UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

ANDREA ROSSI, et al.,	)	
	)	
Plaintiffs,	)	
v.	)	No. 16-cv-21199-CMA (JJO)
	)	
THOMAS DARDEN, et al.,	)	
	)	
Defendants.	)	
	)	

DEFENDANTS' OPPOSITION TO THIRD PARTY DEFENDANTS J.M. PRODUCTS, JOHNSON AND BASS'S MOTION IN LIMINE

Thomas Darden, John T. Vaughn, Industrial Heat, LLC ("IH"), IPH International, B.V. ("IPH"), and Cherokee Investment Partners, LLC ("Cherokee") (collectively, "Defendants") hereby oppose the motion in limine of Third Party Defendants J.M. Products, Inc. ("JMP"), Henry Johnson and James Bass (collectively, the "JMP Parties") for the reasons that follow.

I. Evidence JMP And Johnson Deceived IH And IPH Into Believing JMP Was Affiliated With Johnson Matthey plc Is Admissible.

The JMP Parties argue that IH should be precluded from introducing evidence that JMP, Johnson and Plaintiffs Andrea Rossi ("Rossi") and Leonardo Corporation ("Leonardo") fraudulently induced it to enter into the Term Sheet by falsely representing that JMP was affiliated with Johnson Matthey plc ("Johnson Matthey"). Their bases are that this representation either (a) conflicts with the Term Sheet or (b) was not included in the Term Sheet even though IH participated in the Term Sheet's drafting. They are wrong on both counts.

First, there is nothing in the Term Sheet that contradicts that JMP is affiliated with Johnson Matthey. Quite to the contrary, in connection with entering the Term Sheet, Johnson on behalf of JMP represented and warranted in writing that JMP was owned by a UK entity (Johnson Matthey is a UK entity).

Second, IH's participation in the drafting process of the Term Sheet actually supports rather than cuts against admission of the Johnson Matthey evidence. On July 10, 2014, IH sent Plaintiffs a draft of the Term Sheet that was to be among IH, Johnson Matthey and Leonardo. Ex. 1 (IH-00007129-31). The next day Rossi sent back the Term Sheet, replacing Johnson Matthey with "JM Corporation" and falsely told IH: "About the meeting in London; they prefer to act as the US company (JM Corp) because they are a public company and the only point on which I had to insist has been their terror to get engaged in a thing like the one happened with the

Swedish radio, Krivit etc." Ex. 2 (IH-00007110-12). Furthering the fraud, a few days later Rossi again emphasized that "regarding the important issue of JMC"

> There is no way that the Customer accepts any further disclosure. Today I got the solid hope that after 3-4 months of good operation they will make an official outing. As a matter of fact I was not supposed to give you their name. … You will be allowed to say to your investors that Johnson Matthey is the main supplier of JMC and that the same buys from JMC all the production not bought by other Customers. Substantially there is no real difference; if then, after 3-4 months of operation, we have the outing of the owner, better.

Ex. 3 (IH-00011864). In short, IH's participation in the drafting process reflects that it sought to memorialize in the Term Sheet the involvement of Johnson Matthey, but was thwarted in doing so by the deception of Plaintiffs and JMP that Johnson Matthey was involved with JMP but its affiliation had to remain confidential at its request.[1]

In any event, the JMP Parties read *Corporate Fin. v. Principal Life Ins.,* 461 F. Supp.2d 1274 (S.D. Fla. 2006), out of context. The point they are ignoring is that both *Corporate Financial* and the published 11th Circuit case on which it relies, *Johnson Enter. of Jacksonville v. FPL Group*, 162 F.3d 1290 (11th Cir. 1998), place emphasis on whether the relevant agreement contains a merger or integration clause – such a clause existed in *Johnson*, so that plaintiff's fraudulent inducement claim failed, but such a clause did not exist in *Corporate Financial*, so that plaintiff's fraudulent inducement claim survived. *Johnson*, 162 F.3d at 1315; *Corp. Fin.*, 461 F. Supp.2d at 1291. This is obviously of great significance because the merger or integration clause is what informs the contracting parties that they should not be relying on

---

[1] JMP acts as if it is not responsible for the lies of Rossi, but JMP testified (at its Rule 30(b)(6) deposition) that Rossi was JMP's "scientific and technical director." Ex 4 (excerpts from JMP Deposition Transcript ("Dep. Tr.") at 6:21-22; 19:2-3; *see also id*. 27:13-14, 28:12-15. J.M. Products is responsible for the false statements made by its director. *See Meyer v. Holley*, 537 U.S. 280, 286 (2003).

anything outside the contract since the contract states it contains the parties' full agreement and/or that it supersedes any prior agreements.[2]

II. Evidence Of Johnson's False Warranty On Behalf Of JMP That It Was Owned By A UK Entity Is Admissible.

The JMP Parties also move for this Court to prohibit IH and IPH from using the false representation and warranty that Johnson executed on behalf of JMP to the effect that JMP was owned by a UK entity (which Johnson Matthey is). They first argue this evidence should be excluded for the same reasons as Johnson's false representations that JMP was affiliated with Johnson Matthey. As explained in the prior section, however, Johnson's false statements about the JMP-Johnson Matthey affiliation cannot be excluded. Moreover, the representation and warranty at issue here was provided in connection with, and immediately preceding the Term Sheet being executed. Hence the Term Sheet cannot be understood divorced from the representation and warranty. *See* Composite Ex. 5 (IH-00011528–IH-00011532; IH-00123694).

