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

Defendants hereby reply to Plaintiffs' opposition ("Opposition" or "Opp.") [D.E. 233] to Defendants' motion ("Motion" or "Mot.") [D.E. 197] to exclude all opinions and testimony of Plaintiffs' expert, Dr. Kau-Fui Vincent Wong ("Dr. Wong").

INTRODUCTION

Plaintiffs Andrea Rossi and Leonardo Corporation ("Leonardo") ostensibly oppose Defendants' Motion, but in fact they decline to address nearly every specific argument (and the facts supporting those arguments) contained in the Motion. Instead, they rest their opposition on two misguided propositions. First, Dr. Wong's Opinions # 1 and # 2 are reliable because he reviewed the Smith Report, the Murray Disclosure and the Penon Report, and he further spoke with Rossi. That, of course, does nothing to demonstrate that Dr. Wong employed a reliable methodology for which specialized knowledge was required or reliably applied such a methodology to the facts and data in this case. Second, Dr. Wong's Opinions # 3 and # 4 are reliable because Rossi told him that a heat exchanger was used at the Doral Warehouse and Dr. Wong did not personally have to observe the heat exchanger to form an opinion. But Defendants' challenge is not that Dr. Wong lacked personal knowledge of the alleged heat

exchanger, but that all he did was accept Rossi's self-serving statements while ignoring the overwhelming facts and data demonstrating that no such heat exchanger existed. Rule 702 requires that an expert's opinion be "based on sufficient facts or data" and reflect the reliable application of an acceptable methodology "to the facts of the case." Dr. Wong parroting Rossi's self-serving statements contradicted by all of the available concrete facts is simply not an admissible opinion under Rule 702.

ARGUMENT

I. Dr. Wong's Opinion # 1 Is Inadmissible.

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*." Wong Report (a true and correct copy of which is attached hereto as Ex. 1) at 4 (emphasis added). He admitted in his deposition, however, that he knows "[n]othing" about how the E-Cat operated: "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." *See* Wong Dep. (excerpts of which are attached hereto as Composite Ex. 2) at 76:14-77:4. Dr. Wong also admitted that his "opinion" on using a coefficient of performance ("COP") equation to measure the E-Cat Plant's performance is that (a) he was told to use that equation and (b) he was told the parties had agreed to use of that equation. *Id*. at 78:5-24; 87:11-15; 150:18-23.

Plaintiffs quite literally do not dispute either of these points. They simply state his opinion must be reliable because the Wong Report generically states that Dr. Wong viewed the Defendants' expert report and disclosure and the Penon report, he spoke with Rossi, and he took measurements at the Doral Warehouse. Op. at 7. That may all be true, but none of that makes Dr. Wong's Opinion # 1 an admissible expert opinion. Since Dr. Wong admits to knowing absolutely nothing about how the E-Cat Plant operates, his opinion does not reflect any

application of his engineering training or experience to assess what would be a "suitable" means of evaluating the E-Cat Plant. Instead, Dr. Wong's "opinion" is nothing more than simply that a COP equation is "suitable" to evaluate the E-Cat Plant's performance because *that is the equation he was told to use*. This renders his opinion inadmissible because it does not involve application of any specialized knowledge by Dr. Wong, it invades the providence of the Court or jury to determine to what equation the parties agreed (presumably in the License Agreement), and it is just a restatement of an interested party's testimony. *See National R.R. Passenger Corp. v. Heritage Forest Prods.*, 2005 WL 6008102, at *5 (S.D. Ga. Oct. 6, 2005) ("This opinion, which just restates an interested party's testimony before concluding that that party was not at fault, fails on all three prongs of Rule 702"); *Ramjeawan v. Bank of Am. Corp.*, No. 09-20963-CIV, 2010 WL 1645097, at *1 (S.D. Fla. Apr. 21, 2010) (expert opinion testimony regarding the meanings of an agreement is inadmissible).

II. Dr. Wong's Opinion # 2 Is Inadmissible.

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*." Ex. 1 at 4 (emphasis added). Once again, because Dr. Wong admitted to knowing absolutely nothing about how the E-Cat operated, Ex. 2 at 76:14-77:4, this opinion does not involve application of his specialized engineering knowledge. Instead, all he did was look at some of the numbers in spreadsheets attached to the Penon Report (he did not look at the Penon Report's methodology and he even stopped looking at the numbers once he "recognize[d] that it was whole bunch of repeated stuff."). *Id.* at 64:13-21; 65:13-66:1-25. He concluded that the power output number was relatively constant at around 1 megawatt ("1 MW") but the electrical input varied. *Id.* at 152:4-10. From this he simply opined: "If the energy output (numerator) of

the plant is approximately constant, the equation dictates that the COP of the E-Cat will increase when the plant draws less electrical power (denominator decreases)." Ex. 1 at 5.[1] Or, stated differently but substantively the same, if a numerator is always 10, then the equation numerator over denominator will increase as the denominator decreases: 10 divided by 5 equals 2, 10 divided by 2 equals 5, and 10 divided by 1 equals 10. Ex. 2 at 151:20-152:3. As Dr. Wong admitted, this is just basic math.

