher R.J. Pace, Esq. (FBN 721166
cpace@jonesday.com
Christopher M. Lomax, Esq. (FBN 56220)
clomax@jonesday.com
Christina T. Mastrucci, Esq. (FBN 113013)
cmastrucci@jonesday.com
Erika S. Handelson, Esq. (FBN 91133)
ehandelson@jonesday.com
JONES DAY
600 Brickell Avenue, Suite 3300
Miami, FL 33131

- and -

Bernard P. Bell, Esq. (*PHV*)
bellb@millerfriel.com
MILLER FRIEL, PLLC
1200 New Hampshire Avenue, N.W.
Suite 800
Washington, DC 20036
Attorneys for Defendants, Darden, Vaughn, Industrial Heat, LLC, IPH Int'l B.V., and Cherokee Investment Partners, LLC

Service via: CM/ECF

Francisco J. León de la Barra, Esq. (FBN 105327)
fleon@acg-law.com
Fernando S. Arán, Esq. (FBN 349712)
faran@acg-law.com
ARÁN CORREA & GUARCH, P.A.
255 University Drive
Coral Gables, Florida 33134
Attorneys for Third-Party Defendants, JMP, Johnson, and Bass

Service via: CM/ECF

Rodolfo Nuñez, Esq. (FBN 016950)
rnunez@acg-law.com
RODOLFO NUÑEZ, P.A.
255 University Drive
Coral Gables, Florida 33143
Attorney for Third-Party Defendants, Fabiani and USQL

Service via: CM/ECF