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.

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; FABIO PENON; UNITED STATES QUANTUM LEAP, LLC; FULVIO FABIANI; and JAMES BASS,

Third-Party Defendants.

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

MOTION FOR JUDGMENT ON THE PLEADINGS AS TO COUNT I OF THE COMPLAINT

Pursuant to Federal Rule of Civil Procedure ("Rule") 12(c), Industrial Heat, LLC ("IH") and IPH International, B.V. ("IPH") hereby move for judgment on the pleadings as to Count I of the complaint ("Complaint") [D.E. 1] of Andrea Rossi ("Rossi") and Leonardo Corporation ("Leonardo") (collectively, "Plaintiffs") based upon the allegations in the Complaint, the Amended Answer, Additional Defenses, Counterclaims and Third Party Claims ("AACT") [D.E. 30], and the exhibits attached to the Complaint and AACT.

FACTUAL BACKGROUND

The License Agreement

Leonardo, Rossi, IH, and AmpEnergo, Inc. ("AEG") entered a License Agreement on October 26, 2012 ("License Agreement"). Compl. ¶ 44, Ex. B.[1] The License Agreement (1) granted IH and IPH a license to certain technology claimed by Plaintiffs; and (2) provided Plaintiffs an opportunity to earn three separate payments upon satisfaction of certain conditions. *Id.* ¶ 46. The last payment, for $89 million, would be due upon successful completion of "Guaranteed Performance." *Id.*; License Agreement §§ 3.2(c), 5. Guaranteed Performance required a demonstration that the "Plant" (also referred to in the License Agreement as the "1MW E-CAT Unit") could produce a certain coefficient of power ("COP") for 350 out of 400 days. *Id.*, Ex. B.[2] Under the License Agreement, Guaranteed Performance was supposed to

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[1] IH later made an assignment as to the License Agreement to IPH. *See* AACT ¶ 48 (page 33).

[2] The "Plant" is defined in License Agreement § 1.2 as "a 1MW E-CAT Unit, or at the election of the Company, a 'Hot Cat' Unit, each as described in Exhibit C." There are no allegations in either the Complaint or the AACT, nor could there be any truthful allegations, that the Company elected a 'Hot Cat' Unit to be the Plant or that the "E-Cat Unit" Plaintiffs purportedly operated from February 19, 2015 to February 15, 2016, *see* Compl. ¶¶ 66, 71, was anything other than the 1MW E-CAT Unit. The small "Hot Cat" Unit was described in a series of emails referenced in the License Agreement Ex. C.

commence "immediately following delivery of the Plant to the Company" – *i.e.*, IH. License Agreement § 5.[3]

The Proposed Second Amendment to the License Agreement

In October 2013, IH and Rossi signed a proposed second amendment to the License Agreement that, if properly executed, would have modified the Guaranteed Performance requirements by, among other things, having the Guaranteed Performance period commence on a future date agreed to in writing by the parties ("Proposed Second Amendment"). *See* Compl., Ex. D. The Proposed Second Amendment also would have required that the Guaranteed Performance not be conducted using the Plant/1MW E-Cat Unit, but instead "a six-cylinder Hot Cat unit reasonably acceptable to the Company [IH] (the 'Six Cylinder Unit')." *Id.*[4]

The Complaint, the Motion to Dismiss and the Court's Ruling on the Motion to Dismiss

In April 2016, Plaintiffs sued IH and IPH, among others. In the first Count of the Complaint, they alleged that they had achieved "Guaranteed Performance" using the "E-Cat Unit," which they also described as "the [E-Cat] Plant." Compl. ¶¶ 77, 79. Therefore, they claimed to be entitled to an $89 million payment under the License Agreement. *Id*.

IH and IPH moved to dismiss Count I. [D.E. 17] ("Motion to Dismiss"). Among other things, they argued that Plaintiffs failed to state a claim for breach of contract because "the Complaint and its Exhibits demonstrate that that Plaintiffs have failed to fulfill their obligations regarding the Guaranteed Performance, the fulfillment of which is a condition precedent to IH and IPH's obligation to pay $89 million." Motion to Dismiss at 5. IH and IPH argued that the

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[3] The "Company" is defined as IH in the first paragraph of the License Agreement.

