

**UNITED STATES DISTRICT COURT
FOR THE 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' OPPOSITION TO
PLAINTIFFS' 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* (“Motion” or “Mot.”) of Plaintiffs Andrea Rossi and Leonardo Corporation (“Leonardo”) for the reasons that follow.

I. Evidence That Plaintiffs Lied To IH About Limitations That Had To Be Placed On The Validation Test Is Admissible.

Pursuant to the License Agreement, a “Validation” test was to take place involving a substantial number of E-cat reactors. Days before the test was to occur, however, Plaintiffs falsely represented to IH that the test needed to involve fewer reactors to comply with Italian law in order to induce IH to agree to a “Validation” test using fewer reactors:

This morning I had a meeting with the Health Office of the Province of Ferrara, ***which has to authorize the 24 hours test...*** We found an acceptable solution. ***He explained to me that the Italian law ‘DPR (Decreto del Preseidente della Repubblica) #551-Dec. 21 1999 requests an authorization for any plant that makes more than 35 kWh/h and this authorization takes at least 6 months... Therefore if we can consume up to 35 kWh/h without authorization, this implies that in out LENR case I can produce up to 210 kWh/h, which is a consistent amount of energy... In this case we do not need any authorization...***

4th Am. Answer, Additional Defenses, Countercl. and Third-Party Claims (“AACT”) [D.E. 132], Ex. 9 (emphasis added), attached hereto as Exhibit 1. The next day IH accepted Plaintiffs’ representations and request: “[W]e will agree to do a test of only those reactors constituting the allowable percentage of the plant (eg ***35kw/210kw*** instead of 165kw/1mw). We would like to get details about how this will work: how many reactors, how will you decide which ones, etc.” See IH-00098392-96, attached hereto as composite Exhibit 2. Plaintiffs responded, on the same day: “Very good. We will operate 30 reactors, no preference about which.” *Id.*

At his deposition, Rossi told a completely different story. Rossi testified that the Ferrara health office told him:

in Italy we do not have authorizations for experiments. There is not something that is called an authorization for 36 hours. ***Your are either authorized or you are not... And so they said it is unthinkable that we can authorize you and take the reliability.*** The law does not foresee this. ***But if you find some kind of an agreement with your outdoor - - without your neighbor, we don't come...*** So I have gone to my neighbors and say please, I have to make this and this and this and said they all right. You don't make too much noise, and we can accept it because we want to sleep.

Rossi Dep. (excerpts of which are attached hereto as Exhibit 3) at 147:5-150:13 (emphasis added). Plaintiffs make no attempt to reconcile this testimony with the April 2013 e-mails because they are irreconcilable: Rossi simply lied when he told IH that he and the Ferrara health official found a way to comply with Italian law by testing fewer E-cat reactors; per Rossi's deposition testimony, testing any number of reactors would violate Italian law, but if the neighbors did not complain, any number of reactors could be used in the Validation test.¹

Not knowing of Rossi's deception, IH agreed to the First Amendment to the License Agreement, which reduced the number of E-cat reactors to be used in the Validation test to 30 reactors. This is a textbook example of fraudulent inducement into a contract amendment. Even then, Plaintiffs did not comply with the Amendment, but instead tested only 18 E-cat reactors, again claiming this lower number was needed to comply with Italian law. See Penon Dep. Ex. 8, attached hereto as Exhibit 4.²

With this context, which Plaintiffs ignore, it is easy to see why Plaintiffs wish to exclude this evidence and equally easy to see why Plaintiffs' wish cannot be granted. First, Plaintiffs

¹ To the extent Plaintiffs' motion can be read to argue there is no evidence to demonstrate their deceit, the above discussion conclusively refutes any such suggestion.

