UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

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.

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

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

Counter-Plaintiffs,

v.

ANDREA ROSSI and LEONARDO CORPORATION,

Counter-Defendants,

and

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

Third-Party Defendants.

DEFENDANTS' CONSOLIDATED MOTION IN *LIMINE*

Should this matter proceed to trial, Thomas Darden, John T. Vaughn, Industrial Heat, LLC ("IH"), IPH International, B.V. ("IPH"), and Cherokee Investment Partners, LLC (collectively, "Defendants") hereby request an adverse inference jury instruction against Andrea Rossi and Leonardo Corporation ("Plaintiffs"), J.M. Products, Inc. ("JMP"), United States Quantum Leap, LLC ("USQL") and Fulvio Fabiani due to their destruction of evidence crucial to the claims asserted in this litigation. Defendants also move this Court for an order excluding (1) any undisclosed expert testimony or opinions offered by Plaintiffs or Third-Party Defendants; (2) any evidence related to illnesses or physical ailments Rossi purportedly suffered as a result of working on the 1 MW Plant; (3) the measurements contained in Fabio Penon's reports; and (4) any argument that entities in which IH or IPH invested (other than Leonardo) used the E-Cat IP.

I. Plaintiffs' and Third Party Defendants Should be Sanctioned for Destroying Material Evidence.

Plaintiffs in bad faith destroyed critical evidence in this case, including (1) piping that transported heated fluid from the 1 MW Plant operated by Leonardo at the warehouse in Doral, Florida ("Doral Warehouse") to a container walled off on the other side of the Doral Warehouse and allegedly operated by JMP; (2) a purported heat exchanger that allegedly dissipated the heat from the steam produced by the 1 MW Plant; and (3) email communications from Rossi, on behalf of Leonardo, to Penon.

Moreover, USQL and Fabiani (the owner and sole member of USQL) destroyed Fabiani's email communications with Penon, Rossi, and others relating to the operation of the 1 MW Plant at the Doral Warehouse as well as data collected about the operation of the Plant. Finally, JMP, which now admits that it was being run by Rossi (though this was concealed from Defendants), allowed Rossi to destroy both the piping and heat exchanger referenced above.

This conduct is the subject of Defendants' Motion for Sanctions Based on Plaintiffs' and Third-Party Defendants' Spoliation of Evidence [D.E. 194], which is currently pending before Magistrate Judge O'Sullivan. Defendants maintain that the appropriate remedy for Plaintiffs' and Third-Party Defendants' willful destruction of material evidence is dismissal of Plaintiffs' claims with prejudice and entry of judgment in favor of IPH and IH (1) on their first breach-of-contract claim against Plaintiffs, (2) on their breach-of-contract claim against USQL and Fabiani, and (3) on their Florida Deceptive and Unfair Trade Practices Act claim against Plaintiffs, JMP, Fabiani and USQL. If these claims are allowed to proceed to trial, Defendants request that the Court instruct the jury that the destroyed evidence was not favorable to Plaintiffs and Third-Party Defendants. Defendants further request that the Court preclude Plaintiffs and Third-Party Defendants from introducing evidence that purports to establish the existence of, or to describe the contents or function of, the destroyed evidence.

A. ***Legal Standard***

"'Spoliation' is the intentional destruction, mutilation, alteration, or concealment of evidence." *Walter v. Carnival Corp.*, No. 09-20962-CIV, 2010 WL 2927962, at *2 (S.D. Fla. July 23, 2010). "Federal law governs the imposition of sanctions for spoliation of evidence in a diversity action." *Id.* "To establish spoliation, the party seeking sanctions must prove several things; first, that the missing evidence existed at one time; second, that the alleged spoliator had a duty to preserve the evidence; and third, that the evidence was crucial to the movant being able to prove its prima facie case or defense." *Id.* In the Eleventh Circuit, sanctions may include dismissal of the case, exclusion of expert testimony, or "instructing the jury that spoliation of evidence raises a presumption against the spoliator." *Id.* (citing *Flury v. Daimler Chrysler Corp.*, 427 F.3d 939, 945 (11th Cir. 2005)).

