

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

CASE NO. 1:16-cv-21199-CIV-ALTONAGA/O'Sullivan

ANDREA ROSSI and LEONARDO
CORPORATION,

Plaintiffs,

v.

THOMAS DARDEN; JOHN T. VAUGHN;
INDUSTRIAL HEAT, LLC;
IPH INTERNATIONAL B.V.;
And CHEROKEE INVESTMENT
PARTNERS, LLC,

Defendants.

INDUSTRIAL HEAT, LLC and
IPH INTERNATIONAL B.V.,

Counter-Plaintiffs,

v.

ANDREA ROSSI and LEONARDO
CORPORATION,

Counter-Defendants,

v.

J.M. PRODUCTS, INC.; HENRY
JOHNSON; FABIO PENON;
UNITED STATES QUANTUM LEAP, LLC;
FULVIO FABIANI; and JAMES A. BASS,

Third-Party Defendants.

**J.M. PRODUCTS, INC., HENRY JOHNSON, AND JAMES A. BASS'
MOTION IN LIMINE**

Third-Party Defendants, J.M. Products, Inc., Henry Johnson, and James A. Bass,
(collectively, "Third-Party Defendants") hereby move this Honorable Court for an order

excluding certain exhibits and witness testimony from trial.

Legal Standard

“‘Irrelevant evidence is not admissible,’ Fed. R. Evid. 402, and ‘[e]vidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action,’ Fed. R. Evid. 401.” *United States v. Riquene*, 552 Fed.Appx. 940, 943 (11th Cir. 2014). “[E]ven relevant evidence may be excluded if its probative value is substantially outweighed by a danger of unfair prejudice, confusing the issues, or misleading the jury.” *United States v. Terrero*, 571 Fed.Appx. 778, 781 (11th Cir. 2014) (citing Fed. R. Evid. 403).

Memorandum of Law

1. Counter-Plaintiffs should be precluded from introducing any evidence related to alleged oral representations concerning Johnson Matthey

Counter-Plaintiffs claim, in part, that JM Products, Johnson, Rossi, and Leonardo all made representations to IH that JM Products was a subsidiary of, or affiliated with, Johnson Matthey. In support of this claim, Counter-Plaintiffs seek to introduce the self-serving testimony of John T. Vaughn (“Vaughn”) and Thomas Darden (“Darden”) that they recall such statements being made at some point prior to entering into the Term Sheet.

“It is established law in Florida that a party cannot justifiably rely on representations not contained in a subsequent agreement when the agreement conflicts with those representations or where the party participated in drafting the agreement and did not reduce the representations to writing.” *Corporate Financial, Inc. v. Principal Life Ins. Co.*, 461 F.Supp.2d 1274, 1291 (S.D. Fla. 2006) (citing *SEB S.A. v. Sunbeam Corp.*, 148 Fed.Appx. 774, 798 (11th Cir. 2005) (internal citations omitted)). It is undisputed that IH and its counsel participated in the drafting of the Term Sheet. *See* ECF No. 242 (at Statement of Undisputed Material Facts, ¶¶5, 9); ECF No. 245

¶¶5, 9. It is also undisputed that the Term Sheet does not contain any reference to Johnson Matthey. *See* ECF No. 132-17. Accordingly, IH cannot now rely on any alleged representations concerning Johnson Matthey. *See Corporate Financial* at 1291.

Given that IH cannot rely on such representations as a basis to establish its cause of action for fraudulent inducement, any testimony or evidence related to Johnson Matthey is not relevant to any issue to be tried and such evidence should be excluded.

2. Counter-Plaintiffs should be precluded from offering the Compliance with OFAC form for anything other than the purpose for which the document was created

Third-Party Defendants believe that Counter-Plaintiffs will seek to introduce the Compliance with OFAC document (see ECF No. 207-43 at p. 7) to attempt to establish that JM Products and Johnson represented to IH that JM Products was affiliated with Johnson Matthey. As described in more detail above, IH cannot rely on such representations to establish its cause of action for fraudulent inducement. Accordingly, Counter-Plaintiffs should be precluded from offering the Compliance with OFAC document to support or establish the allegation that JM Products or Johnson represented to IH that JM Products was affiliated with Johnson Matthey. Furthermore, Counter-Plaintiffs should be precluded from offering the Compliance with OFAC document for anything other than the purpose for which the document was created; namely, to show that JM Products was compliant with OFAC and not owned by a blocked entity or nationality. Any testimony or evidence as to the specific content of the document would be taken out of context to the detriment of Third-Party Defendants and would be extremely likely to confuse the issues or mislead the jury.

