UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

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

ANDREA ROSSI, *et al.*,

Plaintiffs,

v.

THOMAS DARDEN, *et al.*,

Defendants,
_____/

PLAINTIFFS' RESPONSE IN OPPOSITION TO
DEFENDANTS' CONSOLIDATED MOTION IN LIMINE

Plaintiffs, Andrea Rossi and Leonardo Corporation, by and through their undersigned counsel, hereby respond to Defendants', Thomas Darden, John T. Vaughn, Industrial Heat, LLC, IPH International, B.V., and Cherokee Investment Partners, LLC, Consolidated Motion in Limine ("Motion"), ECF No. 264, and state as follows:

Brief Introduction

Defendants argue that: (1) Plaintiffs should be sanctioned for destroying material evidence; (2) Plaintiffs and Third Party Defendants should be precluded from offering any undisclosed expert testimony or opinions; (3) Plaintiffs should be precluded from offering any evidence related to Dr. Rossi's illnesses or physical ailments; (4) Plaintiffs should be precluded from offering the measurements contained in Dr. Fabio Penon's reports; and (5) Plaintiffs should be excluded from mentioning the use of the E-Cat IP with respect to Defendants' investments. Defendants seek relief that has already been denied them by the Court (spoliation), is overly broad and/or otherwise contrary to current law. Defendants' Motion should be denied in its entirety.

I. Defendants' Motion regarding spoliation has already been denied, and should be denied again.

First, Defendants request an adverse inference jury instruction against Andrea Rossi, Leonardo Corporation, J.M. Products, Inc., United States Quantum Leap, LLC, and Fulvio Fabiani due to purported spoliation of evidence. ECF No. 264 at 2. Specifically, Defendants allege that Plaintiffs and/or Third-Party Defendants destroyed evidence including (1) piping that transported heated fluid from the 1 MW E-Cat Plant to a container operated by J.M. Products, Inc.; (2) a heat exchanger that dissipated heat from the steam produced by the 1 MW E-Cat Plant; and (3) e-mail communications from Andrea Rossi to the Expert Responsible for Validation ("ERV"), Fabio Penon. *Id.*

On April 20, 2017, Judge O'Sullivan denied Defendants' Motion for Sanctions, ECF No. 266, which raised the very same arguments regarding spoliation. *See* **Composite Ex. 1** at 46:7. Specifically, Judge O'Sullivan found that (1) the request was untimely because the Defendants failed to bring this matter to the court for approximately a year after learning of the alleged spoliation; (2) that the pipe and heat exchanger were removed in or around March 2016, but no duty to preserve arose until August of 2016; (3) that the allegedly spoliated evidence is not crucial; rather, it is cumulative; and (4) Defendants have not shown any bad faith. *Id.* at 45-47. The Court further found that Defendants failed to take sufficient steps to obtain other copies of the Penon communications; either through questioning Dr. Penon during deposition, obtaining such communications form the e-mail server, or accepting Plaintiffs' offer to examine the e-mail servers. *Id.* at 48:8-14. Defendants' attempt to re-raise the matter in its Motion in Limine is an improper attempt to appeal such ruling while evading the factual findings made by Judge O'Sullivan. For this reason alone, Defendants' Motion should thus be denied.

Moreover, even if Defendants' Motion had not already been argued and denied, the Motion is untimely. "Courts view spoliation motions filed near a dispositive motion deadline or in response to a motion for summary judgment with extreme skepticism." *Sherwood Invs. Overseas Ltd., Inc. v. Royal Bank of Scotland N.V.*, 2015 Bankr. LEXIS 2513 (Bankr. M.D. Fla. July 22, 2015) (citing *Olson v. Shawnee Cnty. Bd. of Comm'rs*, 7 F. Supp. 3d 1162, 1199 (D. Kan. 2014); *Am. Nat. Prop. & Cas. Co. v. Campbell Ins., Inc.*, No. 3:08-CV-00604, 2011 U.S. Dist. LEXIS 80534, 2011 WL 3021399, at *3 (M.D. Tenn. July 22, 2011)). Rather, "[s]poliation issues should be broached well in advance of any dispositive motion deadline." *Id.*

Defendants first raised this issue on March 22, 2017, ECF No. 194, the same date as the dispositive motion deadline. Defendants now re-raise the same issue well after the dispositive motion deadline. Further, Defendants cannot argue they have been somehow prejudiced or only recently discovered the physical changes to the facility, as they have been aware of Plaintiffs' re-purposing of the output pipe and heat exchanger since March 2016—approximately a year before Defendants filed their present Motion *See, e.g.,* **Composite Ex. 1** at 46:8-11. Defendants' Motion should accordingly be denied.

II. Defendants' request to exclude expert testimony lacks specificity and is overbroad.

The Defendants argue that Plaintiffs and Third Party Defendants should be precluded from introducing any expert testimony other than that of Dr. K. Wong. ECF No. 264 at 14. While this sounds like a reasonable request, Defendants' true intention is to prevent fact witness testimony from Dr. Rossi and Dr. Penon.