A party has an obligation to retain relevant objects, data and documents, including emails, where litigation is reasonably anticipated. *Managed Care Sols., Inc. v. Essent Healthcare, Inc.,* 736 F. Supp. 2d 1317, 1324 (S.D. Fla. 2010) (litigation should have been reasonably anticipated when "counsel for the defendant sent counsel for the plaintiff a letter outlining the defendant's position with respect to some of the provisions of the PSA which the Plaintiff claimed had been breached"); *see also Point Blank Sols., Inc. v. Toyobo Am., Inc.,* 09-61166-CIV, 2011 WL 1456029, at *11 (S.D. Fla. Apr. 5, 2011) ("duty to preserve evidence arises when a party reasonably anticipates litigation."); *Southeastern. Mech. Servs., Inc. v. Brody*, 8:08-CV-1151T30EAJ, 2009 WL 2242395, at *3 (M.D. Fla. July 24, 2009) ("SMS undoubtedly anticipated litigation when it sent TEI a demand letter on June 3, 2008.").

A party that has willfully failed to preserve electronically stored information in anticipation of litigation is, at minimum, subject to an adverse inference. More specifically, the Court "upon finding that the party acted with the intent to deprive another party of the information's use in litigation may: (A) presume that the lost information was unfavorable to the party; (B) instruct the jury that it may or must presume the information was unfavorable to the party; or (C) dismiss the action or enter a default judgment." Fed. R. Civ. P. 37(e)(2).

A court's application of an adverse inference against a party that has spoliated evidence "makes a finding or imposes a rebuttable presumption that the missing evidence would have been unfavorable to the party engaging in the misconduct." *F.T.C. v. First Universal Lending, LLC*, 773 F.Supp.2d 1332, 1352 (S.D. Fla. 2011). In the Eleventh Circuit, an adverse inference is drawn from a party's failure to preserve evidence "when the absence of that evidence is predicated on bad faith." *Bashir v. Amtrak,* 119 F.3d 929, 931 (11th Cir. 1997). Nevertheless, "the spoliating party need not have acted with malice when spoliating the evidence in order for

the court to draw an adverse inference." *Swofford v. Eslinger*, 671 F. Supp. 2d 1274, 1280 (M.D. Fla. 2009) (citing *Graff v. Baja Marine Corp*., 310 F. App'x 298 (11th Cir. 2009)).[1]

B. ***Argument***

1. **Plaintiffs Destroyed the 1MW Plant's Output Pipe.**

Rossi claims that a system was in place during the purported "guaranteed performance" test to measure the energy input into and energy output from the 1 MW Plant at the Doral Warehouse. Rossi Dep. 234:14-235:4 [Ex. 1].[2] Critical to this system was the measurement of the temperature of the heated fluid in the pipe that carried the fluid from the 1 MW Plant to the JMP container (the "Output Pipe"). The License Agreement among Plaintiffs, IH and IPH required that this heated fluid carried by the Output Pipe be at least 100 degrees Celsius. Compl. Ex. B (License Agreement) § 5. Furthermore, a large amount of energy is required to convert water into steam (the heat of vaporization is 2258 Joules of energy per gram of water), so a device that turns water into steam at 100 degrees Celsius would have to produce many times more energy than one that only heats water to 99 degrees Celsius. Expert Report of Rick Smith at 9 [Ex. 2]. Also critical was a device or devices in the Output Pipe designed to capture any water carried through the pipe (such as a steam trap and a condensate drip or trap line) – if the trap line is filled with water, what is traveling though the Output Pipe is not pure steam; if there

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[1] Numerous courts in this Circuit have imposed the sanction of an adverse inference against a party that failed to preserve material evidence without a compelling justification. *See, e.g*., *Austrum v. Fed. Cleaning Contractors, Inc.*, 149 F.Supp.3d 1343 (S.D. Fla. 2016); *Swofford*, F. Supp. 2d at 1274; *Southeastern Mech. Servs., Inc. v. Brody*, 657 F. Supp. 2d 1293 (M.D. Fla. 2009); *St. Cyr v. Flying J Inc*., No. 3:06-cv-13-33TEM, 2007 WL 1716365 (M.D. Fla. June 12, 2007); *Morrison v. Veale*, No. 3:15-cv-1020-TFM, 2017 WL 372980, at *8 (M.D. Ala. Jan. 25, 2017).