The JMP Parties also argue, without any supporting authority, that if the representation and warranty is to be used as evidence, it can only be used "for the purpose for which the document was created; namely, to show that [JMP] was compliant with OFAC and not owned by a blocked entity or nationality." Mot. at 3. That makes no sense. The representation and warranty contains a blatant lie, as Johnson and Rossi have both admitted: JMP is not and never has been "owned by an entity formed in the United Kingdom." IH sought this assurance because it connected JMP to Johnson Matthey; Johnson on behalf of JMP provided the assurance to

---

[2] All of this stands in stark contrast to Defendants' position that Plaintiffs could not have relied on the supposed statements made to Rossi that Cherokee was guaranteeing payments due under the License Agreement. The License Agreement states the party responsible for such payments if due, and it is IH, not Cherokee. The License Agreement also contains a merger and integration clause, so Plaintiffs knew they could not later claim reliance on "prior agreements" or on a claim that the License Agreement and its related writings did not contain "the entire agreement" of the parties. License Agreement § 16.4.

mislead IH as to this affiliation. The representation and warranty is thus highly probative of, and admissible to prove, fraudulent inducement because it is a "false statement concerning a material fact." *Johnson*, 162 F.3d at 1315.

III. Evidence the JMP Parties Deceived IH And IPH As To The Performance Of The 1 MW Plant At The Doral Warehouse Is Admissible.

The JMP Parties' third and fourth requests to exclude evidence address the evidence that (a) JMP was not using the steam allegedly provided to it from the 1 MW Plant operated by Plaintiffs, (b) JMP did not produce any products, (c) Johnson on behalf of JMP sent false and misleading letters to IH and IPH about the steam JMP was receiving even though JMP made no measurements of what it was receiving from Plaintiffs (but rather let Rossi dictate the content of the letters Johnson would then send under JMP's name), and (d) Bass misrepresented that JMP was satisfied with the steam that it was receiving and using from Plaintiffs. Mot. at 4. Their argument for excluding all of this evidence is the same: This evidence is irrelevant and prejudicial because it does not prove whether Plaintiffs operated the 1 MW Plant at a coefficient of performance ("COP") level high enough to satisfy the License Agreement's "guaranteed performance" test. *Id*.

But the Court has already rejected this argument in connection with accepting the 4th Amended Answer, Additional Defenses, Counterclaims and Third Party Claims ("AACT"). The AACT alleged that the JMP Parties' lies about the supposed steam output of the 1 MW Plant – which is half of the COP calculation (Plant output divided by Plant input) – "created, and were intended to create, the false impression that the Plant was operating as proposed by Rossi and Leonardo …, which in turn would justify the continued operation of the Plant in Florida, with Counter-Plaintiffs bearing the cost of such operation and being mislead as to its performance."

AACT ¶ 146. The Court held this allegation was sufficient to demonstrate that the JMP Parties' deceptive conduct caused injury to IH and IPH. D.E. 130, at 2.

Given the Court's ruling, there can be no question that IH and IPH are entitled to prove this allegation is correct, and they have ample proof to do so. For example, as summarized in Defendants' reply on their summary judgment motion:

> … Rossi told IH that having a "real Customer" with a need for steam would be an independent check on how the 1 MW Plant was operating because the customer could confirm the level of steam the Plant was producing. Def. SOMF ¶¶ 59, 76; *see also* AEG Dep. (an excerpt of which is attached hereto as Ex. 7) 215:8-23. Darden and J.T. Vaughn agreed, not knowing that J.M. Products was a fake customer: "We felt that having a *bona fide* customer would be an additional way of being able to measure energy output. That if someone credible was receiving the energy then that would be one added way to ratify the power production." Ex. 2 at 159:1-5 (emphasis added), 159:21-22 ("[H]aving a very credible customer would be beneficial in terms of verification[.]"); Vaughn Dep. (excerpts of which are attached hereto as Composite Ex. 5) 182:24-183:5 (IH wanted to know that the customer would be "accurately assessing the energy that [it] consumed" because "that's a check on whether or not it's a – how much energy is actually being produced"); *see also* Ex. 2 at 300:7-10, 300:23-301:3, 301:16-21 (explaining how Bass' made-up claims about the power J.M. Products was receiving reinforced Plaintiffs' claims about the 1 MW Plant's performance).
>
> J.M. Products, Johnson, and Bass maintained the ruse that J.M. Products was a legitimate company with an actual need for the steam allegedly being produced by the 1 MW Plant to deceive and manipulate IH and IPH into believing that the 1 MW Plant was, or at least might have been, working as claimed by Plaintiffs. IH and IPH would have known to the contrary had they known J.M. Products was a shell company with no manufacturing process or customers, solely under the control of Plaintiffs. …

D.E. 256, at 10-11.

