

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 1:16-cv-21199-CMA/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.

PLAINTIFFS' REPLY IN SUPPORT OF MOTION *IN LIMINE*

Memorandum of Law

1. Defendants should be precluded from introducing any evidence related to Alleged Fraud with respect to the Validation Test

Plaintiffs seek to preclude any evidence which is tantamount to a non-pleaded claim of fraud in the inducement which Defendants seek to offer in support of their pleaded claim of breach of contract. Specifically, Defendants claim that their agreement to modify the underlying License Agreement was procured by fraud, arising from representations made by Plaintiff Rossi regarding his conversations about the laws applicable to the operation of the E-Cat in Italy with an official from the Health Office of the province of Ferrera, Italy. To prove this un-pleaded claim, Defendants seek to offer evidence of some of the Italian laws allegedly applicable to the testing of the E-Cat. Defendants attempts to salvage this legal theory must fail.

First, Defendants tacitly ignore Federal Rule of Civil Procedure 44.1, which provides that, “[a] party who intends to raise an issue about a foreign country’s law must give notice by a pleading or other writing.” Notwithstanding their clear attempt to offer foreign law as evidence in this

matter, Defendants have not provided the requisite notice in this case. In their response, Defendants make no attempt to explain why they should be excused from this failure.

Second, Defendants have identified no expert in Italian law to assist the Court in interpreting it. See *La Fontaine v. Signature Research, Inc.*, 2016 U.S. Dist. LEXIS 29499 * (S.D. Fla. Mar. 8, 2016). Even if such evidence were otherwise relevant or admissible, Defendants simply have no ability to present evidence as to what Italian law does or does not require.

Third, Defendants' entire argument is based on the false premise that Dr. Rossi himself interpreted Italian law. The "smoking gun" e-mail cited by Defendants evidences no such representation. Instead, Dr. Rossi unequivocally states, "He [the official from the Health Office] explained to me..." Dr. Rossi never claims that he himself read and/or understood Italian law, and merely relays what he was told. Defendants present no evidence to contradict that Dr. Rossi had such a meeting, or what Dr. Rossi was told at that time.

Instead, Defendants misstate Dr. Rossi's testimony on the issue. Rossi testified that the Health Office official told him that there is no specific Italian law requiring authorization for a 36-hour test. Instead, Rossi's understanding was that Italian law requires authorization for the operation of certain types of equipment (inclusive of the E-Cat machinery at issue), which could take months to acquire. There is no need for Plaintiffs to reconcile Dr. Rossi's testimony to his earlier e-mail, as they are entirely consistent. Further, it is undisputed that by testing fewer reactors, it was less likely that Plaintiffs would successfully achieve validation pursuant to the License Agreement. Simply, Plaintiffs were not motivated to attempt to deceive Defendants into agreeing to test fewer reactors, as such was against Plaintiffs' interests.

Defendants' case law is easily distinguishable. *Mejia v. Jurich*, 781 So. 2d 1175, (Fla. 3rd DCA 2001) involved purchasers of certain real estate who alleged that they were fraudulently induced into signing agreements for the purchase of homes based on certain misrepresentations made by the defendant salespersons. The court found that, because the defendant was an "experienced and knowledgeable" real estate salesperson, plaintiffs were entitled to rely on her "representations as statements of fact and not mere puffing or salesmanship." *Id.* at 1178. In the present case, there is no claim that Dr. Rossi was experienced or knowledgeable in Italian law nor did he represent what he believed Italian law to be. To the contrary, Dr. Rossi sought the advice of an official from the Health Office in Ferrara for an explanation of what was required by Italian law, and simply relayed what he had been told.

Similarly, *Chino Electric, Inc. v. United States Fidelity & Guaranty Co.*, 578 So. 2d 320, 323, (Fla. 3rd DCA 1991) involved a fraudulent misrepresentation made by the agent of a surety company to a potential claimant that the time for filing a claim against a bond had expired under the terms of said bond. The court held that because only the agent had a copy of the bond, the agent had knowledge that the time for filing suit had not expired, and therefore the claimant presented a valid claim for fraudulent misrepresentation. *Id.* at 323. In the present case, Defendants make no claim that Dr. Rossi was in possession of documents which would prove that he had knowledge that his statements to Defendants regarding what he had been told by the Health Office official about Italian law were false, or even that such statements were false.