Plaintiffs have no substantive response to this analysis. Again, they just fall back to their mantra that Dr. Wong's opinion must be reliable because he reviewed "the Smith Report, the Wong Report [sic., presumably Plaintiffs mean the Murray Disclosure], and the Penon Report" as well as speaking to Rossi. Opp. at 8. None of that, however, changes the "methodology" that Dr. Wong testified to using – looking at some numbers, seeing a "whole bunch of repeated stuff," and then applying grade-school level math. No expert is needed, and no "expert opinion" is admissible, to direct jurors how to do simple math. *See Advanced Drainage Sys., Inc. v. Quality Culvert, Inc.*, No. 2:12-1121, 2015 WL 1299368, at *8 (S.D. Oh. Mar. 23, 2015); *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).

III. Dr. Wong's Opinion # 3 Is Inadmissible.

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 testimony was clear, and

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[1] Of note, but of no surprise, Dr. Wong gave no weight or regard to Rossi's testimony that it was not possible to regulate the COP of the E-Cat Plant. Leonardo Dep. (excerpts of which are attached hereto as Composite Ex. 3) 313:1-4; Rossi Dep. (excerpts of which are attached hereto as Composite Ex. 4) 280:23-281:7. This is directly counter to Dr. Wong's assumption that the output of the E-Cat Plant could be kept constant while the input into the Plant decreased since this, of course, would be regulating the COP of the E-Cat Plant.

Plaintiffs do not dispute, that this opinion was conditioned and wholly dependent on the assumption that there was a substantial heat exchanger in operation at the Doral Warehouse during the time that Plaintiffs were allegedly producing 1 MW of steam power – equivalent to the power consumed by several hundred homes. Ex. 2 at 146:20-149:19; Opp. at 9; *see also What is a Megawatt?*, https://www.-nrc.gov/docs/ML1209/ML120960701.pdf. But not only did Dr. Wong never see such a heat exchanger, also there are no photographic images of this heat exchanger and no records of the heat exchanger (or of the various parts that would be used in such a device, such as pipes). Mot. at 17.

Plaintiffs try to deflect the Court's attention away from these facts by arguing that (a) Dr. Wong is not opining on whether a heat exchanger existed at the Doral Warehouse, but only on whether, if it existed as described by Rossi, it could have removed from the Warehouse the massive amount of heat allegedly generated by the E-Cat Plant, and (b) an expert's opinion does not have to be based on personal knowledge. Neither argument helps Plaintiffs' case. Rule 702 expressly requires that an expert's opinion must be "based on sufficient facts or data." But Dr. Wong's opinion is sorely lacking in that regard. All he relies upon are the self-serving statements of Rossi about the existence of this alleged heat exchanger, without a single piece of paper to back up its existence – no photographs, no receipts, no diagrams, not even left over vestiges of the alleged heat exchanger. Ex. 2 at 70:7-27; 99:4-23; 101:9-25; 102:1-6.

Why are there no vestiges? The obvious explanation is because the heat exchanger never existed. But how about Plaintiffs' explanation? That comes from Rossi's deposition testimony, both individually and as the corporate representative for both Leonardo and J.M. Products, Inc. In that testimony, he admitted that after the "Guaranteed Performance" test was completed in late February 2016 (Rossi and Leonardo's lawsuit was filed at the beginning of April 2016), he took

down and took apart the alleged heat exchanger, with the assistance of day laborers whom he cannot identify and as to whom he has no records. Making matters worse (both from a credibility and spoliation perspective), he not only took apart the alleged heat exchanger, but he disassembled it completely and put all of its components – the pipes, the fans and the wood housing – to other uses so that the alleged heat exchanger cannot be reassembled or even identified. Ex. 4 at 236:10-237:18; JMP Dep. (excerpts of which are attached hereto as Composite Ex. 5) 94:1-17; Ex. 3 at 271:22-272:10; 273:24-274:5.

Under these circumstances, there can be no doubt that Dr. Wong's opinion is inadmissible. It is not backed by facts or data, nor is it based on a reliable methodology by an engineer to assess the effectiveness of a claimed heat exchanger when there are no images, diagrams or records of the exchanger. All Dr. Wong had was the self-serving statements of Rossi. That is clearly not enough to form an admissible expert opinion. *See National R.R. Passenger Corp*, 2005 WL 6008102, at *6 ("This opinion, which just restates an interested party's testimony before concluding that that party was not at fault, fails on all three prongs of Rule 702"); *Stinson Air Ctr., LLC v. XL Speciality Ins. Co.*, 2005 WL 5979096, at *3 (W.D. Tex. July 8, 2005) ("Because the opinions given are based solely upon representations of a party with an interest in the outcome of this lawsuit, without any independent review of ordinary sources of financial analysis, this Court finds Mr. Finch's methodology for formulating an expert opinion to be unorthodox and unreliable.").[2] This is especially so because, as explained above, Rossi is the one who made sure that there was no corroborating data to back up his self-serving statements.