[2] Each exhibit to this motion is designated by [Ex. #]. Deposition excerpts and deposition exhibits for the same deponent are combined into a single exhibit. Deposition exhibits are cited herein by the name of the deponent followed by "Dep."

is no water in the trap line, that would indicate that steam was traveling through the Output Pipe. Dameron Dep. 78:11-79:14; 200:6-201:6 [Ex. 3].

Plaintiffs claim to have ended their "guaranteed performance" test in February 2016. At that time, representatives of IH and IPH were present and they locked up the 1 MW Plant. They did not and could not, however, take possession of the Output Pipe. Sometime soon thereafter, Plaintiffs (with JMP's knowledge) removed the Output Pipe. In fact, they not only took down the Output Pipe, they disassembled it and elected to used the Output Pipe for other purposes at the Doral Warehouse. Leonardo Dep. 272:22-273:8 [Ex. 4].

2. **Plaintiffs Destroyed the Alleged Heat Exchanger.**

One megawatt (1 MW) of energy is a massive amount of energy – enough to power several hundred residential houses. *What is a Megawatt?*, https://www.nrc.gov/docs/-ML1209/ML120960701.pdf [Ex. 5]. No one disputes that if steam containing that much energy was circulated through the Doral Warehouse without a mechanism to discharge the heat from that steam outside the Doral Warehouse, the Doral Warehouse would be superheated and human beings would not be able to operate in the Doral Warehouse. Expert Disclosure of Joseph Murray at 2 [Ex. 6]; Wong Dep. 146:20-149:19 [Ex. 7]. Plaintiffs attempt to overcome this fatal flaw by claiming that they built a "heat exchanger" that carried the steam transported from the 1 MW plant to the JMP container out of the JMP container though a lengthy series of pipes to a second story room. In that room, Plaintiffs assert, fans pushed the heat released from the steam out a window and allowed the steam to cool back to water, which was then returned to the JMP container and ultimately back to the 1 MW Plant. Rossi Dep. 238:3-239:8.

There are no photographs of this alleged heat exchanger. Rossi Dep. 235:5-9; 238:3-240:6; Leonardo Dep. 269:18-271:21; JMP Dep. 114:14-117:12; 120:9-124:25 [Ex. 8]. There are no receipts for the equipment Plaintiffs allegedly used to build the heat exchanger (including

for the piping, the fans or the wood housing in the second story room). Leonardo Dep. 266:16-267:4; JMP Dep. 142:5-143:4; 144:20-145:23; 157:22-158:2. There are no records for the temporary workers who allegedly assisted Plaintiffs in constructing this heat exchanger in 2015 or dismantling it in 2016, and Plaintiffs do not know the identity of any of these temporary workers. Leonardo Dep. 265:1-266:15; 288:21-290:6; Rossi Dep. 235:10-236:17; 291:13-19; JMP Dep. 140:10-141:14; 153:13-23; 156:20-157:21.

Notwithstanding the foregoing, Plaintiffs and JMP insist that the heat exchanger existed. What happened to it? Plaintiffs claim that they took down the heat exchanger after completion of the "guaranteed performance" test. Rossi Dep. 236:10-237:18; JMP Dep. 94:1-6. Furthermore, just like with the Output Pipe, they claim that they not only took down the heat exchanger, but they disassembled it completely and put all of its components to new uses – they disassembled the piping, fans and wood housing, and used all of this equipment for something else. Leonardo Dep. 273:24-274:5.

3. **Plaintiffs' Destroyed their Communications with Penon.**

According to both Rossi and Penon, Rossi communicated *daily* with Penon directly about the claimed "guaranteed performance" test that Plaintiffs were conducting and that Penon was to be measuring. Penon Dep. 190:2-17 [Ex. 9]; Leonardo Dep. 37:5-39:24. These communications were by email, and the emails purportedly were providing daily information to Penon about the operation of the 1 MW Plant. Leonardo Dep. 16:10-17:1; 37:5-39:24; Penon Dep. 108:20-109:5.

What specifically was in those daily emails? What data was attached to those daily emails? What else was communicated in those emails? The obvious way to determine this would be to review the emails, but that is not possible. And the reason is simple: Rossi, the CEO of Leonardo (and the director of JMP), destroyed the emails.