In *Int'l Schs. Servs. v. AAUG Ins. Co., Ltd.*, 2012 U.S. Dist. LEXIS 153683, 2012 WL 5192265 (S.D. Fla. July 25, 2012), an entity owning 43 international schools sued an insurance company for failing to pay hundreds of health insurance claims. The plaintiff's fraudulent misrepresentation claim was based on the insurance company's statement that it "was solvent and had the financial capability to insure the policies at issue." *Id.* at 17-18. The Court held that such statements "clearly constitute statements of fact under Florida law, and therefore properly constitute the basis for a fraud claim." *Id.* at 18. The present case, at least as it involves Defendant's breach of contract action,¹ involves no such statements of financial condition.

2. Evidence regarding the efficacy/propriety of the Validation and Guaranteed Performance Test Protocols should be excluded.

Defendants misstate Plaintiffs' argument. Plaintiffs do not argue that IH and IPH cannot dispute how these tests were measured because the expert responsible for validation provided protocols in advance. Plaintiffs argue that IH and IPH should be precluded from introducing irrelevant evidence which would likely confuse the jury. USCS Fed Rules Evid. R. 401 provides:

Evidence is relevant if:

- (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and
- (b) the fact is of consequence in determining the action.

Evidence related to the efficacy/propriety of the Validation and Guaranteed Performance Test Protocols is not relevant to any issue, legal or factual, to be decided in this case.

¹ Plaintiffs' claim for fraudulent inducement against Defendants, however, is premised on statements strikingly similar to the misrepresentations set forth in *Int'l Schs. Servs. v. AAUG Ins. Co., Ltd.*

Defendants would have this Court ignore the terms of the License Agreement, ask the triers of fact to step into the shoes of a nuclear engineer, and determine what is the best way to test this new technology. The parties' License Agreement provides for the means and methods by which the underlying technology was to be tested and validated. The License Agreement provided that the both parties would collaborate to choose third-parties to assist in the process. The parties did so collaborate. The License Agreement provided that Defendants' payment obligations would be triggered upon successful completion of the tests. Such test protocols were agreed upon, such tests took place at great expense, and the agreed-upon third party certified the results.

Only after Defendants understood that Plaintiffs' technology might pass the Guaranteed Performance Test did they begin to formulate excuses to avoid making payment. One of Defendants' excuses was that the Validation Test Protocol was "not robust enough." See Depo Tr. of John T. Vaughn at 70:6 – 82:13. This testimony, and any similar testimony, should be excluded as being violative of Rules 602 (Vaughn lacks personal knowledge) and 701 (Vaughn's lay person opinion is neither rationally based on his perception nor helpful to determining a fact in issue) of the Federal Rules of Evidence. Whether the agreed-upon test protocol was robust enough is not an issue to be decided by the Court or the jury. While Defendants have asserted a claim that the tests and/or results were somehow manipulated, Defendants have not claimed in their pleadings any cause arising from the "robustness" of the test protocol.

Plaintiffs do not argue that the Validation or Guaranteed Performance Tests were reliable or valid because the agreed-upon expert, Penon, said so. Plaintiffs argue that these tests were reliable and valid because *Defendants* said so. Not only did Defendants fail to make any objection to the protocol or provide any negative feedback in response to the updates they received, they used such information to continue to raise funds – ultimately resulting in a \$50 million raise completed in May of 2015. Only after receiving these funds did Defendants then begin formulating complaints regarding the test protocol.

Contrary to Defendants allegations, Plaintiffs have not mischaracterized the testimony of Defendant Darden and witnesses Murray and Smith. **See Ex. 8, 9 and 10** to Plaintiffs' Motion *in Limine*. Defendants' attempts to spin this testimony should be ignored. Defendants' after-the-fact attempts at a "do-over" with respect to their agreements regarding the testing protocols should not be allowed, as such are not at issue in this case.

3. Defendants should be precluded from seeking to introduce evidence as to their attempts to replicate the technology.

Notably, Defendants do not argue that there is a contractual provision requiring that they be able to replicate the underlying technology – they cannot, as none exists. Instead, Defendants argue that Sections 3.2(b), 12(b) and 13.1 “memorialize the parties’ intent” that replication was a critical element. Of course, Defendants have neither pleaded nor claimed breaches of Sections 12(b) or 13.1 of the License Agreement.