Finally, it is not clear whether the JMP Parties believe this *in limine* argument covers all of their lies relating to the performance of the 1 MW Plant, but it clearly does not. For example, the only deceptive statement they identify for Bass about the Plant's performance is that he "stated JM Products was satisfied with the steam." Mot. at 4. But he said far more. For example, he told Darden that JMP was engaged in a manufacturing process at the Doral

Warehouse and its utility bills had been greatly reduced from what they were before because JMP was using the steam energy for its manufacturing process instead of electrical energy. Ex. 6 (excerpts from Darden Dep. Tr.) at 228:17-24; 298:15-17. All of this was false: Bass knew nothing about the quality or quantity of steam being produced by the 1 MW Plant, knew JMP was not operating a manufacturing facility at the Doral Warehouse, and had no basis to claim JMP's utility bills were reduced because of the steam it was receiving from the 1 MW Plant since JMP had no prior operations before being set up as the fake customer to receive the output from the 1 MW Plant. Ex. 7 (excerpts from Bass Dep. Tr.) at 27:15-28:16, 41:17-42:18, 71:1-15, 133:23-135:12, 136:12-19.

The JMP Parties appear to believe they could lie to Defendants with impunity under the principle of "no harm, no foul." But their deception did cause harm in various forms, including causing IH and IPH to bear the costs for repairs, maintenance, equipment and personnel so the 1 MW Plant could operate – costs they would not have incurred if they knew JMP was not a bona fide customer but merely a shell controlled by Plaintiffs. D.E. 256 at 13. Evidence of the JMP Parties' deception and the injury to IH and IPH is highly relevant and clearly admissible.

IV. Evidence Bass Was Not A Bona Fide "Director of Engineering" Is Admissible.

The JMP Parties' final request to exclude evidence covers the evidence that Bass was not a JMP employee, but merely an independent contractor, because this evidence does not prove that Bass was not JMP's "Director of Engineering." But the JMP Parties are ignoring the chain of evidence here. *Cf. White v. German Alliance Ins.*, 103 F. 260, 201 (1st Cir. 1900) (even if evidence might not otherwise be admissible, it is admissible if it serves as "one link in the chain of proof"). In addition to the fact that Bass was a part-time independent contractor of JMP rather than an employee, he also was hired by Rossi, worked under Rossi's direction, and was bestowed with his job title by Rossi. Exh. 4 at 26:4-13, 44:2-6; Ex. 7 at 154:12-21, 157:2-10. Bass

thereafter met with Darden as the JMP "Director of Engineering" and made false statements to him about, for example, the steam power JMP was using and its impact on JMP's costs (utility bills) – statements that would appear to be within the purview of a "Director of Engineering." This was all part of the scheme to deceive IH and IPH into believing, among other things, that the 1 MW Plant was providing energy to a real customer and performing as Plaintiffs claimed it would perform. Evidence of this deception is clearly admissible.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that this Court deny the JMP Parties' motion in limine.

Dated: May 2, 2017

Respectfully submitted,

/s/ Christopher R. J. Pace

Christopher R.J. Pace
cpace@jonesday.com
Florida Bar No. 721166
Christopher M. Lomax
clomax@jonesday.com
Florida Bar No. 56220
Erika S. Handelson
ehandelson@jonesday.com
Florida Bar No. 91133
Michael A. Maugans
mmaugans@jonesday.com
Florida Bar No. 107531
Christina T. Mastrucci
cmastrucci@jonesday.com
Florida Bar No. 113013
JONES DAY
600 Brickell Avenue
Brickell World Plaza
Suite 3300
Miami, FL 33131
Tel: 305-714-9700
Fax: 305-714-9799

Bernard P. Bell
Admitted pro hac vice
Miller Friel, PLLC
1200 New Hampshire Avenue, NW
Suite 800
Washington, D.C. 20036
Tel.: 202-760-3158
Fax: 202-459-9537
Email: bellb@millerfriel.com
Attorneys for Defendants/Counter-Plaintiffs

Attorneys for Defendants/Counter-Plaintiffs

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May 2, 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/ *Michael A. Maugans*
Michael A. Maugans