

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA**

CASE NO. 1:16-cv-21199-CIV-ALTONAGA/O'Sullivan

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.

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

Counter-Plaintiffs,

v.

ANDREA ROSSI and LEONARDO
CORPORATION,

Counter-Defendants,

v.

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

Third-Party Defendants.

**THIRD-PARTY DEFENDANTS' UNITED STATES QUANTUM LEAP, LLC AND
FULVIO FABIANI'S MEMORANDUM OF LAW IN OPPOSITION TO
DEFENDANTS'/COUNTER-PLAINTIFFS' MOTION IN LIMINE**

Third-Party Defendants, United States Quantum Leap, LLC ("USQL") and Fulvio Fabiani ("Fabiani") (collectively, the "Third-Party Defendants"), by and through their

undersigned counsel and pursuant to Local Rule 7.1 hereby submit their Memorandum of Law in Opposition to Defendants'/Counter-Plaintiffs' Motion in *Limine* [ECF No. 264] ("Motion").

Standard of Review

As set forth in *Buy-Low Save Centers, Inc. v. Glinert*, 547 So. 2d 1283 (Fla. 4th DCA 1989), the general purpose of a motion in limine is to "prevent the introduction of improper evidence, the mere mention of which at trial would be prejudicial". The Motion, as it pertains to Fabiani and USQL, does not seek the proper relief and instead is an improper attempt to mount a collateral attack seeking alternative spoliation sanctions in addition to those sought in the Motion for Sanctions previously filed by the Defendants [ECF 194]. The Defendants' Motion for sanctions was denied by Magistrate Judge O'Sullivan [ECF 266].¹ Judge O'Sullivan's order has been appealed and will be heard by the Court on May 23, 2017 along with a hearing on this Motion [ECF 285].

Nevertheless, in an effort to address the arguments for spoliation sanctions, the proper standard of review requires the Defendants to prove that (i) the missing evidence existed at one time, (ii) that the alleged spoliator had a duty to preserve the evidence, and (iii) that the evidence was crucial to the movant being able to prove its prima facie case or defense. *Managed Care Solutions, Inc. v. Essent Healthcare, Inc.*, 736 F.Supp.2d 1317, 1323-24 (S.D. Fla. 2010). In addition the Defendants must show that USQL and Fabiani acted in bad faith. *Id.* at 1328. The Motion must be denied as to the Third-Party Defendants because the Defendants have failed to demonstrate that USQL and Fabiani reasonably anticipated to be parties in the litigation between the Plaintiff and Defendant. Denial is also required because the communications admittedly

¹ With regard to Section II of the Motion, USQL and Fabiani do not intend on presenting expert testimony or opinion. USQL and Fabiani do not take a position with regard to Sections III through V of the Motion as those arguments are directed at the Plaintiff only.

deleted by Fabiani were not crucial and as confirmed in the Motion, obtained and available from other parties and non-parties. Finally, the Defendants have failed to demonstrate that Fabiani acted in bad faith to frustrate their claims and defenses. On the contrary, the actual data provided by USQL and Fabiani is in dispute and what has been provided is being utilized by the Defendants to support the claims against the Plaintiff, including the alleged scheme embroiling the Third-Party Defendants.

Defendant Ignores Fact That Data was Delivered by Fabiani Prior to Destruction

Defendant cites to testimony from Fabiani's deposition on page 40 and 46 for the proposition that Fabiani destroyed data. Admittedly, the deposition of Fabiani was made more difficult due to the use of an interpreter and the transcript leaves much to be desired. The Court is directed to review pages 40 through 48:9 of Fabiani's deposition for more complete testimony on this matter. At one point Fabiani testifies that the data he was sending to Dr. Penon was also provided to the Defendant. (Fabiani Depo. Tr. 44:14-45:1). Fabiani then makes it abundantly clear that the same data he sent to Dr. Penon he also turned over to an engineer for Industrial Heat at the offices of Jones Day. (Fabiani Depo. Tr. 48:2-6). The reference to a meeting at the offices of Jones Day is corroborated by Joseph Murray's testimony on behalf of the Defendants where he confirms this meeting and obtaining documents from Fabiani on a flash drive. (Murray Depo. Tr. 363:25-367:7).

The thermal raw data complained of in the Motion were also provided to the Defendants during discovery. Undersigned counsel personally on behalf of USQL and Fabiani produced the sought after electrical and thermal raw data.