² In the report on the Validation test prepared by Fabio Penon, he stated that "[t]o comply with the Italian law the trial was conducted by activating only 18 E-Cat units." Ex. 4 at PENON0000076. Penon admitted in his deposition that this alleged Italian law requirement was provided to him by Rossi. Penon Dep. (excerpts of which are attached hereto as Exhibit 5) at 149:25-151:12.

argue that their deception is not relevant to the breach-of-contract claims in this case, but it is directly relevant to determining the enforceable terms of the License Agreement: If IH was fraudulently induced to enter the First Amendment, then that Amendment becomes voidable and Plaintiffs were required to comply with the License Agreement without amendment. The deception is also relevant for a host of additional reasons: It proves Plaintiffs' willingness to deceive Defendants, demonstrates that there is no basis to excuse or forgive Plaintiffs for testing fewer E-cat reactors than required by the License Agreement or even the First Amendment, and specifically addresses (and proves) allegations in the AACT including that Plaintiffs fraudulently represented "Italian law and the Ferrara Health Office required limitations on the Validation process to the extent represented by Rossi." D.E. 132, Sixth Additional Defense; *see also id.* at p. 10 ¶ 57, Second Additional Defense, Third Additional Defense, p. 37-38 ¶¶ 49-54.

Second, Plaintiffs' position that Plaintiffs' false statements were not pled with the specificity required by Federal Rule of Civil Procedure 9(b) fails for two reasons: (1) a motion *in limine* is not the appropriate vehicle to attack the pleadings in this case, and (2) in any event the AACT clearly satisfies Rule 9(b) – it not only quotes the fraudulent statements, it identifies the date and speaker and attaches the relevant email as an exhibit. *Id.* at p. 37 ¶ 50 & Ex. 9 (Exhibit 1 hereto).

Third, Plaintiffs argue their false statements are "mere opinion or misrepresentation of law." As the above evidence reflects, their false statements are neither – they are concrete lies about restrictions on the Validation test Plaintiffs fabricated to justify reducing the number of E-cat reactors they would use in the test. Rossi lied about an agreement with a government official allowing testing on a specific condition (staying below 35 kWh/h) when there was no such agreement. Furthermore, if there were some opinion component in Plaintiffs' false statements,

even that component would be actionable because it was all predicated on false information (e.g., Rossi fabricated the content of his meeting with the government official). *See Mejia v. Jurich*, 781 So.2d 1175, 1177 (Fla. 3rd DCA 2001) (opinion treated as a statement of fact if made by “one having superior knowledge of the subject” who “knew or should have known from the facts in his or her possession that the statement was false”); *Chino Elec. V. U.S. Fidelity & Guar.*, 578 So.2d 320, 323 (Fla. 3rd DCA 1991) (“the modern trend of cases is to find statements of fact implied in otherwise material misrepresentations which have some legal character”); *Cf. Int’l Schs. Servs. v. AAUG Ins.*, 2012 WL 5192265, at *6 (S.D. Fla. July 25, 2012) (noting that Florida law liberally regards statements as factual in nature even if they may involve some opinion).

Finally, Plaintiffs’ claim that they had no notice that an Italian law might be implicated in this case. But the Italian law is specifically identified in paragraph 50 of, and Exhibit 9 to, the AACT. Defendants have also provided Plaintiffs the text of the Italian law with an English translation. Defs. Reply to Mot. for Summ. J. [D.E. 253], Ex. 1 attached hereto as Exhibit 6. Moreover, the falsity of Plaintiffs’ statements are not even contingent on the content of the Italian law; however the law reads, Plaintiffs lied about striking an agreement with an Italian official that required limiting the number of reactors to be tested to less than called for under the License Agreement. *See Chino Elec.*, 578 So.2d at 323; *Nagashima v. Busck*, 541 So.2d 783, 784 (Fla. 4th DCA 1989).

II. Evidence Of Flaws In the Validation And Purported Guaranteed Performance Testing Process And Data Collection Is Admissible.

Plaintiffs argue, albeit in a roundabout fashion, that IH and IPH cannot dispute the means by which either the Validation test or the claimed “Guaranteed Performance” test was measured because Penon provided protocols in advance for such measurements.

To start, it is worth noting that this argument has no impact on the fatal flaws as to both the Validation test and the Guaranteed Performance test explained in Defendants' summary judgment motion and reply, including that the Validation test used too few reactors and did not last the required duration, and that the Guaranteed Performance test was done after the time period unambiguously specified by the License Agreement. *See* Defs.' Mot. for Summ. J. [D.E. 203] at 7-10; 253 at 4-7.

