

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

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

ANDREA ROSSI, et al.,

Plaintiffs,

v.

THOMAS DARDEN, et al.,

Defendants.

/

PLAINTIFFS' MOTION IN LIMINE

Plaintiffs, Andrea Rossi and Leonardo Corporation, hereby move this Honorable Court for an order excluding certain exhibits and witness testimony from trial.

LEGAL STANDARDS

This Court has the inherent power to grant a motion in limine to exclude evidence that could be objected to at trial. *Luce v. United States*, 469 U.S. 38, 41, 105 S. Ct. 460 (1984). Rule 402, Federal Rules of Evidence, states, in pertinent part: "Evidence which is not relevant is not admissible." Relevant evidence is defined by Rule 401, Federal Rules of Evidence, as: "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." *See Huddleston v. United States*, 485 U.S. 681, 682-92, 108 S. Ct. 1496 (1988). Rule 403, Federal Rules of Evidence, states: "The court may exclude relevant evidence if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading

the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” *Id*; see also *U.S v. Scheffer*, 523 U.S. 303, 305-17, 118 S. Ct. 1261 (1998); *Old Chief v. United States*, 519 U.S. 172, 180-92, 117 S. Ct. 644 (1997). Due process does not guarantee the right to introduce all relevant evidence and therefore, Rule 403 does not violate Due Process. *Montana v. Egelhoff*, 518 U.S. 37, 41-43, 116 S. Ct. 2013 (1996).

Further, Rule 602, Federal Rules of Evidence provides:

A witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may consist of the witness’s own testimony. This rule does not apply to a witness’s expert testimony under Rule 703.

Rule 701, Federal Rules of Evidence provides:

If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is:

- (a) rationally based on the witness’s perception;
- (b) helpful to clearly understanding the witness’s testimony or to determining a fact in issue; and
- (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

Rule 802, Federal Rules of Evidence provides:

Hearsay is not admissible unless any of the following provides otherwise:

- a federal statute;
- these rules; or
- other rules prescribed by the Supreme Court.

MEMORANDUM OF LAW

1. Defendants should be precluded from introducing any evidence related to alleged fraud with respect to the Validation Test.

In an attempt to confuse the issues surrounding their conclusory breach of contract claim, Defendants seek to introduce evidence to support a claim that Dr. Rossi defrauded Defendants into making modifications/amendments to the License Agreement and the Validation Test Protocol. Any such evidence should be precluded, as it fails to satisfy Rule 401, Federal Rules of Evidence.

Defendants' Fourth Amended Answer, Additional Defenses, Counterclaims and Third-Party Claims ("AACT"), Count I is for breach of contract, which summarily concludes that Plaintiffs breached the License Agreement because (1) Plaintiffs did not transfer and deliver all E-Cat IP; (2) Validation was never achieved and Penon's Validation report was false; or (3) both. Defendants have neither plead a claim of fraud with respect to Count I, nor did they meet the heightened pleading standards such a claim would require pursuant to Rule 9(b). *Llado-Carreno v. Guidant Corp.*, 09-20971-CIV, 2011 WL 705403, at *5 (S.D. Fla. Feb. 22, 2011) (finding that the "particularity requirement of Rule 9(b) applies to all claims that sound in fraud . . .").

To prove a claim for breach of contract, Plaintiffs must establish: "(1) the existence of a contract; (2) a material breach of that contract; and (3) damages resulting from the breach." *Merle Wood & Assocs., Inc. v. Trinity Yachts, LLC*, 857 F. Supp. 2d 1294, 1301 (S.D. Fla. 2012) (quoting *Vega v. T-MobileUSA, Inc.*, 564 F.3d 1256, 1272 (11th Cir.2009)). Defendants' alleged evidence of fraud does not make the facts related to the alleged breach of the validation/transfer of IP provisions more or less probable. Nor is the alleged evidence of consequence in determining whether Plaintiffs breached the contract. As a result, such alleged evidence should be excluded.