"Generally, the purpose of a motion in limine is to prevent the introduction of improper evidence, the mere mention of which at trial would be prejudicial." *Buy-Low Save Centers, Inc. v. Glinert*, 547 So. 2d 1283 (Fla. 4th DCA 1989). Whether any particular opinion testimony is that

of an expert or a lay witness, however, is better addressed by objection on a matter-by-matter basis, if and when such issues arise. *See, e.g., AEM, Inc. v. United States, IRS (In re Mirabilis Ventures, Inc.*), No. 6:08-bk-04327-KSJ, 2012 Bankr. LEXIS 1287 (Bankr. M.D. Fla. Mar. 21, 2012) (denying a motion in limine and holding that the court will rule on contemporaneous objections to testimony because the scope of the testimony was undetermined).

In the Motion, Defendants do not indicate any particular persons that they anticipate may be offering expert testimony. Instead Defendants' true intent is revealed in their overbroad argument that "Plaintiffs and Third Party Defendants cannot offer expert testimony and opinions through fact witnesses at trial…." Evidently, Defendants are seeking to use any favorable ruling in this regard to attempt to exclude either Dr. Penon, a nuclear engineer and Dr. Rossi from testifying as to facts and observations within their personal knowledge that contradict the Defendants' purported expert testimony. Dr. Rossi, as a party to the License Agreement, the inventor of the underlying technology, and the individual responsible for operating the equipment throughout the Guaranteed Performance Test, will testify as to facts, observations, measurements and conclusions within his knowledge related to the nature of the E-Cat technology, and the operation, maintenance and development of the same.

Similarly, Dr. Penon, as the expert agreed-upon by Plaintiffs and Defendants to validate the underlying technology and certify the results of the Guaranteed Performance Test, will also testify to the facts, observations, measurements and conclusions gathered and formulated by him during the Guaranteed Performance Test. Such information includes information within the scope of Penon's duties and functions as the ERV as contemplated by the License Agreement and the subsequent understandings of the parties. Defendants have employed expert witnesses to opine on the work performed by both Dr. Rossi and Dr. Penon. Certainly, based on their first-hand

knowledge, experience and expertise, they may testify as to the assumptions made and conclusions drawn by them in the scope of their respective duties during the Guaranteed Performance Test. Defendant's attempt to preemptively exclude such testimony is a clear usurpation of the jury who is better suited to determine the appropriate weight to be given any such testimony. Defendants' attempt to preclude them from testifying should be denied.

III. Evidence of Rossi's illnesses or physical ailments.

The Defendants assert that "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." ECF No. 264 at 15. Notably, Dr. Rossi previously suffered from an ailment that caused him to cough excessively and periodically caused him to have reflux which had to be dispelled into a cup or other vassal. Since his deposition, Dr. Rossi has had surgery to correct the ailment and is still recovering therefrom. Accordingly, any mention of Dr. Rossi's physical illnesses or ailments would be offered only for the purposes of explaining his appearance and/or reasons for coughing at any point during trial and/or during depositions.[1] Such an explanation would not be prejudicial to Defendants. In fact, precluding Plaintiffs from providing such explanation would prejudice Plaintiffs, who may, at times, appear rude to the jury by needing to step out of the courtroom or spit into a cup, which occurred frequently during deposition.

IV. The measurements used by the agreed-upon ERV, Fabio Penon are not hearsay and are reliable.

The parties contracted to use an agreed-upon third-party expert to be the final arbiter as to whether the underlying technology satisfied the contractual requirements set forth in the License

[1] Plaintiffs do not now, nor have they ever, argued directly or by implication, that Dr. Rossi's physical illness was caused by work performed during the Guaranteed Performance Test.

Agreement and amendments thereto. The parties did, in fact, agree upon such a third-party expert responsible for validation – Fabio Penon. This is undisputed. Penon provided Defendants with a draft test protocol, solicited and received Defendants' comments to the protocol, and performed pursuant thereto for twelve (12) months without any objection from Defendants. Incredibly, Defendants now argue that Fabio Penon's measurements are hearsay and unreliable, and therefore should be excluded. ECF No. 264 at 17. This is absurd.

First, Dr. Penon's measurements are not hearsay as Dr. Penon can testify (and did at deposition) regarding such measurements and how he prepared the same. Notably, Dr. Penon testified at deposition regarding the report, the measurements, and the calculations. For example, Dr. Penon testified that he prepared the report and that the report contained his observations and his measurements. *See* **Composite Ex. 2** at 118:2-23. Dr. Penon similarly described the steps he took to verify data observed or provided to him, including reconciliation of data. *See id.* at 109:6-18. Even if Dr. Penon had failed to lay the requisite predicate for admissibility and/or authenticity during his deposition, he did not, Dr. Penon could similarly testify at trial, if necessary, regarding the measurements and his own observations in preparing the same.