4. **Fabiani Destroyed his Communications with Penon and Others.**

Rossi was not the only person who was communicating with and providing data to Penon. According to both Fabiani and Penon, Fabiani (the owner and sole member of USQL) also regularly sent emails to Penon that contained data on the performance of the 1 MW Plant. Fabiani Dep. 38:3-40:14 [Ex. 10]; Penon Dep. 108:3-12. While both acknowledge the email communications, Penon and Fabiani disagreed as to the data contained in those emails. Penon testified that Fabiani sent data he accessed from Penon's computer at the Doral Warehouse, which contained the *data from Penon's measuring equipment* at the Warehouse. Penon Dep. 169:19-172:2. Fabiani, on the other hand, testified that he sent data to Penon *from Fabiani's measuring equipment* and that he could not access or tamper with Penon's data. Fabiani Dep. 38:3-39:10; 88:8-89:2.[3]

Once again, the obvious way to determine the content of those emails and their attachments would be to review them, but Fabiani – like Rossi – has destroyed his email communications with Penon. In fact, Fabiani/USQL has gone even further: Fabiani destroyed not just his emails with Penon but all of his email communications concerning the operation of the 1 MW Plant other than his communications with Defendants. Fabiani Dep. 32:21-33:21; 35:7-40:16. Some of those communications have been obtained from other parties in this litigation, but that discovery could not obtain Fabiani's communications with non-parties (like Penon) and, of course, is limited to what the other parties preserved. Fabiani also testified in his deposition that he was collecting temperature data not only from the Output Pipe, but also from the individual e-cat reactor units contained in the 1 MW Plant. Like the Fabiani emails, however, Fabiani/USQL also destroyed this data. Fabiani Dep. 40:6-15; 46:10-47:19; 85:3-

[3] Rossi testified that neither he nor Leonardo has any information to contradict that Fabiani sent Penon data from Penon's own computer. Leonardo Dep. 155:23-156:19.

99:8.[4] Fabiani was clear in his testimony that he undertook this intentional destruction of evidence sometime after March 31, 2016, when the Technical Consulting Agreement expired between USQL and IH (the "USQL Agreement" [Ex. 11]). Fabiani Dep. 35:7-14. At the earliest, therefore, the destruction occurred just days before Plaintiffs filed their lawsuit.

5. **JMP was Directly Involved In Destroying Evidence.**

As noted above, the Output Pipe was connected both to the 1 MW Plant on the "Leonardo side" of the Doral Warehouse and to the container on the "JMP side" of the Doral Warehouse. Also, the alleged heat exchanger was solely on the JMP side of the Doral Warehouse – an area where Defendants were precluded from going during Plaintiffs' supposed "guaranteed performance" test. Leonardo Dep. 303:7-12; 319:16-320:12. Rossi, the CEO of Leonardo, was able to destroy the Output Pipe and heat exchanger evidence because, as Rossi admitted when testifying as JMP's Rule 30(b)(6) corporate representative, he was fully in charge of, and running, JMP, making all decisions for JMP at the Doral Warehouse. JMP Dep. 8:19-24; 17:11-16; 22:16-23:1. Hence, when Rossi was destroying the Output Pipe and claimed heat exchanger evidence, he was doing so on behalf of both Leonardo and JMP.

6. **Plaintiffs' and Third Party Defendants Knew they were Destroying Evidence Needed for Litigation.**

There can be no dispute that by December 2015, Plaintiffs and JMP at least reasonably anticipated (if not knew for certain) that litigation was likely over whether Plaintiffs' operation

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[4] Fabiani also has destroyed, or at least has refused to produce, the full spreadsheet he maintained of other data he collected on the operation of the 1MW Plant. Fabiani has produced one tab from this spreadsheet covering the entire "guaranteed performance" time period, albeit in PDF format (Fabiani Dep. Ex. 3), and Rossi produced what appears to be an earlier version of this spreadsheet with 13 additional tabs (one for each month from February 2015 to February 2016). Rossi_00001075 [Ex. 16] (representative pages from two months only because of spreadsheet's length). The tabs for the months of August 2015 to February 2016, however, do not contain the data that is populated in the tabs for the prior months. *Id*. Both Rossi and Fabiani testified that this spreadsheet was maintained by Fabiani. Rossi Dep. 259:11-260:23; Fabiani Dep. 100:8-104:5.