Even if such a claim had been properly pled (it has not), any evidence introduced by Defendants related thereto would either be impermissible lay opinion testimony lacking personal knowledge, or hearsay with no applicable exception. Defendants' alleged evidence of fraud appears to be premised on alleged misrepresentations made by Rossi regarding Italian law. Federal Rule of Civil Procedure 44.1 provides that, "[a] party who intends to raise an issue about a foreign country's law must give notice by a pleading or other writing." Defendants have provided no such notice in this case. Further, Defendants have identified no expert in Italian law to assist the Court in interpreting it. See *La Fontaine v. Signature Research, Inc.*, 2016 U.S. Dist. LEXIS 29499 * (S.D. Fla. Mar. 8, 2016).

Defendant IH's 30(b)(6) witness testified as to the lack of evidence in support of the factual allegations in the AACT, as follows:

Q. Okay. Looking at the allegations in the counterclaim, paragraph 50 is a recitation of a Rossi e-mail dated April 23, 2013.

And you state in paragraph 51: Upon information and belief, Rossi had no such meeting with the Ferrara Health Office and Rossi's statement was false that Italian law would not allow for the 24-hour validation process as set forth in the license agreement without first obtaining a permit that would require "at least six months" to obtain.

What proof do you have that no such meeting took place?

A. We have no proof that such meeting took place. I guess that is our proof.

Q. Got it. Okay. What proof do you have that there is no Italian law that would require a permit for such test?

A. Counsel has looked into this and they have

looked into Italian law in this matter.

Q. Okay. Do you know if -- well, strike that. I will move on.

Did your -- do you have an understanding of what the Italian law actually provides as it relates to such a validation process? Is it set forth in the license agreement?

A. Do I?

Q. Yes.

A. I'm not sure. I would have to ask our counsel. But I don't think that it requires permitting for this sort of activity.

Q. And what is the basis for your statement, other than communications with your counsel?

A. Communication with the counsel.

Q. Okay.

A. I haven't done the primary analysis of Italian law.

See Depo Tr. of Industrial Heat at 157:3-158:13, attached hereto as **Composite Ex. 1**. To be actionable, fraudulent misrepresentation must be of material fact rather than mere opinion or misrepresentation of law. *Capps Agency, Inc. v. MCI Telecommunications Corp.*, 863 F. Supp. 1555 (M.D.Fla.), affirmed, 24 F.3d 254 (1993); *Bailey v. Trenam Simmons, Kemker, Scharf, Barkin, Frye & O'Neill, P.A.*, 938 F. Supp. 825 *, 1996 U.S. Dist. LEXIS 14232, 10 Fla. L. Weekly Fed. D 253 (S.D. Fla. 1996). Vaughn's testimony would be violative of Rules 602, 701 and 802, Federal Rules of Evidence.

In summary, Defendants have not properly pled a cause of action for fraud relating to the First Amendment or the Validation Test, Defendants have failed to identify any admissible evidence that could support such a claim, and therefore they should be precluded from seeking to introduce any evidence related thereto. If such evidence were permitted, it would be likely to cause confusion to a jury and would unduly prejudice Plaintiffs. Specifically, the Court should exclude: (a) any evidence or testimony regarding Italian law; (b) any claim that Plaintiffs made misrepresentations to induce Defendants to enter into the First Amendment, Validation Protocol or any amendments thereto.

2. Evidence regarding the efficacy/propriety of the Validation and Guaranteed Performance Test Protocols should be excluded.

Defendants also claim, in part, that they should be excused from their contractual obligation to pay Plaintiffs because the agreed-upon protocols for the two contractual tests were, in hindsight, insufficient. In support of this claim, Defendants seek to introduce both lay and expert testimony. Because such testimony is not relevant to any issue, and would likely confuse the jury, such should be excluded.

