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 BASS

Third-Party Defendants.

DEFENDANTS' REPLY TO RESPONSE OF THIRD-PARTY DEFENDANTS FULVIO FABIANI AND USQL IN OPPOSITION TO DEFENDANTS' CONSOLIDATED MOTION IN LIMINE

INTRODUCTION

Defendants Thomas Darden, John T. Vaughn, Industrial Heat, LLC ("IH"), IPH International B.V. ("IPH") and Cherokee Investment Partners, LLC, hereby reply to the opposition brief submitted by Third-Party Defendants Fulvio Fabiani ("Fabiani") and United States Quantum Leap, LLC ("USQL") (collectively, "Third-Party Defendants"), in response to Defendants' Consolidated Motion in Limine.

It is undisputed here that "spoliation is established when the party seeking sanctions proves (1) that the missing evidence existed at one time; (2) that the alleged spoliator had a duty to preserve the evidence; and (3) that the evidence was crucial to the movant being able to prove its *prima facie* case or defense." *Floeter v. City of Orlando*, No. 6:05-cv-400-Orl-22KRS, 2007 WL 486633, at *5 (M.D. Fla. Feb. 7, 2007) (citations omitted).[1] For immediate purposes, it is important to emphasize that Third-Party Defendants—like Plaintiffs and JMP before them—concede in their opposition to Defendants'/Counter-Plaintiffs' Motion in Limine that "the communications [were] admittedly deleted by Fabiani." D.E. 288, at 2-3. Thus, as with Plaintiffs and JMP, the sole question before the Court is whether the destroyed or missing evidence was of sufficient importance that its absence prejudices Defendants' case on the merits, thereby warranting a limiting instruction to the jury. Nothing in the Third-Party Defendants' opposition calls into question the inescapable conclusion that spoliation occurred in this case, that it was extremely serious, and that a remedy is necessary to ensure a fair trial.

Rather than grapple with the case law—which clearly gives rise to spoliation in this case—Third-Party Defendants lead by claiming that Magistrate Judge O'Sullivan already rejected Defendants' position when he ruled on their spoliation motion.

[1] In an effort to avoid redundancy, Defendants hereby incorporate by reference the arguments made under the governing legal standards in their reply to Plaintiffs' and J.M. Products, Inc.'s ("JMP") oppositions to the instant motion. D.E. 297.

But Judge O'Sullivan's ruling did not apply to Fabiani or USQL because their counsel was not available for the hearing on Defendants' motion. D.E. 266. In any event, Judge O'Sullivan's ruling is on appeal to this Court and is not binding on this Court.

Thereafter, Third-Party Defendants devote the bulk of their opposition to statements of fact that are internally inconsistent and belied by the record:

(1) Third-Party Defendants claim that, although they admittedly destroyed data, Defendants in fact have all the data they need from other sources. D.E. 288, at 3. This is false. For example, the Third Party Defendants testified to having individual data collected from each of dozens of E-Cat reactors used in connection with the operation of the 1 MW Plant in Florida, but that data was not produced and has been destroyed.

(2) Alternatively, Third-Party Defendants claim that, before they destroyed the data, they hand-delivered it to Defendants in Miami. *Id.*at 3. This is incorrect. The only data Third-Party Defendants provided at that meeting was summaries of raw data, with a promise to produce the underlying raw data later.]

(3) Third-Party Defendants nevertheless claim that they provided "the sought after electrical and thermal raw data" during discovery. *Id*. Although they did provide some raw data during discovery, there is other raw data that they have never produced and that, at least according to Third Party Defendants' testimony, no longer exists.

(4) Third-Party Defendants next claim that they destroyed the data pursuant to the Technical Consulting Agreement with IH (the "Agreement"), and that they had no "notice that [Fabiani] would be subject to a claim in the dispute between the Defendants and Dr. Rossi." D.E., at 3. The record is clear that Third-Party Defendants were on notice that it was important to retain—and not unilaterally destroy—the data. And the Agreement expressly required them to provide any data they had to IH, not to destroy it in lieu of providing it to IH. Any contrary suggestion is specious.