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[2] Curiously, the one case Plaintiffs cite in support of their arguments is *Nature's Prods. v. Natrol Inc.*, No. 11-62409-CIV, 2013 WL 7738172 (S.D. Fla. Oct. 7, 2013). But in *Nature's Products*, the Court excluded the testimony of an expert (Dr. Shelke) on whether "a wheat-free glutamine peptide is or has been on the market" because her opinion was only backed by "personal communications" with someone. "Unlike the content of published sources, the content of those personal communications is unreviewable.

Adding to all of this is that Defendants' experts were able to access and inspect the Doral Warehouse in March of this year. *See* Supp. Smith Rpt. (a true and correct copy of which is attached hereto as Ex. 6) at 2. What they discovered was not any vestiges of the supposed heat exchanger, but in fact concrete evidence that it did not exist. For example, the inspection of the Doral Warehouse revealed that in the area where Plaintiffs claim the heat exchanger was housed, there was no electrical power source, no holes or patches where conduit and power boxes would have been mounted, no holes or patches where piping would have been supported, and no holes or patches in the floor or drywall. *Id.* at 8.

As can be ascertained from the foregoing, Plaintiffs' argument that an expert can form an opinion without personal knowledge of the underlying facts is a red herring. Defendants' attack is not that Dr. Wong lacked personal knowledge of the alleged heat exchanger; it is that he lacked any credible facts or data to form an opinion about the performance of this mythical heat exchanger. Another red herring is Plaintiffs' criticism that if Dr. Wong can be criticized for assuming a heat exchanger existed, Defendants' experts are subject to equal criticism for assuming one did not exist. But the difference between the two is obvious: Because there is no credible, reliable evidence that a heat exchanger was operating at the Doral Warehouse, Defendants' experts correctly did not factor into their heat simulations and heat analyses the existence of such a heat exchanger. Defendants' experts did what engineering experts should do – they formed opinions based on facts. Dr. Wong did what engineering experts should never do – form an opinion based on fantasy, disregarding all of the obvious signs that no heat exchanger existed. Mot. at 17; Ex. 6 at 8-11; *see also U.S. v. Frazier*, 387 F.3d 1244, 1262 (11th Cir. 2004)

Dr. Shelke does not appear to be drawing upon her own education and experience; rather, she is reiterating the unverifiable viewpoint or experience of another individual. Accordingly, Dr. Shelke may not testify as to her opinion of the availability on the market, duration on the market, or cost of a wheat-free glutamine peptide."

("The 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" (quoting Fed. R. Evid. 702 2000 advisory committee's notes (2000))); *Furmanite America, Inc. v. T.D. Williamson, Inc.*, 506 F.Supp.2d 1126, 1129-30 (M.D. Fla. 2007) (expert testimony must be based upon "knowledge, meaning more than "subjective belief or unsupported assumptions.") (internal quotation marks omitted).

IV. **Dr. Wong's Opinion # 4 Is Inadmissible.**

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." Ex. 1 at 4.

For the same reasons as stated in connection with Opinion # 3 above, Opinion #4 is an inadmissible expert opinion. Opinion # 4 is not backed by facts or data, nor is it based on a reliable methodology by an engineer to assess the effectiveness of a supposed heat exchanger for which there was no concrete evidence. Opinion # 4 is wholly dependent on the self-serving, and unreliable, statements of Rossi. *See supra* pp. 4-7.[3]

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[3] Unlike Opinion # 3, this opinion does make reference to Dr. Wong's observations (*i.e.*, "[u]nder the conditions *observed and* described …"). The supposedly relevant observation was that there were also two ventilation fans at the Doral Warehouse that could have pushed some heat out of the Warehouse through air vents in the ceiling. But Dr. Wong admitted at his deposition that the fans were not ventilation fans, but merely air circulation fans, and that he did not know whether there were any vents in the roof for heat to exit; rather, he saw two openings in the ceiling which in fact were skylights and was told that they were air vents. Ex. 2 at 114:3-115:6; 115:13-23; 116:18-117:4; 118:13-20; & Depo. Ex. 7. In any event, Dr. Wong's testimony was clear that absent the alleged heat exchanger operating at the Warehouse, he agreed with Defendants' expert that the Doral Warehouse would be unbearable – even deadly – hot. Ex. 2 at 146:20-149:19; *see also id*. at 148:11-12 ("Whoever would be in the reactor room would be dead first …").

CONCLUSION

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

Dated: April 6, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on April 6, 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 M. Lomax*
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