Both Plaintiffs and Defendants have brought competing breach of contract claims. Plaintiffs claim that they have fully performed their obligations and are entitled to full payment pursuant to the terms of the contract. See DE 1, Count I. Defendants claim that Plaintiffs did not fulfill their obligations under the License Agreement as result of their failure to either transfer all E-Cat IP or to achieve validation. See DE 132, Count I. The License Agreement, as amended, specifically provided for the method and means by which “Validation” and “Guaranteed Performance” would be measured.

Validation. Section 4 of the License Agreement, as amended by the First Amendment, governs Validation. The amended section states, in pertinent part:

The Validation will be made in the factory of Leonardo in Ferrara, Italy on April 30th and May 1, 2013.... “Validation” will be deemed successful and achieved when the expert responsible for validation (“ERV”) certifies that the performance standards for the Plant set forth in Exhibit A to [the First Amendment] have been met. ... The ERV will be chosen by mutual agreement between Leonardo and the Company....

See First Amendment, attached hereto as **Ex. 2**. It is undisputed that:

- the parties mutually agreed to designate Fabio Penon as the ERV. *See* IH-00099334-36 (4/24/2013 email between Rossi and Darden), appended hereto as **Ex. 3**.
- Plaintiffs and Defendants mutually agreed to the Validation Protocol contained in Exhibit A to the First Amendment to the License Agreement. *See Composite Ex. 1* at 115:4-25, 121:7-11; IH-00058504 (4/13/2015 Memo from Weaver to Darden, Mazzarino, and Vaughn), appended hereto as **Ex. 4**.
- Defendant Darden, IH engineer T. Barker Dameron, and IH’s intellectual property consultants at Deep River Ventures all reviewed the Validation Protocol prior to its being approved. *See id.*
- The Validation test took place in Ferrara, Italy on April 30 and May 1, 2013. *See* AACT. ¶ 56; Depo Tr. of Thomas Darden at 97:14-18, attached hereto as **Composite Ex. 5**.
- The agreed-upon ERV certified the results of the Validation test on May 7, 2013. *See* AACT ¶ 56; IH-00015632 (Validation Results), attached hereto as **Ex. 6**.

Defendants seek to introduce the lay testimony of Defendant John T. Vaughn, who claimed that the Validation Test was invalid, in part, because the test performed “wasn’t robust enough.” *See* Depo Tr. of John T. Vaughn at 70:6 – 82:13, attached hereto as **Ex. 7**. Vaughn’s testimony, any similar testimony, is not factual, but rather is based on personal opinion, and would be violative of Rules 602 and 701, Federal Rules of Evidence.

Guaranteed Performance.

Defendants seek to introduce the expert testimony of Rick Smith, who opines that the methodology used by the ERV is “not valid to tabulate and compute performance of the E-Cat” and that the “E-Cat test was not properly instrumented and there was no measurement of the E-Cat’s actual output.” *See* Smith Report attached hereto as **Ex. 8**. This testimony is irrelevant to any issue before the Court, as Defendants had already agreed on the methodology to be followed to compute performance of the E-Cat. Specifically, in responding to the draft protocol prepared by Penon, Defendant Darden provided recommendations and proposed modifications, stating, “These are just suggestions – I am sure you can find the best way to do this.” *See* IH-00019121-25 (2/18/15 e-mail from Darden to Penon, whereupon Darden responded: “Thanks do [*sic*] very much for your important work. This evaluation will have the eyes of the world on it once we release any information.”), appended hereto as **Ex. 9**.

Defendants seek to introduce the expert testimony of Joseph Murray. Significantly, Murray’s testimony is not that Plaintiffs’ or any Third-Party engaged in manipulation of data or other nefarious activity (*See* Depo Tr. of Joseph Murray at 340:4-12, attached hereto as **Ex. 10**), but rather that he believed that the issues stem from “a combination of poor test plan, poor documentation, and a completely inadequate selection of the sensors used for this system.” *Id.* at 340:17-20. Even if true, none of this testimony is relevant, as it would fail to support or negate any cause of action or defense asserted in this matter. It should be noted that, despite having the opportunity do so, Defendants did not have Smith, Murray or any other expert in the field participate in the preparation of the protocol for the GPT, prior to the commencement of the GPT.