Furthermore, Plaintiffs' argument is just a disguised means of repeating the argument they have been pressing, without success, all along – that whether the Validation or Guaranteed Performance test was reliable or valid is irrelevant because Penon stated the tests were acceptable and that is conclusive. As Defendants have explained before, however, nothing in the License Agreement so provides. Indeed, it would require IH and IPH to accept Penon's conclusions even if they were the product of fraud (either involving Penon or to deceive Penon), coercion or bribery. Nothing in the License Agreement supports such a position.

Plaintiffs also misstate the evidence in support of their argument. For example, they refer to "suggestions" made by Tom Darden to Penon as to the testing he was to conduct, but they ignore that Penon stated he was in accord with at least one of the suggestions and got Rossi to agree to the suggestion as well: "Following my request a few weeks ago, before the plant start up dr [sic.] Rossi has to apply a condensed steam collector at the bottom of the steam pipe ..."
See Penon Dep. Ex. 25 attached hereto as Exhibit 7. The evidence will show that no such condensed steam collector was used with the 1 MW Plant but, to the contrary, Plaintiffs removed such a device that was installed by IH. Dameron Dep. (excerpts of which are attached hereto as Exhibit 8) at 78:11-79:14; 200:6-201:6. Darden also gave specific direction, not just "suggestions," about how any measurements conducted at the Doral Warehouse should occur,

which Plaintiffs ignored. Ex. 7 (“Let’s make sure there is more than one way to measure the temperature in that [output] pipe.”). Similarly, Plaintiffs mischaracterize Murray’s testimony to suggest that he opined the data collected for the Guaranteed Performance test was reliable. Quite to the contrary, he opined that if the power data reported by Florida Power & Light (“FPL”) is reliable, the data used by Penon by definition is not because of its material departures from the FPL data (whether due to intentional manipulation or otherwise). Murray Dep. (excerpts of which are attached hereto as Exhibit 9) at 257:24-258:6, 260:5-14.

Finally, Plaintiffs argue that the expert testimony of Murray and Smith should be excluded based on their *Daubert* motion [D.E. 215]. If the Court grants that motion, the effect presumably will be to exclude such testimony. If the Court denies the motion, the testimony will be admissible. Plaintiffs’ *in limine* motion adds nothing to this calculus.

III. Evidence That Neither IH, IPH Nor Anyone Else Could Achieve The Results Plaintiffs Claimed They Were Achieving Using The E-Cat Technology Is Admissible.

Plaintiffs argue that evidence IH and IPH were not able to replicate the results Plaintiffs claimed would be achieved using the E-Cat IP is inadmissible because the License Agreement did not require that IH be able to “replicate” Plaintiffs’ claims. But the Agreement required Plaintiffs to transfer to IH “all E-Cat IP,” which they represented was everything “necessary or useful” for IH to develop and manufacture “all the products deriving from the E-Cat IP,” and further for Rossi to “provide ongoing training and support” to “enable [IH] to utilize the E-Cat IP.” License Agreement (attached hereto as Exhibit 10) §§ 3.2(b), 12(b), 13.1.

These contractual conditions clearly memorialize the parties’ intent, and Plaintiffs knew that replication was a critical requirement of the License Agreement. Very shortly before entering into the Agreement, Rossi represented to Darden that: “Leonardo will put the Company in condition to be able to reproduce perfectly all the manufacturing processes that Leonardo is

able to do, regarding the production of the plants, the modules and all the [E-cat] products of Leonardo Corporation.” See IH-00010884 (attached hereto as Exhibit 14). And it is equally clear that Defendants relied on this representation in entering into the Agreement. See IH 00021578 (attached hereto as Exhibit 15).

IH and IPH’s inability to replicate Plaintiffs’ claimed fantastical results, or even anything remotely approaching those results, thus demonstrates either that the E-Cat IP does not work and Plaintiffs’ results are fabricated (which they will not admit) or that Plaintiffs breached the Agreement sections requiring them to provide IH and IPH with all of the E-Cat IP needed to replicate those results and the training and support to so replicate.