Section 12(b) of the License Agreement provides:

The patents and patent applications identified on Exhibit A and all other E-Cat IP, all of which is to be delivered to [IH] in accordance with Section 3.2(b), are owned by Leonardo and/or Rossi and are all the patents and patent applications and other intellectual property that are necessary or useful for [IH] to develop, manufacture, make, have made, use, have used, offer to sell, have offered for sale, sell, have sold, import, and have imported all the products deriving from the E-Cat IP in the Territory.

Section 13.1 of the License Agreement provides, in pertinent part:

Services by Rossi. In consideration of the payments set forth herein, Rossi will provide ongoing training and support to the Company in the use of the Plant and the production of the E-Cat Products for a period of not less than twelve months following Validation, as and to the extent reasonably requested by the Company to enable it to utilize the E-Cat IP, operate the Plant and produce the E-Cat Products.

Defendants do not make any allegations that Plaintiffs failed to provide any such “ongoing training and support” nor could they. Instead, Defendants make an illogical leap, and have inserted a non-existent obligation into the License Agreement. Defendants now claim that Plaintiffs breached that non-existent obligation. This is not proper, and the evidence pertaining thereto will mislead the jury.

Next, Defendants argue, for the first time that “[v]ery shortly before entering into the [License] 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.’” ECF No. 279 at 6-7. “Florida law, of course, recognizes the parole evidence rule. Evidence of a prior or contemporaneous oral agreement is inadmissible to vary or contradict the unambiguous language of a valid contract.” *Ungerleider v. Gordon*, 214 F.3d 1279, 1282 (11th Cir. 2000). This is like the “commonsense principal of [contract] interpretation that ‘the absence

of a provision from a contract is evidence of an intention to exclude it rather than an intention to include it.” *Megdal Assocs., LLC v. La-Z-Boy, Inc.*, No. 14-81476-CIV, 2016 U.S. Dist. LEXIS 119168 (S.D. Fla. Feb. 19, 2016). Any such representation by Dr. Rossi is accordingly inadmissible as the License Agreement does provide the conditions that must be satisfied before Plaintiffs would be entitled to full payment under the agreement, but notably does not provide that independent replication was one of those conditions. Moreover, even if the statement was not inadmissible parol evidence (it is), the statement is a purported misrepresentation that has not been previously pled or raised. Such purported fraud must be pled with specificity. *See, e.g.*, Fed. R. Civ. P. 9(b). Accordingly, the statement is not admissible.

Defendants further argue that their inability to replicate provides evidence of additional, irrelevant claims. First, Defendants claim that, because they were unable to independently replicate Plaintiffs’ results, the “E-Cat IP does not work” or that Plaintiffs breached the License Agreement by not transferring all such IP. ECF No. 279. The latter argument is meritless, as set forth above. The former argument is not only conclusory, but misapplies logic and Defendants’ own testimony. Simply because Defendants could not replicate Plaintiffs’ technology without the assistance of Dr. Rossi does not *ipso facto* invalidate the technology. In fact, the Defendants testified that there were numerous possibilities as to why they were unable to replicate that would not constitute a breach of the License Agreement. *See* IH Depo Tr. at 159-162.

Finally, Defendants argue that the time they devoted to attempted replication is evidence refuting Plaintiffs’ allegations of fraud. Specifically, Defendants argue that “there was no need to try to reproduce Plaintiffs’ results if IH and IPH never intended to pay out under the License Agreement.” ECF No. 279 at 7. Similarly, Defendants argue that the evidence explains why the Defendants were willing to continue to work with Plaintiffs “even after the Guaranteed Performance period expired...” ECF No. 279 at 8. Finally, Defendants claim that such evidence would be used to support their position that the results of the Guaranteed Performance Test are “unreliable and invalid.” As there is no contractual language requiring that Defendants be able to independently replicate, nor was payment predicated upon replication of Dr. Rossi’s results, this purported evidence would only serve to confuse the jury in what is otherwise a straightforward contractual issue.

It must be noted that the true intent behind Defendants’ feigned cooperation with Dr. Rossi was to use Plaintiffs’ technology — whether or not Defendants believed it worked — to solicit a

\$50 million investment in May 2015. Plaintiffs' technology and/or IP was the "core element" of this investment.² See IH-00099714.

Because Defendants' alleged failure to independently replicate Plaintiffs' test results is not relevant to any issue to be tried, and would serve only to confuse the jury, any purported evidence pertaining thereto should be excluded.