Not only should this purported expert witness testimony be excluded on substantive grounds, but it should also be excluded on procedural ones. Rule 16(f)(1)(C), Fed. Rules of Civ. Pro. provides that if a party fails to obey a scheduling or other pretrial order... the judge, upon motion or the judge's own initiative, may make such orders with regard thereto as are just, and among others any of the orders provided in Rule 37 (b)(2)(A)(ii)-(iv). Rule 37(b)(2)(A), Federal Rules of Civil Procedure, provides, in pertinent part, that: "If a party ... fails to obey an order to provide or permit discovery... the court where the action is pending may issue further just orders. They may include the following: . . . (ii) prohibiting the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence; . . ."

Id. Rule 37(c), Fed. R. Civ. P, provides, in pertinent part: "If a party fails to provide information or identify a witness as required by Rule 26(e) [expert witnesses], the party is not allowed to use that information or witness to supply evidence...at trial." (Emphases added). Expert opinions that were not disclosed in a timely fashion were properly excluded. *Corwin v. Walt Disney Co.*, 475 F.3d 1239 (11th Cir. 2007). As more fully set forth in Plaintiffs' *Daubert* Motion to Strike and Exclude Defendants' Experts [DE 215] and Reply in Support Thereof [252], Defendants have failed to abide by Fed. R. Civ. P. 26(a)(2)(B).

As a result, Plaintiffs have been unduly prejudiced, and Defendants should be precluded from introducing their expert reports and testimony. Specifically, the Court should exclude: (a) any lay witness testimony or evidence regarding the sufficiency and/or robustness of the GPT protocol, and (b) any expert witness testimony or evidence regarding the propriety of the GPT protocol, the sufficiency of the equipment, or the documentation related thereto.

3. Defendants should be precluded from seeking to introduce evidence as to their attempts to replicate the technology.

In Count I of their AACT, Defendants claim that Plaintiffs breached the License Agreement by failing to achieve validation and failing to transfer all E-Cat IP. To support these claims, Defendants seek to introduce evidence that they failed to independently replicate the test results achieved by Plaintiffs. Such evidence is not relevant to any issue before the Court, and should be excluded because there is no contractual requirement that Defendants be able to replicate the technology.

The plain, clear, and unambiguous language in the contract makes no mention whatsoever of the term “replication” or any variation thereof. There is no provision in the License Agreement that conditions performance by any party upon Defendants’ independent ability to replicate any test result. It is a “commonsense principal of [contract] interpretation that ‘the absence of a provision from a contract is evidence of an intention to exclude it rather than an intention to include it.’” *Megdal Assocs.*, 2016 U.S. Dist. LEXIS 119168, at *11 (quoting *Azalea Park Util., Inc. v Knox-Fla. Dev. Corp.*, 127 So. 2d 121, 123 (Fla. 2d DCA 1961)). The parties did agree to validate the technology by virtue of two separate tests: the Validation Test and the GPT. Further, the License Agreement called for an independent third-party (the expert responsible for validation) to be the final arbiter as to whether the technology was valid, presumably to avoid having to litigate the issue. If Defendants intended Plaintiffs to have further obligations, they could have insisted they be placed in the License Agreement. They did not.