Furthermore, evidence of IH and IPH’s extensive, expensive but unsuccessful efforts to reproduce the energy-production results that Plaintiffs were claiming that they were achieving using the E-Cat IP is relevant and admissible for a variety of reasons. The extensive and expensive efforts contradict Plaintiffs’ claim that Defendants fraudulently induced them to enter the License Agreement because they never intended to pay out under the Agreement. Such bad intent is refuted by the fact that IH and IPH collectively paid Leonardo over \$11 million under the License Agreement, but it is also undercut by IH and IPH’s reproduction efforts – there was no need to try to reproduce Plaintiffs’ results if IH and IPH never intended to pay out under the License Agreement. The evidence also supports Defendants’ position that the results of the claimed Guaranteed Performance test are unreliable and invalid. Indeed, IH and IPH are not alone in not being able to reproduce Plaintiffs’ claimed results – Plaintiffs and Penon claim during the purported Guaranteed Performance test the 1 MW Plant was, at times, producing over 100 times the energy it was consuming. This not only is *impossible* under the laws of physics, but it is *tens and tens* of times higher than anyone else has ever even purported to claim using the

E-Cat technology or anything derived therefrom. D.E. 132 ¶67, Ex. 14 (attached hereto as Exhibit 11). And the evidence is significant to explaining the conduct of the parties, such as various Defendants being willing to continue to work with Plaintiffs – even after the Guaranteed Performance period expired under the License Agreement – while they sought to determine whether Plaintiffs’ claimed results were reproducible (which they ultimately determined were not).

IV. Evidence of IH and IPH’s Damages Is Admissible.

Plaintiffs seek to exclude evidence of IH and IPH’s damages on Counts II and V of the AACT. IH and IPH have provided Plaintiffs extensive documentary discovery as to their damages, including spreadsheets tabulating the expenses incurred by IH and IPH in connection with various activities and events (such as the operations of the 1 MW Plant at the Doral Warehouse). *See Pine Ridge Recycling v. Butts Cty.*, 889 F. Supp. 1526, 1526 (M.D. Ga. 1995).³ Nevertheless, Plaintiffs ask this Court to bar IH or IPH from offering damages evidence on five different violations – breach of the License Agreement’s confidentiality, patent assignment, taxes and covenant-not-to-compete provisions, and violation of the Florida Deceptive and Unfair Trade Practices Act (“FDUTPA”).

There are four points to be made as to the contract claims Plaintiffs raise. First, IPH is entitled to specific performance of Plaintiffs’ obligations under the License Agreement. For example, IPH is entitled to a Court order prohibiting Plaintiffs from further disclosures of the E-Cat IP and compelling Plaintiffs to transfer the “Licensed Patents” to IPH. *See DePrince v. Starboard Cruise Servs.*, 163 So.3d 586, 597 (Fla. 3rd DCA 2015); License Agreement § 16.4

³ Plaintiffs contend that IH and IPH have not respected the “spirit” of Rule 26 by not tabulating the expenses in these spreadsheets. IH and IPH will provide Plaintiffs the tabulations to avoid any spiritual affront.

(providing for injunctive relief as a remedy for breach of confidentiality provision). Second, IPH is entitled at least to nominal damages on any breach of the License Agreement. Defs.’ Reply to Mot. for Summary Judgment [D.E. 253] at 2-3 & n.1 (citing cases). Third, each breach – regardless of whether it results in concrete damages – supports Defendants’ affirmative defense of prior breach to Plaintiffs’ contract claim. Finally, Plaintiffs’ argument is that IPH cannot claim damages because witnesses could not testify to damages calculations, but they cite no legal support for this position, and IPH should not be excluded from offering evidence of damages simply because damages had not been calculated as of the time of depositions in February 2017.

As to FDUPTA damages, Plaintiffs simply summarize the argument they made in their summary judgment briefs. IH and IPH addressed that argument in their summary judgment briefing, demonstrating that Plaintiffs are incorrect in mischaracterizing IH and IPH’s hard dollar losses as “special consequential damages.” Defs.’ Resp. to Pls.’ Mot. for Summ. J. [D.E. 237] at 24; D.E. 253 at 14-15.