4. Defendants have failed to identify any damages in support of AACT Count II (Breach of Contract) and Count IV (FDUTPA).

Defendants have failed to identify any actual damages in support of Counts II and IV of their Fourth Amended Answer, Additional Defenses, Counterclaims and Third-Party Claims ("AACT"). Defendants wrongfully claim that they have provided "extensive documentary discovery" as to their damages, but none of which could, as a matter of law, apply to these two counts. Specifically, Defendants have taken the position that the testing in Doral was not related to the requirements of the License Agreement, accordingly, any damages resulting from such test would not be recoverable under Count II for breach of contract. Similarly, as a matter of law, damages for claims brought under FDUTPA must be "actual damages", not merely consequential damages. No actual damages have been claimed or proven by Defendants. Moreover, to the extent that Defendants argue that they can rectify their failure to properly disclose their damages by providing Plaintiffs with tabulations of their damages at some unspecified point in the future, such argument is unpersuasive. Notably, Defendants have failed to provide such information for nearly 9 months since they filed suit, three months after the close of discovery, nor have they provided such tabulation in the week since their promise to do so. See ECF No. 279, *fn* 3.

In their Response, Defendants argue that IPH "is entitled to specific performance of Plaintiffs' obligations under the License Agreement." ECF No. 279 at 8. However, Defendants Fourth AACT fails to request any such specific performance. Rather, Defendants' "Prayer for Relief" includes only a request for "compensatory and expectation damages and/or restitution...." ECF No. 132 at 68. "To demonstrate a right to [specific performance] under Florida law, a plaintiff must plead facts showing: (1) the plaintiff is clearly entitled to this remedy; (2) there is no adequate remedy at law; and (3) justice must require it." *La Gore Palace Condo Assoc. v. QBE Ins. Corp.*,

² 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. See IH-00022338-00022391. Applying that percentage to the \$50 million investment in Defendants' IP Holding company, \$47.5 million of the investment is attributable to the E-Cat.

733 F. Supp. 2d 1332, 1334 (S.D. Fla. 2010); *see also Parkway Baptist Church, Inc. v. Guideone Elite Ins. Co.*, No. 10-23965-CIV, 2011 U.S. Dist. LEXIS 159816 (S.D. Fla. Sept. 21, 2011). Defendants did not plead such elements and are barred from seeking the remedy of specific performance.

Defendants argue that IPH is “entitled at least to nominal damage on any breach of the License Agreement.” The Defendants argument is incorrect. The failure to allege and prove damages is fatal to a claim for breach of contract. *Degirmenci v. Sapphire – Fort Lauderdale, LLLP*, 693 F. Supp. 2d 1325, 1346 (S.D. Fla. 2010). Nominal damages, on the other hand, are recoverable only if a party has been damaged, but, for one reason or another, is unable to prove the recoverable damages. *Miami Heart Inst. v. Heery Architects & Eng’rs*, No. 88-1714-CIV, 1991 U.S. LEXIS 11808, 1991 WL 163030 (S.D. Fla. Aug. 22, 1991). In the matter *sub judice*, Defendants do not assert damages that they are unable to prove. Instead, Defendants are unable to indicate that there are any recoverable damages, whatsoever. ECF No. 262 at 13-15. Accordingly, it is well within the Court’s discretion to exclude such undisclosed theories of damages, as well as any other damage evidence that has not been disclosed throughout the course of discovery. *Mee Indus. v. Dow Chem. Co.*, 608 F.3d 1202, 1221 (11th Cir. 2010).

With respect to FDUTPA, Defendants rely solely on the arguments set forth in their summary judgment briefs. ECF No. 279 at 9. Again, Defendants have not alleged any actual damages with respect to their claimed FDUTPA violation. The consequential damages Defendants claim they have suffered are not recoverable under the Act and, as such, Defendants should be barred from introducing any such evidence. *Nat’l Union Fire Ins. Co. v. Tyco Integrated Sec., LLC*, No. 13-CIV-803731, 2015 US. Dist. LEXIS 82646, 2015 WL 3905018 (S.D. Fla. June 24, 2015).