These facts are similar to the case of *1550 Brickell Assocs. v. QBE Ins. Corp.*, 2011 U.S. Dist. LEXIS 2247, 2011 WL 9506 (S.D. Fla. Jan. 3, 2011). There, the plaintiff sued the defendant

insurance company for breach of contract, seeking to collect proceeds on an insurance policy. The defendant moved to preclude plaintiff from presenting evidence of referring to indemnity reserves for the plaintiff's claim. The plaintiff contended that evidence of the defendant's reserves: (1) is probative of whether the defendant breached the policy; (2) is probative as to damages; (3) may constitute party admissions; and (4) may be used for impeachment. The Court granted the defendant's motion in limine, stating

Even assuming evidence of Defendant's indemnity reserves is relevant, there exists a real danger such information would prejudice Defendant and potentially mislead the jury. The Court is not convinced that jurors would not equate Defendant's increasing reserve amounts with admissions of coverage. It could tend to inject a bad faith element into a simple breach of contract action.

Id. at 8. As in *1550 Brickell*, the introduction of evidence as to Defendants' alleged inability to replicate may well prejudice Plaintiffs and confuse the jury by injecting unnecessary elements into a simple breach of contract action. The Defendants' alleged failure to replicate could have been caused by any number of factors outside of the Plaintiffs' control.

Because Defendants' alleged failure to independently replicate Plaintiffs' test results is not relevant to any issue to be tried, any evidence as to such should be excluded. Specifically, the Court should exclude any evidence or testimony regarding Defendants' alleged inability to replicate the technology.

4. Damages in support of AACT Count II (Breach of Contract) and Count IV (FDUTPA).

Defendants have failed to identify any actual damages in support of their Count II and Count IV, and should be precluded from surprising Plaintiffs with new evidence at trial.

Even where evidence is relevant, such evidence should be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. Rule 403, Fed. R. Evid. It is within this Court's discretion to exclude undisclosed theories of damages as well as any other damage evidence that has not been disclosed throughout the course of discovery. *Mee Indus. v. Dow Chem. Co.*, 608 F.3d 1202, 1221 (11th Cir. 2010). In *Mee*, the district court had excluded the specific category of damages related to "loss of goodwill" because the plaintiff's failure to disclose the category of damages and related calculation was not substantially justified or harmless. *Id.* at 1221-22.

Defendant IPH's breach of contract claim contains 5 separate parts: (a) breach of confidentiality, (b) failure to assign licensed patents, (c) failure to inform/consult on patent application, (d) breach of covenant not to compete, and (e) failure to pay taxes. With respect to their Count II claim of breach of contract, IPH claims that it should be allowed to "prove up damages at trial after liability is determined." See DE 237 at pg. 18.

It is important to note that Defendant IPH never disclosed any damages figures pursuant to Fed. R. Civ. P. 26(a)(1)(C). While Defendants did not file their counterclaims until after the Rule 26(a) initial disclosure deadline set forth in the Case Management and Scheduling Order; however, if the letter of Rule 26(a) did not mandate disclosure in these circumstances, the Rule's spirit certainly did. See *Hi Ltd. P'ship v. Winghouse of Fla., Inc.*, 2004 U.S. Dist. LEXIS 30687, *35, 2004 WL 5486964 (M.D. Fla. Oct. 5, 2004). Further, Rule 26(e)(1) imposes an obligation on parties to supplement their Rule 26(a) disclosures. As set forth in *In re Bankatlantic Bancorp, Inc.*, 2010 U.S. Dist. LEXIS 93500 *, 2010 WL 6397501 (S.D. Fla. Aug. 20, 2010):