Moreover, Penon's report, in its entirety, does not constitute hearsay. Rather, Penon's report is, *inter alia,* a statement of legal consequence. Statements of legal consequence are not hearsay because the statement is admitted merely to show that it was actually made, not to prove the truth of what was asserted in it. *Arguelles v. State*, 842 So. 2d 939, 943 (Fla. 4th DCA 2003); *see also Nationstar Mortg., LLC v. Craig*, 193 So. 3d 74, 77 at n. 6 (Fla. 3d DCA 2016). Defendants were legally obligated to pay Plaintiffs the amount of $89 million upon Dr. Penon's written certification that Plaintiffs achieved Guaranteed Performance. *See* **Ex. 3** at 4. The report represents such certification, thereby giving rise to the legal consequence of the $89 million payment.

To the extent this Court were to find that some or all of the measurements and/or the report are hearsay, the Defendants' argument to exclude is improperly made as a motion in limine. "Generally, the purpose of a motion in limine is to prevent the introduction of improper evidence, the mere mention of which at trial would be prejudicial." *Buy-Low Save Centers, Inc. v. Glinert*, 547 So. 2d 1283 (Fla. 4th DCA 1989). The mere mention of Dr. Penon's measurements would not be prejudicial. Moreover, such measurements would be subject to multiple hearsay exceptions. For example, the measurements may be introduced pursuant to the "business records exceptions," as Dr. Penon prepared the report at or near the time the measurements were taken, the report was made from information transmitted by person(s) with knowledge, the report was prepared in the ordinary course of a regularly conducted business activity, and the report was prepared as a regular practice of such business and in the manner that the parties agreed upon pursuant to the License Agreement. *See Deutsche Bank Trust Co. Ams. v. Frias*, 178 So.3d 505 (Fla. 4th DCA 2015.)

Even if the measurements contained in the report do not qualify as a business record, such measurements may be relied upon as a recorded recollection in the event Dr. Penon is unable to adequately testify from memory regarding the same. § 90.803(5), Fla. Stat.

With respect to reliability, Defendants first argue that the measurements should be excluded because conflicting testimony exists. ECF No. 264 at 17. Needless to say, if conflicting testimony rendered evidence inadmissible, there would be no purpose of having a trier of fact. Any such conflicting testimony, even if it exists, would go to the weight of the evidence, not the admissibility. *See, e.g., Loughan v. Firestone Tire & Rubber Co.*, 749 F.2d 1519, 1523 (11th Cir. 1985). Defendants next re-argue that e-mails sent to Dr. Penon regarding the measurements were destroyed. ECF No. 264 at 18. As addressed above, Defendants' argument is meritless. Moreover,

as Judge O'Sullivan has determined, any such e-mail communications are not crucial to the claim or defense of any party. **Composite Ex. 1** at 48:3-7.

Finally, Defendants argue that the measuring devices that Dr. Penon installed at the 1 MW E-Cat Plan to measure the performance were removed and shipped out of the country. ECF No. 264 at 18. However, the Defendants and/or their agents were present at the time the recording devices were removed. Defendants did not object, question or otherwise raise any concerns regarding the removal of such devices. The Defendants also did not request inspection of such devices at any time during the course of discovery. Rather, Defendants (yet again) rely on their own lack of diligence in this matter in an effort to sway the merits of this action. Defendants' Motion lacks merit and should be denied.

V. Evidence that Defendants' solicited investments based upon Rossi's technology is admissible.

Finally, the Defendants argue that Plaintiffs lack evidence supporting the position that Defendants improperly provided E-Cat IP to companies in which Defendants invested and/or that Defendants "received a $50 million investment from Woodford Funds based on the E-Cat IP." ECF No. 264 at 19. Defendants further argue that Woodford Funds' investment did not "have anything to do with the E-Cat IP…. other than IH and IPH's investment in Leonardo" *Id.* Defendants' argument is not only improperly couched as a motion in limine, is meritless, but also ignores incontrovertible evidence. On March 4, 2016, Woodford Funds explained that "Rossi's technology was a core element of the initial [$50 million] investment." **Ex. 4**. In fact, according to Defendants' balance sheet, as reported by their business valuator, Plaintiffs' technology and/or IP accounted for approximately 95% of Defendants' total "low energy nuclear reactor" investments. **Ex. 5** at 21. Applying that percentage to Woodford Funds' $50 million investment in

Defendant's IP Holding company, Woodford Funds' investment attributable to the E-Cat IP is $47.5 million.

Defendants patently improper motion in limine erroneously requests this Court to prejudge the facts which may be presented at trial, and exclude any evidence Defendants deem insufficient. To the extent any contradicting evidence exists as to whether Defendants received investments based upon the E-Cat and/or E-Cat IP, such contradicting evidence goes to the weight, rather than admissibility. *See, e.g., Loughan v. Firestone Tire & Rubber Co.*, 749 F.2d 1519, 1523 (11th Cir. 1985). A motion in limine is not intended to usurp the province of the jury. Accordingly, Defendant's Motion should be denied.

Dated: May 2, 2017.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY, that a true and correct copy of the foregoing was served by in the manner specified below on May 2, 2017 on all counsel or parties of record on the attached Service List.

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