Defendants Have Failed to Establish that Litigation was Reasonably Anticipated by Fabiani/USQL

The record is undisputed that at a meeting at with counsel and representatives of the Defendants, Fabiani provided to the Defendants data sought by them at the conclusion of the Technical Consulting Agreement. (Murray Depo. Tr. 363:25-367:7). This meeting took place sometime in March 2016 before the termination of the Technical Consulting Agreement or soon thereafter. *Id.* The testimony of Fabiani as cited by the Defendants is that any destruction of emails and data took place after such meeting, immediately after the termination of the Technical Consulting Agreement and after the majority of data had already been turned over to the Defendants. At no time did the Defendants provide Fabiani with a notice that he would be subject to a claim in the dispute between the Defendants and Dr. Rossi over the license agreements and no such notice has been provided in support of the Motion. At no time did the Defendants provide notice to Fabiani that that he should maintain possession of all documents and communications related to the E-cat plant because of anticipated litigation with Dr. Rossi.

Many months passed before USQL and Fabiani would be brought into this action. Not until August 2016 did the Defendants file their Third-Party Claims. Fabiani met with the Defendants without any pending litigation and turned over sought after data evidencing a good faith attempt to resolve any differences with the Defendants. The subsequent destruction of data and emails was for the purpose of complying with Fabiani's understanding concerning the confidentiality requirements of the agreement with the Defendants. (Fabiani Depo. Tr. 33:15-21; 34:12-35:4). Fabiani's testimony again is that he turned over the data or documentation he believed was required under the agreement between the parties and thereafter deleted material in accordance with his standard practice to preserve client confidentiality.

Deleted Communications Not “Crucial” for the Movant to Prove it Prima Facie Case or Defense

There has been no showing by the Defendants that the alleged documents destroyed by Fabiani were in any way crucial to prove a prima facie case as required. Quite the contrary is true. The data provided by Fabiani has been used by the Defendants in support of their claims and defenses. Joseph Murray’s proposed expert testimony comparing the electrical absorption data provided by Fabiani, Penon and FPL is clearly dependent on the data actually provided by Fabiani. Additionally, Defendants’ purported expert Rick A. Smith utilized and considered various data provided by Fabiani in formulating his opinions. Specifically, Mr. Smith utilized Fabiani’s electric and thermal data produced in discovery and certain System Absorption Data also provided by Fabiani. Far from hiding “crucial” evidence to preclude Defendants from setting forth a prima facie case, Fabiani has provided and produced data relied upon by Defendants to prosecute this action.

In addition, the Defendants themselves admit in the Motion that with regard to communications, those could be and have been obtained from other parties and third parties. Much is made of the missing communications and data provided by Fabiani to Penon. No mention is made of any attempt by the Defendants to obtain such communications and data from Penon, despite the fact that the Defendants deposed Penon during discovery. The Defendants have failed to meet this requirement for the imposition of spoliation sanctions against USQL and Fabiani.

No Showing of Bad Faith

Similar to the arguments presented above, the Defendants have failed to demonstrate any bad faith on the part of the Third-Party Defendants. It is curious that the Defendants have failed to provide this Court with a detailed description of the data provided by Fabiani at the previously

referenced meeting at the offices of Jones Day. Certainly Fabiani's participation in that meeting is evidence of a good faith attempt to comply with any perceived deficiency in the production of data generated during the E-cat plant's operation in Doral. Mr. Murray testifies that all that was missing after the Jones Day meeting with the final report and raw data. (Murray Depo. Tr. 364:4-16). The raw data was produced during discovery and there is no evidence that a final report exists aside from Fabiani's claims that he was working on a final report.

Finally, as set forth above, Fabiani was under the belief that he was required to purge his project files for the purpose of maintaining confidentiality after turning everything over to the Defendants. Moreover, such purge took place long before he was notified of being a party in this action. Fabiani's understanding was that he was required to turn over his data not communications, this is not bad faith. Fabiani did turn over the data. The Defendants have failed to demonstrate bad faith on the part of the Third-Party Defendants.

Conclusion

For the foregoing reasons, Third-Party Defendants, United States Quantum Leap, LLC and Fulvio Fabiani respectfully request that this Court enter an order denying Defendants' Combined Motion in Limine, and for such other and further relief as the Court may deem just and proper.

Respectfully submitted this 5th day of May, 2017.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May 5, 2017, I electronically filed the foregoing with the Clerk of the Court using CM/ECF. Copies of the foregoing document will be served on all counsel of record via transmission of Notice of Electronic Filing generated by CM/ECF.

/s/ Rodolfo Nunez

Rodolfo Nuñez, Esq.