Courts have held that the duty to supplement continues after the close of discovery. See *Rodriguez v. IBP, Inc.*, 243 F.3d 1221, 1230 (10th Cir. 2001) (the duty to supplement extended beyond the close of discovery, until the filing of a notice of appeal); *Klonoski v. Mahlab*, 156 F.3d 255, 267-68 (1st Cir. 1998) (no longer good law on another point) (the duty to supplement extended beyond the close of discovery and into trial); *Hunyh v. J.P. Morgan Chase & Co.*, 2008 U.S. Dist. LEXIS 54714, 2008 WL 2789532 at *24-25 (D. Ariz. Jul. 17, 2008) [*17] (Rule 26 requires supplementation after discovery closes under certain circumstances to narrow the issues for trial and to prevent unfair surprise), quoting *Episcopo v. General Motors Corp.*, 2004 U.S. Dist. LEXIS 5142, 2004 WL 628243 at *6 (N.D. Ill. 2004); *Locascio v. Jacobs*, 2006 U.S. Dist. LEXIS 98073, 2006 WL 1540290 at *1 (M.D. Fla. May 30, 2006) (the duty to supplement under Rule 26(e) supersedes the parties' agreement to stop supplementing 30 days prior to trial and the duty to supplement discovery responses continues, at least, until trial).

Notwithstanding Defendants' failure to disclose their damages pursuant to Rule 26(a), or supplement pursuant to Rule 26(e), Plaintiffs attempted to ascertain IPH's alleged damages in discovery.

a. Damages arising from breach of confidentiality. With respect to IPH's purported damages, IPH was unable to discern how IPH was harmed, instead concluding that such breach would "lead to damages." *See* Depo Tr. of IPH International B.V. at 56:8-19, attached hereto as **Composite Ex. 11**. IPH testified further that IPH could not state how much IPH had been damaged. *See id.* at 61:15-23. Defendant Darden testified that "we have not made a computation" of damages and that "we don't know yet what damages we might have." *See Composite Ex. 5* at 240:5-11.

b. Damages arising from failure to assign licensed patents. With respect to purported damages as to this claim, IPH could not "assign a specific dollar amount to damages" purportedly resulting from IPH's claim. *See Composite Ex. 11* at 66:10-19 ("We have not been able to assign a value to that specific allegation."). Defendant Darden testified that no one from IPH or IH had made any attempt to calculate purported damages, also noting that damages are "contingent upon

the technology working or the patent or IP being effective for someone else who makes the technology work. So if someone else is effective then the breach will have harmed us.” *See Composite Ex. 5* at 240:4-19. Furthermore, Defendants have taken the conflicting position that the underlying technology has no value. *Composite Ex. 1* at 145:25, 146:1-13. If Defendants are to be believed, there could not possibly be any damage stemming from a failure to assign patents encompassing a valueless technology. The doctrine of judicial estoppel precludes Defendants from taking these contrary positions, and Defendants should be precluded from now seeking to bring evidence in support of any damages with respect to this alleged breach.

c. Damages arising from failure to inform/consult on patent application. With respect to purported damages, IPH testified that it had not differentiated the damages alleged in the prior claim (failure to assign) with this claim. *See Composite Ex. 11* at 70:25-71:5. Defendant Darden testified that neither IH nor IPH had computed damages related to any purported violation of section 7 of the Licensee Agreement (failure to inform/consult). *See Composite Ex. 5* at 240:7-24.

d. Damages arising from breach of covenant not to compete. With respect to purported damages, IPH could not identify any damages that it had purportedly suffered as a result of any purported breach of section 13.3 of the License Agreement. *See Composite Ex. 11* at 73:3-6.

e. Damages arising from failure to pay taxes. With respect to purported damages, Defendant Darden testified that he had not computed any actual damages related to a claim for purported breach of section 13.5 of the License Agreement, and stated that he did not believe that the other Defendants had done so either. *See Composite Ex. 5* at 246:12-247:2. IPH admits that

it is not aware of any damage as a result of its claim related to breach of sections 12(a), 12(e) and 13.5 of the License Agreement. *See* **Ex. 11** at 77:16-21.

It would be manifestly unfair to allow Defendant IPH to introduce hereto before undisclosed evidence related to its purported breach of contract action at trial.