5. Evidence regarding Plaintiffs’ prior business dealings with Hydrofusion should be excluded.

Defendants again disregard the Federal Rules of Evidence in arguing that evidence related to Plaintiffs’ prior, unrelated business dealings is relevant to the present case. Defendants claim that their purported evidence is related to “Plaintiffs’ ability (and willingness) to manipulate testing results to deceive a business partner.” Defendants seek to introduce prior bad acts to show conformity with the facts of their alleged case herein. Such evidence is directly prohibited by Fed.

R. Evid. 404(b)(1). Defendants have failed to cite to any rule or case which holds otherwise. Any evidence relating to Plaintiffs' prior agreements and/or business dealings with unrelated third parties should be excluded as being impermissible character evidence.

6. Defendants should be precluded from introducing evidence pertaining to Dr. Rossi's prior issues with the Italian government.

Pursuant to Federal Rules of Evidence 404 and 609(b), evidence of any alleged prior crimes, wrongs or other acts pertaining to Dr. Rossi should be excluded from evidence. Defendants state, in a non-committal fashion, that they do not intend to offer such evidence. ECF No. 279 at 10-11. If true, then Defendants should have no objection to such being precluded pursuant to Court order. Any allegation pertaining to Plaintiffs' failure to pay taxes is without factual or evidentiary support and is intended solely to harass and intimidate the Plaintiffs. Even if the allegations were true, which they are not, the allegation would not give rise to a material breach of the License Agreement because no tax liens have been (or even could be) attached to the licensed intellectual property granted to Defendants. *See, e.g., United States v. Rodgers*, 461 U.S. 677 (1982); *In re Garcia*, No. 01-945-CIV, 2002 WL 31409580 (S.D. Fla. Sept. 6, 2002); *Coutant v. U.S., Dep't of Treasury, I.R.S.*, No. 00-14163CV, 2002 WL 34382737 (S.D. Fla. Feb. 27, 2002).

Similarly, Defendants state that "IPH does not intend to offer pursuant to FRE 609 evidence of 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." ECF No. 279 at 11. To the best of undersigned counsel's knowledge, Rossi has been acquitted of all charges; but this is irrelevant as to the admissibility of any such evidence.

7. Defendants IPH and Cherokee should be precluded from introducing witness testimony and/or exhibits as to those topics for which they failed to provide substantive 30(b)(6) testimony.

On May 5, 2017 and May 8, 2017, Plaintiffs were required to re-deposed the 30(b)(6) corporate representatives for IPH and Cherokee, respectively, due to the representatives' prior insufficient testimony. As further set forth in Plaintiffs' Motion in Limine, ECF No. 262, and Plaintiffs' Appeal of March 24, 2017 Order Regarding Defendants IPH International, B.V. and Cherokee Investment Partners, LLC Failure to Comply with Rule 30(b)(6), ECF No. 240, Defendants' improper discovery conduct is unduly prejudicial as it has required the re-taking of

depositions after the discovery and dispositive motion deadlines thereby denying Plaintiffs from following up with any additional discovery from other witnesses or sources. However, such prejudice is now compounded by the fact that Plaintiffs were unable to take such depositions until after the joint pre-trial stipulation, proposed jury instruction, and proposed verdict form deadline, due, in part, to the delay caused by Defendants' motion for protective order pertaining to the same. These subsequent depositions have been insufficient to remedy the prejudice incurred by Plaintiffs as a result of Defendant IPH and Cherokee's sanctionable conduct.³ Accordingly, IPH and Cherokee should be precluded from introducing evidence for which they failed to provide substantive 30(b)(6) testimony in their initial depositions. Further, Defendant IPH, despite having an additional two months to do so, still has failed to identify any specific money damages attributable to Counts II and IV of Defendants' Fourth Amended Counterclaim. As such, IPH should be precluded from presenting evidence as to such at trial.

WHEREFORE, Plaintiffs respectfully requests this Court issue an Order precluding Defendants from introducing any and all exhibits and witnesses at trial related to the subjects set for the herein, and such other and further relief as the Court may deem just and proper.

Dated: May 9, 2017

Respectfully submitted,

s/ Brian W. Chaiken

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³ As a sanction for their failure to be prepared to provide the testimony required of a 30(b)(6) witness, Magistrate Judge O'Sullivan ordered the parties to submit to re-deposition and indicated additional remedies may be available if such depositions were insufficient to remedy the prejudice to Plaintiffs.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May 9, 2017, the foregoing document was served on all counsel of records identified on the attached Service List via the manner specified.

/s/Brian W. Chaiken, Esquire

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