of the 1 MW Plant at the Doral Warehouse could constitute "guaranteed performance" under the License Agreement. On December 4, 2015, IPH counsel sent a letter to Plaintiffs' counsel advising Plaintiffs, among other things, that what they were doing at the Doral Warehouse could not be the "guaranteed performance" test under the License Agreement. [Ex. 12]. A few days later, IH requested a visit to the Doral Warehouse to inspect the 1MW Plant. *See* Johnson Dep. Ex. 40 [Ex. 13]. That same day, JMP told IH that (a) Plaintiffs' counsel insisted that IH not be permitted to access the Doral Warehouse and (b) Plaintiffs believed IH had breached the License Agreement. *See* Johnson Dep. Ex. 41. Several days later, Plaintiffs' counsel sent a letter expressly accusing "IH and/or IPH" of "anticipatory repudiation of the License Agreement." [Ex. 14].

As to Fabiani and USQL, Fabiani testified that he did not destroy his emails and data relating to the operation of the 1 MW Plant at the Doral Warehouse, including his emails with Penon, until after the USQL Agreement with IH ended on March 31, 2016. Fabiani Dep. 32:21-33:21; 35:11-14; 38:3-40:16. Earlier in March, however, Fabiani had met with IH personnel in Miami, admitted that he expected litigation between Plaintiffs and IH, and promised to send all of the data that he had to IH shortly, as required by the USQL agreement with IH. *See* Declaration of John T. Vaughn ¶¶ 5-8 [Ex. 15]. This, of course, proved to be a lie – Fabiani did not send all of his data to IH, but instead destroyed relevant emails and data, and thereafter fled to Russia (where he remains today). Fabiani Dep. 32:21-33:21; 35:7-40:16.

7. Plaintiffs, JMP, USQL and Fabiani should be Sanctioned for Destroying Evidence

The appropriate remedy for Plaintiffs, JMP, USQL and Fabiani's conduct is for judgment to be entered against them on the claims referenced above. Absent this, the next most appropriate remedy is for this Court to issue an instruction to the jury that the destroyed evidence

was unfavorable to them. *See First Universal Lending, LLC*, 773 F.Supp.2d at 1352. Plaintiffs, JMP, USQL and Fabiani not only intentionally destroyed evidence, but they intentionally destroyed evidence that goes to the very core of this litigation. An adverse inference instruction against the spoliating parties here is warranted because they intentionally and in bad faith destroyed material evidence. *See Bashir*, 119 F.3d at 931. In fact, an adverse inference is a proper sanction in the instant matter regardless of whether Plaintiffs and Third-Party Defendants acted with malice. *Swofford*, F. Supp. 2d at 1280.

Plaintiffs, JMP, USQL and Fabiani's willful destruction of material evidence has prejudiced IH and IPH in their ability to defend and prosecute this suit. *Flury* 427 F.3d at 592. These parties knew or should have known that the evidence they destroyed was essential to a determination as to whether the 1 MW Plant performed in a manner consistent with what Plaintiffs claim. Plaintiffs allege that they are owed $89 million because they, with the assistance of JMP, USQL and Fabiani, were able to operate a device (the 1 MW Plant) for roughly one year that completely upends long-standing laws of physics by producing more energy (indeed, they claim tens of times more energy) than it consumed. Defendants know this is false, which is why they are not liable on any of Plaintiffs' claims and why IH and IPH have brought their claims against Plaintiffs and the Third Party Defendants. Plaintiffs, JMP, USQL and Fabiani have all engaged in intentional conduct to try to prevent Defendants from defeating Plaintiffs' claims and to prevent IH and IPH from proving their claims against Plaintiffs and the Third Party Defendants. There is no conceivable justification for their conduct, the sole purpose of which was to interfere and seek to affect the outcome of the instant litigation. Under these circumstances, if the above-referenced claims are not dismissed, this Court should instruct the jury to presume the destroyed evidence was unfavorable to Plaintiffs, JMP, USQL and Fabiani.

II. Plaintiffs and Third-Party Defendants Should be Precluded from Presenting Expert Testimony or Opinions at Trial.

A. *Relevant Factual Background*

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

The deadline for submitting expert witness summaries or reports in this case was January 30, 2017 and the deadline for submitting rebuttal expert witness summaries or reports was February 13, 2017. [D.E. 23]. Defendants timely submitted an expert witness report for Rick Smith and an expert witness summary for Joe Murray. The Third Party Defendants made no expert disclosures, and the only expert disclosure Plaintiffs made was for Dr. K. Wong as a rebuttal expert to address some of the opinions offered by experts Smith and Murray. Dr. Wong's opinions and testimony should be excluded for the reasons set forth in Defendants' Motion to Exclude the Opinions and Testimony of Dr. K. Wong. [D.E. 197].