In sum, Third-Party Defendants' arguments are without merit and should be rejected. As a consequence of the spoliation that occurred in this case, the Court should instruct the jury that,

as to the Third Party Defendants, (a) their email communications with Penon would have demonstrated that they (along with Rossi and Leonardo) were manipulating the claimed results of the alleged Guaranteed Performance Test; and (d) they (along with Rossi and Leonardo) intentionally deceived IH and IPH about the operations of the 1MW Plant at the Doral Warehouse and the Guaranteed Performance Test, and obstructed IH and IPH's ability to learn the truth about those activities.

ARGUMENT

I. Fabiani Admittedly Destroyed Data and *Never* Provided Complete Data to Defendants.

Third-Party Defendants first argue that Fabiani gave all the data to an IH engineer at Jones Day on a flash drive in March of 2016, and that this engineer – Joseph Murray – corroborated these events. D.E. 288, at 3. At a minimum, they add, this shows there is no bad faith on their part. *Id*. at 6.

It is undisputed, however, that the Third-Party Defendants collected data that was never provided to IH or Mr. Murray. First, Third-Party Defendants admitted in their deposition that Fabiani collected temperature data from the individual E-Cat reactor units that were being used at the Doral Warehouse and that he destroyed that data. Ex. 1 (excerpts from Fabiani Deposition Transcript ("Dep. Tr.")) at 40:6-15; 46:10-47:19; 85:3-99:8.

Second, Third-Party Defendants destroyed email communications with Fabio Penon, who was to be measuring the performance of the 1 MW Plant largely from abroad. Those emails transmitted data to Mr. Penon, but Mr. Penon and Third-Party Defendants disagree as to just what data was transmitted. Penon Dep. 169:19-172:2; Fabiani Dep. 38:3-39:10; 88:8-89:2. Who is right and who is wrong in this disagreement could be resolved by reviewing the emails and

their attached data, but that cannot be done because of the Third-Party Defendants' document destruction.

Third, as Mr. Murray explains in his accompanying declaration, Fabiani also informed him at the March 2016 meeting that Fabiani "had a nearly complete final report and a spreadsheet with some flow rate measurements that he personally took from time-to-time in a file on his computer." Ex. 2 (declaration of Joseph Murray ("Murray Decl.")) ¶ 3. In an email that preceded this March meeting, Third-Party Defendants described this report as one that would "bring to light all the flaws and functional deficiencies of the [E-Cat] system." Ex. 3 (Feb. 23, 2016 email). Mr. Murray repeatedly requested this report and data from the Third Party Defendants, but they refused to provide it. Ex. 4 (Apr. 1, 2016 email).

Because Third-Party Defendants admit that they destroyed data, including data sent via email to Mr. Penon regarding the performance of the 1 MW Plant, their argument that they gave some thermal raw data to Defendants during discovery (D.E. 288, at 3) does not eliminate the spoliation that occurred in this case. Likewise, Third-Party Defendants' suggestion that Defendants can just get the missing data from Penon (*Id*. at 5) is whimsical. Penon is not a party to this litigation, so Defendants cannot serve him with a document request. In addition, he lives outside the United States and is therefore not subject to this Court's subpoena power.

Finally, Third Party Defendants' suggestion that Fabiani destroyed the emails and data for purposes of complying with his understanding of the client confidentiality requirements in the Agreement with IH (D.E. 288, at 4) is contradicted by the terms of that Agreement. The Agreement expressly states, in clear language, that whatever files, tests, results, documents "and the like … including any of the foregoing that are electronically maintained" relating to the work Third-Party Defendants were doing in connection with the 1 MW Plant "shall remain the sole

property of Industrial Heat." It states that "[u]pon termination of this Agreement or upon the prior demand of Industrial Heat, USQL shall immediately return all such items and materials … to Industrial Heat." There is no conceivable way that the Agreement can be read as authorizing Third-Party Defendants to destroy data relating to the performance of the 1 MW Plant in Florida rather than providing it to IH.

Third-Party Defendants' position is also belied by the document production in this case. They did produce some emails – namely, their emails with Defendants. They just targeted for destruction their emails with anyone else relating to the 1 MW Plant or what took place at the Doral Warehouse. Also after being compelled to do so in discovery (following a hearing before Magistrate Judge O'Sullivan), Third-Party Defendants did produce some data, as they admit in their opposition. That they selectively retained some data and selectively destroyed other data puts the lie to their claim that they thought the Agreement required them to destroy *all* data.