[4] Of note, the Proposed Second Amendment also stated that "[e]xcept as expressly provided herein, the [License] Agreement remains in full force and effect and is ratified and confirmed by the parties to this Amendment." Proposed Second Amendment § 2.

Proposed Second Amendment and its modification of the Guaranteed Performance timing requirements are unenforceable and, therefore, Plaintiffs did not demonstrate Guaranteed Performance was achieved within the time required under the License Agreement. *Id.* at 5-6. IH and IPH also argued that "even if it the [] Second Amendment was effective, it required that the Guaranteed Performance Test be conducted using a 'Six Cylinder Unit,'" which is not what Plaintiffs alleged in the Complaint to have tested (nor could they have so alleged). *Id.* at 6.

In opposing the Motion to Dismiss, Plaintiffs did not claim that they conducted their testing in Florida using the Six Cylinder Unit and they did not dispute IH and IPH's argument that they could not claim to have been testing the Six Cylinder Unit in Florida. Opposition to Motion to Dismiss ("Opposition"), at 5 [D.E. 18]. All Plaintiffs could argue was that the requirement in the Proposed Second Amendment of testing a Six Cylinder Unit went "beyond the four corners of the Complaint." *Id*.

On July 19, 2016, the Court entered an order dismissing Counts II, V, VII, and VIII of the Complaint ([D.E. 24]) (the "Order"). With respect to Count I, the Court reasoned that based upon the information available in the Complaint, the Proposed Second Amendment was valid and enforceable. Order at 8. As to IH and IPH's argument that Guaranteed Performance under the Proposed Second Amendment required testing of the Six Cylinder Unit, the Court found that there was "insufficient information in the record to determine whether the six-cylinder unit is simply another name for the E-Cat Unit" referenced in the License Agreement. *Id*. Accordingly, the Court declined to dismiss Count I. *Id*. at 8-9.

The AACT

Defendants filed the AACT on August 11, 2016. [D.E. 30]. The AACT makes clear that "[t]he Six Cylinder Unit in the Proposed Second Amendment is separate and distinct from the E-

Cat Unit or Plant as referenced in the License Agreement, the First Amendment, and the Complaint." AACT ¶ 62 (page 11). To eliminate any doubt, Defendants explained that the "Six Cylinder Unit remains in North Carolina" (and hence could not have been tested by Plaintiffs in Florida) *and* attached photographs to the AACT that accurately depict the Six Cylinder Unit. *Id*. ¶ 62, Ex. 3. In addressing paragraph 71 of the Complaint, Defendants further explained: "Defendants admit that the E-Cat Unit was operated in Florida during a period in 2015 and 2016. As reflected in Rossi's internet blog postings at the time, that Unit was the Plant – *i.e.*, the 1 MW E-Cat – which is described in Exhibit C to the License Agreement. AACT ¶ 71 (page 13).

LEGAL STANDARD

Rule 12(c) governs motions for judgment on the pleadings: "After the pleadings are closed—but early enough not to delay trial—a party may move for judgment on the pleadings." "Judgment on the pleadings is appropriate where there are no material facts in dispute and the moving party is entitled to judgment as a matter of law." *Esys Latin America, Inc. v. Intel Corp*., 925 F. Supp. 2d 1306, 1309 (S.D. Fla. 2013) (citation and internal quotation marks omitted). Judgment on the pleadings allows a claim to be resolved where "a judgment on the merits can be achieved by focusing on the content of *competing* pleadings." *Perez v. Wells Fargo N.A*., 774 F.3d 1329, 1336 (11th Cir. 2014) (citation and internal quotation marks omitted).[5]

"Rule 7(a) defines 'pleadings' to include both the complaint and the answer, and Rule 10(c) provides that '[a] copy of any written instrument attached to a pleading is part thereof for all purposes.'" *Horsley v. Feldt*, 304 F.3d 1125, 1134 (11th Cir. 2002) (quoting Rule 10(c)); *see*

[5] "When the exhibits contradict the general and conclusory allegations of the pleading, the exhibits govern." *Geter v. Galardi South Enters., Inc.*, 43 F. Supp. 3d 1322, 1328 (S.D. Fla. 2014).

also id. (an exhibit attached to an answer can be considered in connection with a motion for judgment on the pleadings if it is central to a claim and its authenticity is not disputed).