B. *Legal Standard*

Federal Rule of Civil Procedure ("FRCP") 26(a) requires a party to "disclose to the other parties the identity of any witness it may use at trial to present evidence under Federal Rule of

Evidence [("FRE")] 702, 703, or 705." A party who intends to present expert testimony must also, at the very least, provide a disclosure that includes "(i) the subject matter on which the witness is expected to present evidence under [FRE] 702, 703, or 705; and (ii) a summary of the facts and opinions to which the witnesses is expected to testify." FRCP 26(a)(2)(C)(i)-(ii).

A party is required to timely designate himself or herself as an expert if that party intends to present expert testimony or opinions. *See Shea v. Kerry*, 961 F. Supp. 2d 17, 49-50 (D.D.C. 2013) (barring plaintiff from providing expert testimony "because he did not disclose his testimony—per [FRCP 26]—by the deadlines imposed by the Court."); *Lopez v. Keeshan*, No. 4:11-CV-3013, 2012 WL 2343415, at *5 (D. Neb. Jun. 20, 2012) (excluding testimony of plaintiff for failure to disclose herself as an expert witness); *Hammann v. 800 Ideas Inc.*, No. 2:08-cv-0886, 2014 WL 1089664, at *2 (D. Nev. Mar. 18, 2014) (excluding plaintiffs testimony because he failed to disclose himself as an expert witness prior to the expert disclosure deadline). A witness cannot provide "lay" opinion testimony that is "based upon scientific, technical, or other specialized knowledge within the scope of Rule 702." FRE 701. "Lay opinion testimony is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue." *Shea*, 961 F. Supp. 2d at 50 (citation and internal quotation marks omitted).

"Complying with Rule 26 is 'not merely an aspiration' as 'the expert witness discovery rules are designed to allow both sides in a case to prepare their cases adequately and to prevent surprise.'" *In re Denture Cream Prods. Liability Lit.*, No. 09-2051-MD, 2012 WL 5199597, at *5 (S.D. Fla. 2012) (quoting *Bray v. Gillespie Mgmt. LLC v. Lexington Ins. Co.*, No. 6:07-cv-222-Orl-35KRS, 2009 WL 1043974, at *3 (M.D. Fla. Apr. 17, 2009). "Where a party fails to

provide information as required under Rule 26(a), Rule 37 authorizes the Court to sanction that party." *Id.* (citing FRCP 37(c)).

> Under Rule 37, if a party fails to comply with Rule 26, 'the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless.'

Id. (citing FRCP 37(c)(1))).

Additionally, "[b]ecause of the powerful and potentially misleading effect of expert evidence," exclusion of such evidence under FRE 403 is appropriate if the probative value of the evidence is substantially outweighed by undue prejudice. *See U.S. v. Frazier*, 387 F.3d 1244, 1263 (11th Cir. 2004) (citing Fed. R. Evid. 403). Probative value may be outweighed by undue prejudice when the expert testimony or opinion is presented by a witness with a stake in the outcome of the case. *See Lippe v. Bairnco Corp.*, 288 B.R. 678, 687 (S.D.N.Y. 2003) ("[W]hen expert witnesses become partisans, objectivity is sacrificed to the need to win.").

C. ***Argument***

Plaintiffs and Third-Party Defendants should be precluded from offering any expert testimony and opinions at trial other than those of Dr. Wong because they failed to satisfy Rule 26's disclosure requirements. Plaintiffs and Third-Party Defendants never designated Rossi or Penon as experts, nor did they identify any expert opinions or testimony that they intend to offer through either witness at trial. As a result, Plaintiffs and Third-Party Defendants should be precluded from offering any expert testimony or opinions at trial through Rossi, Penon, or any other witness other than Dr. Wong, including expert testimony offered to rebut the opinions and conclusions of Defendants' experts. *See In re Denture Cream Prods. Liability Lit.*, 2012 WL 5199597, at *5; *see also Hancock v. Hobbs*, 967 F.2d 462, 468 (11th Cir. 1992) (if a party fails to identify an expert witness during discovery, the district court may exclude that expert's testimony); *U.S. v. Marder*, 318 F.R.D. 186, 193 (S.D. Fla. 2016) (excluding rebuttal expert