V. Evidence Of Plaintiffs Intentionally Manipulating E-Cat Testing Is Admissible.

Plaintiffs ask this Court to exclude what they describe as “non-specific” and “purported” evidence of their sabotaging a prior business deal with a company called HydroFusion, which Plaintiffs call “pure conjecture.” But the evidence is *their own words*. Prior to the License Agreement being signed, Plaintiffs had agreed to license the E-Cat IP to HydroFusion. To escape this obligation, Plaintiffs purposely distorted the results of a testing of the E-Cat technology being performed for HydroFusion to dissuade it from moving forward with the agreement, as Plaintiffs explained in a September 2012 email:

With this company Hydrofusion we [meaning Plaintiffs] had agreed upon a draft to sell them IP, know how and manufacturing license for Europe but Germany, France and Italy. By our law, if you send a proposal you are engaged to accept if the proposee accepts all the conditions of the proposal. After receiving your last text at the end of August I decided to go ahead with you, *therefore I had to get rid*

of this engagement. The only way out was to invite them to a test, ask them to bring with them their consultant. *I made the test abort*, maintaining the temperatures below the starting limit. *Then I made up some discussions*, I said they made a wrong test, they escaped, I am free.

D.E. 132 ¶65 & Ex. 12 (attached hereto as Exhibit 12) (emphases added). On the same day but in a separate, earlier email, Rossi described his efforts at deceiving HydroFusion as a “masterpiece”: “I got rid of the European big license I had to sign. I made a masterpiece making them go voluntarily . . . I will explain personally.” *Id.* Ex. 13 (attached hereto as Exhibit 13).

This evidence is relevant even beyond how it reflects on Plaintiffs’ veracity. The evidence also demonstrates Plaintiffs’ ability (and willingness) to manipulate testing results to deceive a business partner. And it explains why IH and IPH were reluctant to accept claims by Plaintiffs as to the results of E-Cat testing, but instead insisted on having the E-Cat IP transferred to them and then being able independently to replicate Plaintiffs’ claimed results.

All told, Plaintiffs’ request to exclude – pretrial – evidence of their manipulation of the HydroFusion test fails. Even less successful is Plaintiffs attempt to turn their HydroFusion argument into a sweeping exclusion of any evidence “Plaintiffs . . . breached prior agreements with unrelated third parties, including but not limited to Hydrofusion.” Plaintiffs provide no basis for such a sweeping pretrial ruling divorced not only from the substance of the evidence as to Plaintiffs’ breaches of contract with other parties, but also from the context in which any such evidence will be offered at trial.

VI. Evidence Of Rossi’s Prior Acquittals.

Plaintiffs seek to exclude evidence of prior criminal charges against Rossi in Italy for which he “has been fully acquitted.” Mot. at 17. As they note, the AACT contains an allegation relating to Rossi’s prior criminal tax charges in Italy to explain the reason for, and materiality of, the License Agreement provisions requiring Plaintiffs to warrant that their taxes were in order

and to commit to paying certain future taxes. D.E. 132 ¶ 125. Assuming the materiality of such provisions is not an issue at trial, or at least not an issue for a jury to decide, IPH does not need to offer such evidence at trial before the jury.

Plaintiffs' argument as to Italian charges on which Rossi was acquitted is otherwise based solely on Federal Rule of Evidence ("FRE") 609. That rule only applies to admitting prior criminal convictions to attack a witness' character for truthfulness. It does not address using such criminal convictions for other purposes, and while it requires the admission of a criminal conviction for impeachment purposes in certain circumstances, it does not address or require the admission of a criminal acquittal. *See* FRE 609. IPH does not intend to offer pursuant to FRE 609 evidence of criminal charges against Rossi as to which he "has been fully acquitted," unless of course Plaintiffs make an argument or offer evidence at trial that makes such evidence admissible under FRE 609.

Finally, Plaintiffs in passing also request exclusion of evidence of other unidentified "prior crimes, wrongs or other acts" pursuant to FRE 404 and 609. Since no evidence is identified in this argument other than Rossi's prior acquittals, there is no basis for the Court to rule on any other, unspecified evidence.

VII. Evidence Not Covered In Rule 30(b)(6) Depositions Is Admissible.

Once again, Plaintiffs argue that IPH and Cherokee cannot admit evidence not covered by the testimony of its Rule 30(b)(6) witnesses. Magistrate Judge O'Sullivan has already ruled on, and rejected, Plaintiffs' argument. D.E. 218. Thereafter, this Court ruled on, and rejected, Plaintiffs' argument. D.E. 246. There is no basis to provide Plaintiffs' a third bite at this apple.

CONCLUSION

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

Dated: May 2, 2017

Respectfully submitted,

/s/ Christopher R. J. Pace

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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/ Erika S. Handelson

Erika S. Handelson