3. Counter-Plaintiffs should be precluded from introducing any evidence relating to the operation of JM Products

Counter-Plaintiffs claim, in part, that JM Products was not a real company and not operating or using the steam that the Plant was providing. Counter-Plaintiffs will seek to introduce evidence relating to the operation of JM Products in an attempt to establish its claim under the Florida Deceptive and Unfair Trade Practices Act (“FDUTPA”). In their FDUTPA claim, Counter-Plaintiffs allege that Plaintiffs and all third-party defendants took part in a scheme to deceive Counter-Plaintiffs as to the operation of the Plant and its ability to perform at the rate specified in the License Agreement. The operation of JM Products and whether or not it was using the steam or producing a product does not provide any information about the rate at which the Plant generates the steam, or energy, and is therefore not relevant to any issue in the FDUTPA claim. The introduction of any such evidence will only serve to act as a red herring and will distract the jury from the real issue, therefore confusing the issues and misleading the jury.

4. Counter-Plaintiffs should be precluded from introducing any evidence relating to representations allegedly made by Third-Party Defendants as to the amount of steam being received by JM Products

Counter-Plaintiffs will seek to introduce documents and testimony in order to suggest that Third-Party Defendants represented the COP, or rate at which the Plant was generating steam, to Counter-Plaintiffs. Examples of such evidence include letters sent by JM Products stating the amount of energy received during the month and requesting an invoice from Counter-Plaintiffs and testimony by Darden that Bass stated JM Products was satisfied with the steam. *See* ECF No. 207 at ¶¶74(a), 75(c). The amount of energy being received and used by JM Products is not related to and does not allow the inference that the Plant is operating at the requisite COP, only that JMP is receiving such amount of energy. In fact, Darden testified that Bass did not represent to Counter-Plaintiffs the Plant’s COP. *See* Darden Depo. Tr. at 302:8-10 (excerpt in ECF No.

242-1). Such evidence is not relevant to the rate at which the Plant generates the steam, or energy, and is therefore not relevant to any issue in the FDUTPA claim. Even assuming, *arguendo*, that such evidence is relevant, the introduction of any such evidence is prejudicial to Third-Party Defendants as it is extremely likely to mislead the jury as to whether any Third-Party Defendant represented the Plant's COP to Counter-Plaintiffs or confuse the issues.

5. Counter-Plaintiffs should be precluded from introducing any evidence relating to the status of Bass as an independent contractor or employee

Counter-Plaintiffs will seek to introduce evidence regarding Bass' employment status with JM Products, i.e. whether Bass was an employee or independent contractor, in an attempt to establish that Bass was not the Director of Engineering for JM Products. Such evidence is not relevant to the finding that Bass was the Director of Engineering. Stated differently, whether or not Bass was an employee or independent contractor has no bearing on the fact that he was the Director of Engineering. Even assuming, *arguendo*, that such evidence is relevant to an issue in this action, it should be excluded on the ground that the introduction of such evidence will confuse the issues or mislead the jury as to the proper analysis in determining whether Bass was the Director of Engineering for JM Products.

WHEREFORE, Third-Party Defendants JM Products, Johnson, and Bass request that this Court enter an Order precluding Defendants/Counter-Plaintiffs/Third-Party Plaintiffs from introducing any and all exhibits and witnesses at trial related to the subjects set forth herein, and for such other and further relief as the Court may deem just and proper.

**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.

Respectfully submitted this 18th day of Aril, 2017.

Arán Correa & Guarch, P.A.
Counsel for JMP, Johnson, and Bass
255 University Drive
Coral Gables, Florida 33134
Telephone: (305) 665-3400
Telefax: (305) 665-2250

By: /s/ Francisco J. León de la Barra
Francisco J. León de la Barra, Esq.
Florida Bar No.: 105327
Fernando S. Arán, Esq.
Florida Bar No.: 349712

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on April 18, 2017, I electronically filed the foregoing with the Clerk of the Court using CM/ECF. Copies of the foregoing document will be served on all counsel of record via transmission of Notice of Electronic Filing generated by CM/ECF.

/s/ Francisco J. León de la Barra
Francisco J. León de la Barra, Esq.
Florida Bar No.: 105327