testimony that was not timely disclosed). Plaintiffs and Third-Party Defendants cannot offer expert testimony and opinions through fact witnesses at trial that were not properly disclosed in accordance with FRCP 26(a)(2). *See Brown v. NCL (Bahamas) Ltd*., 190 F. Supp. 3d 1136, 1142 (S.D. Fla. 2016) ("sanction of exclusion is automatic and mandatory" for failure to comply with Rule 26's expert disclosure requirements).

III. Evidence of Rossi's Illnesses or Physical Ailments is Inadmissible.

A. *Relevant Factual Background*

Rossi has stated that he suffers from illnesses or physical ailments related to his work on the E-Cat technology. *See* [JONP Blog Entry dated April 6-7, 2017], a true and correct copy of which is attached hereto as Ex. 17. Plaintiffs should be barred from presenting evidence or arguments relating to Rossi's physical illnesses or ailments at trial because such information is irrelevant to any claim or defense in this case and would only serve to unduly prejudice the jury. Additionally, to the extent that Rossi claims his condition is caused in whole or in part by his time working at the Doral Warehouse, such a claim would be unsupported by medical testimony and would be highly prejudicial.

B. *Legal Standard*

"Relevant evidence is evidence having 'any tendency to make a fact more or less probable than it would be without the evidence' and the fact is of consequence in determining the action." *Pena v. Handy Wash, Inc.*, 114 F. Supp. 3d 1239, 1246 (S.D. Fla. 2015) (quoting Fed. R. Evid. 401). "Relevant evidence may be excluded if its probative value is 'substantially outweighed by danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." *Id.* "Unfair prejudice . . . means an undue tendency to suggest decision on an improper basis,

commonly, though not necessarily, an emotional one." *Id.* (citation and internal quotation marks omitted). A motion in *limine* is the proper context to seek to exclude anticipated prejudicial evidence before it is offered. *Id.*

C. ***Argument***

To the extent that Rossi seeks to present testimony or evidence that he suffered or suffers from physical illnesses or ailments caused by work performed during the purported "guaranteed performance" test of the 1 MW Plant at the Doral Warehouse, that testimony or evidence should be excluded as irrelevant and unduly prejudicial. Plaintiffs' Complaint does not include any allegations that Rossi suffered injuries, contracted illnesses, or was otherwise physically harmed by the work he performed at the Doral Warehouse or elsewhere. Therefore, evidence about Rossi's physical condition does not make any material fact more or less probable. *See Pena*, 114 F. Supp. 3d at 1246. Furthermore, evidence related to Rossi's physical condition would only serve potentially to inflame the jury's passions and influence them to make rulings on the merits that are not based upon the material facts. Accordingly, any such evidence should be excluded and Plaintiffs and their counsel should be instructed to refrain from making statements or arguments related to Rossi's physical condition in the presence of the jury.

IV. Plaintiffs Should Be Precluded from Relying on the Measurements in Penon's Reports

Plaintiffs' argument that they achieved "guaranteed performance" as required by the License Agreement is based on the reports of Fabio Penon ("Penon's Reports"), the last of which purports to certify that "for a period of 350 days, not consecutives [sic], the temperature of the steam produced by the plant was greater than 100°C and the plant consistently produced energy that it is [sic] at least six times greater than the energy consumed by the Plant." Penon's Final Report, attached hereto as Ex. 18. The measurements Penon allegedly used to reach that

conclusion – and that are included in each of Penon's Reports – are hearsay, are unreliable and lack indicia of reliability or truthfulness. Plaintiffs should therefore be precluded at trial from relying on such measurements as evidence that they achieved guaranteed performance under the License Agreement.

