

**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.

**J.M. PRODUCTS, INC., HENRY JOHNSON, AND JAMES A. BASS' REPLY IN
SUPPORT OF THEIR MOTION *IN LIMINE***

Third-Party Defendants J.M. Products, Inc. ("JM Products"), Henry Johnson ("Johnson"), and James A. Bass ("Bass") (collectively, "Third-Party Defendants") hereby file their reply in support of their Motion *in Limine* to exclude certain exhibits and witness testimony from trial.

1. Evidence pertaining to alleged oral representations concerning Johnson Matthey should be excluded

Defendants again argue that Third-Party Defendants' misstate and/or misapply the law on fraudulent inducement (i.e. the Term Sheet does not have a merger and integration clause and therefore IH's fraudulent inducement claim can be based on representations not contained in the Term Sheet). However, Defendants' interpretation of *Corporate Fin., Inc. v. Principal Life Ins.*, 461 F.Supp.2d 1274 (S.D. Fla. 2006), and *Johnson Enter. of Jacksonville v. FPL Group*, 162 F.3d 1290 (11th Cir. 1998), is misguided and ignores Florida law. It is clear that "a party could not rely justifiably on representations not contained in the contract where the party helped draft the agreement and relinquished opportunities to reduce the representations to writing." *SEB S.A. v. Sunbeam Corp.*, 148 Fed.Appx. 774, 798 (11th Cir. 2005) (citing *Johnson*, 162 F.3d at 1315). Florida courts set out three different instances wherein a party cannot, as a matter of law, justifiably rely on representations not contained in a subsequent agreement: (i) when the agreement expressly conflicts with or contradicts the prior representations, (ii) when the agreement contains a merger or integration clause, or (iii) when the contracting party participated in drafting the agreement and did not reduce the representations to writing. *See Barnes v. Burger King Corp.*, 932 F.Supp. 1420, 1428 (S.D.Fla.1996); *see also Corporate Fin., Inc.* and *SEB S.A.* Contrary to Defendants' position, it is not a requirement under Florida law that two or three of these circumstances exist. If any one of these circumstances exists, then, as a matter of law, the party could not have relied justifiably on the alleged misrepresentation(s).

Accordingly, Counter-Plaintiffs could not have relied justifiably on any representation concerning Johnson Matthey and any evidence or testimony related to representations concerning Johnson Matthey should be excluded.

2. The Compliance with OFAC document should be excluded

Defendants argue that the Compliance with OFAC document should be admissible at trial because it is highly probative of the alleged representation that JM Products was the subsidiary of, or affiliated with, Johnson Matthey. In support of their position, Defendants argue that Johnson Matthey is a United Kingdom entity and therefore the Compliance with OFAC document referred specifically to Johnson Matthey. It is for precisely this reason that Defendants should be precluded from introducing this document at trial. Defendants do not argue that Counter-Plaintiffs relied on the document for the representation that JM Products was owned by an entity formed in the United Kingdom (because they did not). Instead, Defendants argue that such representation somehow proves that Johnson and JM Products represented to Counter-Plaintiffs that JM Products was owned by Johnson Matthey. The document is unreliable for the proposition for which Defendants seek to introduce the document its probative value is outweighed by the danger of unfair prejudice to Third-Party Defendants and the likelihood of misleading the jury.

3. Evidence relating to the operation of JM Products should be excluded

Defendants argue that they should be allowed to introduce evidence relating to the operation of JM Products because such alleged statements and representations caused Defendants to incur costs “they would not have incurred if they knew [JM Products] was not a bona fide customer.” ECF No. 278 at 6. Defendants ignore the deposition testimony of Defendant Thomas Darden, wherein he testified that

[a]fter the plant got installed in Florida and we saw that Rossi had removed all of the instrumentation and the monitoring access that we had, and as we realized that he was restricting access to it so it was not going to be a fully transparent bona fide test, at that point we became very suspicious.

We realized that it was -- something bad was going on down there. And we don't want to get thrown in jail for participating in some

kind of fraud so we said we don't want to receive payment from [JM Products].

See Darden Dep. Tr. at 188:1-10. Defendants did not once request that JM Products maintain or provide records of the operation of the 1 MW Plant, despite their contractual right to do so under the Term Sheet. *See* Darden Dep. Tr. at 293:9-294:4. Despite Defendants best efforts, they cannot escape the fact that not only did they not rely on any alleged representations concerning the operation of JM Products; they simply did not care about the operation of JM Products. Defendants seek to introduce such evidence so that they may confuse the issues and mislead the jury in an attempt to divert the jury's attention away from the real issue: whether or not Defendants are liable for an \$89 million payment resulting from the successful operation of the 1 MW Plant. The operation of JM Products and the alleged statements made by Third-Party Defendants have no bearing on the results of the guaranteed performance test or how the 1 MW Plant was operating. Accordingly, all such evidence should be excluded.

4. Evidence relating to the status of Bass as an independent contractor or employee should be excluded

Defendants argue that Bass' status as an independent contractor, as opposed to an employee, is part of the "chain of evidence" that supposedly proves Bass was not JM Products' Director of Engineering. Bass' status as an independent contractor does not serve as a link in the chain of proof because whether or not Bass was an independent contractor or an employee is wholly irrelevant to the determination of Bass' status as a Director of Engineering. Defendants will seek to mislead the jury into believing that an individual must be an employee in order to be a director of engineering for a business. Moreover, the introduction of such evidence will only confuse the issues as whether or not Bass was the Director of Engineering is not relevant in this matter.

WHEREFORE, Third-Party Defendants JM Products, Johnson, and Bass request that this Court enter an order precluding Defendants/Counter-Plaintiffs/Third-Party Plaintiffs from introducing any and all exhibits and witnesses at trial related to the subjects set forth herein, and for such other and further relief as the Court may deem just and proper.

Respectfully submitted this 9th day of May, 2017.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May 9, 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/ Francisco J. León de la Barra
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