In sum, it is *undisputed* that significant amounts of data and other evidence relating to the alleged Guaranteed Performance Test was destroyed by Plaintiffs and Third-Party Defendants. Third-Party Defendants' attempt to obfuscate that reality by tinkering around the edges of the facts is unavailing. The only question remaining is whether the destroyed and missing data was significant to the merits of Plaintiffs' breach-of-contract claims within the meaning of the Eleventh Circuit's test for spoliation. As Defendants have repeatedly argued in their filings to date, and as Mr. Murray's further Declaration makes clear, there can be no serious question that the destroyed data was important for purposes of determining whether the purported Guaranteed Performance Test was properly executed. If the alleged Guaranteed Performance Test did not produce the outcomes required under the License Agreement, Plaintiffs do not—and cannot—have a colorable breach-of-contract claim for $89 million in damages.

II. Third Party Defendants' Admitted Destruction of Crucial Data Warrants a Limiting Instruction Here.

Third-Party Defendants argue that the testimony of Defendants' experts—Messrs. Murray and Smith—comparing electrical absorption data in fact depended on the data Fabiani *did* provide, so the missing data is not crucial to Defendants' case. D.E. 288, at 5. This argument completely misses the point. The truth of the matter is that Defendants' experts had to *make do with* incomplete information because Third-Party Defendants destroyed large quantities of the underlying data. The bad-faith destruction of electronic data warrants a negative inference against the party that spoliates such evidence. *See Southeastern Mechanical Svcs., Inc. v. Brody,* 657 F.Supp.2d 1293, 1302 (M.D. Fla. 2009). Third Party Defendants' unwarranted spoliation is precisely why the instant motion is before the Court: Defendants have been prejudiced. As Mr. Murray states:

> [N]o real physical system produces the same exact temperature day after day, hour after hour, second after second for weeks on end. Yet the summary data from Penon and separately from Fabiani show a remarkable consistency over a nearly one year period. The consistency of the data they provided clearly indicates that either the data was manipulated or it was incorrectly processed. Raw data would be needed to determine how and where errors were made.

Murray Decl. ¶ 10.

Third-Party Defendants' final pitch against a limiting instruction—that they had no idea that they should have retained the information they destroyed—is unavailing. Their counsel cites no support for this position, and that is because there is no support. As J.T. Vaughn explained in a declaration submitted with an earlier filing in this Court, Third-Party Defendants were told at the March meeting that they would be drawn into litigation if they did not provide all of the data and information they had to IH. Ex. 5 (declaration of J.T. Vaughn).

In addition, the Agreement unequivocally directs Third-Party Defendants to provide to IH the data they collected in connection with the performance of the 1 MW Plant. Their destruction of evidence in the face of that Agreement is definitive proof that they were not acting in good faith, but in an effort to conceal the deceptive scheme against Defendants in which they participated.

Furthermore, as Mr. Murray explains in his Declaration, Third-Party Defendants told him that they took careful measures to secure and protect the data that they collected relating to the performance of the 1 MW Plant. Murray Dec. ¶ 4. This is further evidence that Third-Party Defendants fully understood that they possessed critical data to evaluating the performance of the Plant. In fact, this evidence is bolstered by the fact that, after Third-Party Defendants meet with Mr. Murray, he repeatedly requested the data from Third-Party Defendants. Ex. 4.

In sum, Third-Party Defendants selectively destroyed significant data that should have been preserved and turned over to Defendants. They admit to the destruction, and their justifications for the destruction are patently frivolous. Third-Party Defendants' selective destruction, in breach of the Agreement and in the face of impending litigation, is the archetype of bad faith spoliation that requires a strong remedy. This conclusion is made all the more clear by the facts that IH specifically requested the data from Third-Party Defendants (Ex. 4), Third-Party Defendants said they would be providing the data (Ex. 3), and then Third-Party Defendants destroyed the data. *See Southeastern Mechanical Svcs., Inc.* 657 F.Supp.2d at 1302.

CONCLUSION

For the foregoing reasons, Defendants' Consolidated Motion in Limine should be granted.

Dated: May 12, 2017

Respectfully submitted,

/s/ Christopher R. J. Pace

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May 12, 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
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