FRE 801 defines hearsay as "a statement that: (1) the declarant does not make while testifying at the current trial or hearing; and (2) a party offers in evidence to prove the truth of the matter asserted in the statement. Hearsay is inadmissible as evidence. FRE 802. The measurements contained in Penon's Reports are out of court statements made by Penon as to the performance of the 1 MW Plant, and are being offered by Plaintiffs to prove the performance of the 1 MW Plant. Such measurements are therefore inadmissible hearsay. In fact, the measurements are double hearsay, as they are not the raw data from the measurement devices and are not even based on Penon's direct perception of the measurement devices. Instead, the measurements (at least in part) are based on e-mails containing data, data summaries, or some combination of both sent to Penon by Fabiani or Rossi (and those emails have since been destroyed, as discussed above). *See* Section I(B)(3) *supra*.

Additionally, the measurements are wholly unreliable and should also be excluded under FRE 403. Rule 403 provides that "[t]he court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." Here, the probative value of the measurements contained in Penon's Reports are outweighed by the danger of unfair prejudice to the Defendants and the likelihood of misleading the jury. There is conflicting testimony as to the source of the measurements contained in Penon's Reports. Penon testified that approximately every two months Fabiani

would access Penon's computer located at the Doral Warehouse and send to him by e-mail data collected on the computer from Penon's measuring devices. Penon Dep. 170:15-172:2. On the other hand, Fabiani testified that he did not have access to the data on Penon's computer, and that the e-mails he sent approximately every two months contained Fabiani's summary of the operation of the Plant based on data obtained from Fabiani's – not Penon's – measuring devices. Fabiani Dep. 38:25-40:12; 46:10-47:19. To make matters worse, the e-mails from Fabiani to Penon have been intentionally destroyed, and therefore it is impossible to confirm what measurement data was being transmitted. Fabiani Dep. 40:4-16. Rossi also supposedly sent data to Penon, but those emails have likewise been deleted.

Moreover, the measuring devices that Penon installed at the Doral Warehouse to measure the performance of the 1 MW Plant were removed from the Warehouse in February 2016 and shipped out of the country. Murray Dep. 161:25-162:3 [Ex. 19]. As a result, Defendants cannot inspect the measuring devices to check their functioning or calibration, or to determine the true source (if any) of the measurements in Penon's Reports.[5] Nor can Defendants run any tests on the equipment to verify the measurements claimed by Penon in his Reports. For these reasons, allowing Plaintiffs to rely on the measurements in Penon's Reports will cause prejudice to Defendants and mislead the jury into believing that the measurements contained in the report accurately reflect the performance of the 1 MW Plant.

V. Plaintiffs Should be Precluded from Making any Argument That Companies in Which IH or IPH Invested (other than Leonardo) Used the E-Cat IP

A court may preclude argument of a position for which a party has no supporting evidence. *See, e.g., United States v. Aguinaga*, 643 F. App'x 858, 861 (11th Cir. 2016) (granting

[5] At least some of the measuring devices were allegedly re-calibrated after they were shipped out of the country, but there is no testimony from the companies that purportedly did any such re-calibrations.

prosecution's motion in limine to preclude defendant from raising an entrapment defense because defendant failed to produce sufficient evidence of inducement).

Here, Plaintiffs have argued that IH and IPH improperly provided the E-Cat IP to other companies in which they invested. Plaintiffs have also argued that IH received a $50 million investment from Woodford Funds based on the E-Cat IP. Plaintiffs do not have any evidence demonstrating that IH or IPH provided the E-Cat IP to any other company in which they invested. Darden Dep. 103:16-105:7 [Ex. 20]. Moreover, the evidence demonstrates that the investment from Woodford Funds was not an investment in the E-Cat IP, but rather, an investment in IH's LENR portfolio as whole – none of which had anything to do with the E-Cat IP other than IH and IPH's investment in Leonardo. Thus, based on lack of evidence to support Plaintiffs' position, Defendants request that Plaintiffs be precluded from arguing that entities in which IH and IPH invested used the E-Cat IP or that the investment from Woodford Funds was an investment in the E-Cat IP.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that this Court grant this motion.

LOCAL RULE 7.1(a)(3) CERTIFICATION

Counsel for Defendants conferred with counsel for Plaintiffs and counsel for J.M. Products, Henry Johnson, and James Bass in a good faith effort to resolve the issues the issues raised herein, but were unable to do so. Counsel for Defendants attempted to confer with Counsel for Fabiani and United States Quantum Leap but were unable to do so because he is currently out of the country.

Dated: April 18, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on April 18, 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/ *Erika S. Handelson*
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