FDUTPA Damages. Defendants' Count IV seeks damages pursuant to the Florida Deceptive and Unfair Trade Practices Act ("FDUTPA"). FDUTPA permits recovery for actual damages only. *Nat'l Union Fire Ins. Co. v. Tyco Integrated Sec., LLC*, 2015 U.S. Dist. LEXIS 82646, *99 (S.D. Fla. June 24, 2015 (citing *Rollins*, 951 So. 2d at 869)). Actual damages do not include special consequential damages. *Id*; *see also Rodriguez v. Recovery Performance & Marine, LLC*, 38 So. 3d 178, 180 (Fla. 3d DCA 2010). In fact, Florida courts "specifically reject the recovery of [such] damages under FDUTPA." *Eclipse Med., Inc. v. Am. Hydro-Surgical*, 235 F.3d 1344 (11th Cir. 2000.) To support their claim, Defendants seek to introduce evidence of their consequential damages, namely: (a) maintenance expenses related to operating the 1MW Plant, (b) expenses related to the shipment of the equipment, and (c) travel and housing expenses. *See* Countercl. ¶¶ 141-48. These types of damages are not recoverable under FDUTPA and therefore should be excluded from being introduced. *Id.* At no time have Defendants identified or claimed any other damages stemming from their FDUTPA claim, and they should be barred from introducing any such evidence.

Specifically, the Court should exclude any evidence or testimony regarding Defendants' damages related to the alleged breaches of contract set forth in Counts II, and their FDUTPA claim set forth in Count IV.

5. Evidence regarding Plaintiffs' prior business dealings with Hydrofusion should be excluded.

Defendants intend to introduce evidence pertaining to Plaintiffs' prior business dealings with a company called Hydrofusion. *See, e.g.*, Countercl. ¶65. Specifically, Defendants allege that Plaintiffs escaped an agreement with Hyrdofusion by intentionally undermining the same. *Id.* However, the Plaintiffs' other business dealings, as Defendants themselves state, are "not of significance" to the License Agreement, the negotiations underlying the License Agreement, and/or the obligations associated therewith. *Id.* at n. 7. Rather, Defendants mention the unrelated business dealing in support of Defendants' purported uncertainty as to whether Dr. Rossi intentionally sought to "undermine the testing" of the E-Cat. *Id.* at ¶65.

Similar to Section 1, *supra*, Defendants again seek to introduce non-specific allegations of fraud as proof for a claim for breach of contract. As argued above, any such evidence of fraud does not make the facts related to breach of contract more or less probable. *See Merle Wood & Assocs., Inc. v. Trinity Yachts, LLC*, 857 F. Supp. 2d 1294, 1301 (S.D. Fla. 2012) (setting forth the elements of a claim for breach of contract); *see also* Rules 401, 402, and 403, Fed. R. Evid. Rather, any such allegation would only confuse the issues and mislead the jury. This is especially true in light of the fact that Hydrofusion has never made an allegation of fraud or other wrongdoing pertaining to the parties' business dealings. The allegation is pure conjecture and a deliberate attempt to unduly prejudice the Plaintiffs and cast the Plaintiffs in a negative light.

Furthermore, any purported evidence that the Plaintiffs have breached contracts in the past is not determinative of whether Plaintiffs breached the License Agreement with Defendants. The introduction of such evidence constitutes improper evidence of an alleged prior wrong. Such

prejudicial evidence should be excluded. *See* Rules 401, 402, 403, and 609(b), Fed. R. Evid. Specifically, the Court should exclude any evidence or testimony related to Defendants' claims that Plaintiffs have breached prior agreements with unrelated third parties, including but not limited to Hydrofusion.

6. Defendants should be precluded from seeking to introduce evidence related to Plaintiff Dr. Rossi's past issues with the Italian government.

Defendants should be excluded from introducing any evidence or testimony relating to any alleged prior crimes, wrongs or other acts, pursuant to USCS Fed Rules Evid. R 404 and 609(b). In the AACT ¶125, Defendants allege that "it was well known that Rossi had taxation issues with the Italian government, which even led to him facing criminal tax charges in Italy." Plaintiffs surmise that Defendants intend to seek to introduce testimony or evidence related to this allegation in order to prejudice the jury against Dr. Rossi. Defendants have taken discovery directly related to this issue, and have been fully informed that all such issues relate to proceedings that have taken place well over ten years prior to the matters raised herein, and that Dr. Rossi has been fully acquitted of all allegations of wrong-doing.

Rule 609(b), Fed. R. Evid, provides:

Limit on Using the Evidence After 10 Years. This subdivision (b) applies if more than 10 years have passed since the witness's conviction or release from confinement for it, whichever is later. Evidence of the conviction is admissible only if:

- (1) its probative value, supported by specific facts and circumstances, substantially outweighs its prejudicial effect; and
- (2) the proponent gives an adverse party reasonable written notice of the intent to use it so that the party has a fair opportunity to contest its use.

Defendants have not provided any written notice of their intent to use such evidence, and the prejudicial effect of any such evidence would substantially outweigh any probative value.

Further, Defendants have pursued discovery into matters that have taken place more than ten years ago. Such evidence is irrelevant to any issue pending before the Court, and should be excluded. Specifically, the Court should exclude any evidence or testimony related to any alleged prior bad acts and/or legal issues Dr. Rossi may have had with the Italian government.

7. Defendants IPH and Cherokee should be precluded from introducing witness testimony and/or exhibits as to those topics for which they failed to provide substantive 30(b)(6) testimony.

Defendants (i.e., Cherokee Investment Partners, LLC “Cherokee” and IPH International, B.V. “IPH”) designated the same person as their respective corporate representative for deposition under Rule 30(b)(6). This representative:

- a. Was not properly prepared to answer questions regarding Plaintiffs’ identified topics.
- b. Importantly, while material and information were available to him, did not review them or otherwise seek to become informed to answer questions regarding those identified topics.
- c. Due to his utter failure to prepare, even though appropriate material and/or information were available, did not answer questions regarding Plaintiffs’ identified topics that were material to this action. Significantly, the representative of Cherokee and IPH made a conscious decision to refrain from obtaining information or testimony from the corporate representative of IH, so as to fulfill their respective Rule 30(b)(6) obligations.

Because of this intentional and improper discovery conduct, and because the discovery cut-off period has long since closed¹, consistent with the Southern District of Florida’s ruling in *QBE Ins. Corp. v. Jorda Enters.*, the Court should prohibit IPH and Cherokee from introducing any witness testimony and/or exhibits as to those topics for which they failed to provide substantive

¹ Judge O’Sullivan has ordered that Plaintiffs are entitled to re-depose these witnesses, and Plaintiffs have attempted to do so. However, Defendants have moved for a protective order with respect to the scope of the depositions, which is scheduled to be heard before Judge O’Sullivan on April 20, 2017. Irrespective, Plaintiffs believe they have been unduly prejudiced by Defendants’ failure to comply with Rule 30(b)(6), and that such evidence should be excluded.

testimony, and should hold that their previous deposition testimony should be binding. *See* 277 F.R.D. 676 (S.D. Fla. 2012).

WHEREFORE, Plaintiffs respectfully requests this Court issue an Order precluding Defendants from introducing any and all exhibits and witnesses at trial related to the subjects set for the herein, and such other and further relief as the Court may deem just and proper.

Dated: April 18, 2017

Respectfully submitted,

/s/ John W. Annesser

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Counsel for Plaintiffs

**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, or has attempted to confer with, counsel for Defendant Industrial Heat, LLC. and IPH International, B.V. in a good faith effort to resolve by agreement the issues raised in this Motion.

/s/ John W. Annesser

John W. Annesser, Esq. (98233)

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on April 18, 2017, I electronically filed the foregoing motion with the Clerk of the Court using CM/ECF. Copies of the foregoing document will be served upon interested counsel either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

/s/ John W. Annesser
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