This Court may enter judgment on the pleadings on a breach of contract claim. *See Esys Latin America, Inc*., 925 F. Supp. 2d at 1314. Construction of a contract is a question of law for the courts to determine where the language in the contract is clear and susceptible of only one interpretation. *Id*. at 1311. To prove a breach of contract claim, Plaintiffs must establish performance on their part of the contractual obligations imposed upon them by the License Agreement. *See Marshall Const., Ltd. v. Coastal Sheet Metal & Roofing, Inc*., 569 So.2d 845, 848 (Fla. Dist. Ct. App. 1990). In addition, the conditions precedent to IH and IPH's obligation to perform under the License Agreement must occur before Plaintiffs may claim that either has breached the License Agreement and before Plaintiffs have a right to demand performance. *See Reilly v. Reilly*, 94 So.3d 693, 697 (Fla. Dist. Ct. App. 2012).

ARGUMENT

As reflected in the Court's Order, Count I of the Complaint can survive dismissal only if the Proposed Second Amendment was effective and Plaintiffs satisfied the requirements of the Proposed Second Amendment. Order at 7. *See also id*. at 10 (recognizing that if "the six-cylinder unit is distinct from the E-Cat Unit," then "Plaintiffs may not have a cause of action for breach-of-contract pursuant to the License Agreement if it is determined they did not fulfill conditions precedent to fulfillment of the contract").

Particularly in light of the AACT, there can be no dispute – and in fact Plaintiffs have not disputed, including in their Opposition to the Motion to Dismiss – that (1) the Six Cylinder Unit identified in the Proposed Second Amendment is separate and distinct from the Plant/1MW E-Cat Unit referenced in the Complaint, and (2) the E-Cat Unit Plaintiffs claim to have tested in

Florida was not the Six Cylinder Unit (which remains in North Carolina). *See* AACT ¶¶ 62, 71 (pages 11, 13). Indeed, Exhibit C to the License Agreement includes a photograph and description of the 1MW E-Cat Unit that Plaintiffs operated in Florida for their purported Guaranteed Performance. Exhibit 3 to the AACT includes 3 photographs of the Six Cylinder Unit. The photographs show that these devices are undeniably different.[6]

The sole conclusion that can be drawn from these facts is that Plaintiffs did not fulfill, and could not have fulfilled, the conditions precedent in the Proposed Second Amendment to any obligation by IH or IPH to pay them $89 million under the License Agreement. As the Proposed Second Amendment makes crystal clear, that payment was:

> contingent upon a six cylinder Hot Cat unit reasonably acceptable to the Company (the "Six Cylinder Unit") operating at the same level (or better) at which Validation was achieved for a period of 350 days (even if not consecutive) within a 400 day period commencing on the date agreed to in writing between the Parties ("Guaranteed Performance").

Id. (emphasis added). As a consequence, Count I must be dismissed because Plaintiffs have not satisfied the conditions precedent required to trigger IH and IPH's obligation to perform under the License Agreement. *See Marshal Const. Ltd.*, 569 So.2d at 848. IH and IPH are therefore entitled to a judgment on the pleadings in their favor as to Count I.

CONCLUSION

For the foregoing reasons, IH and IPH respectfully request that this Court enter an order dismissing Count I as a matter of law and to strike certain allegations in the Complaint that are rendered immaterial if Plaintiffs' Count I breach of contract claim is dismissed.

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[6] Also, the Complaint never references the Six Cylinder Unit. Instead, every time the Complaint references the device tested in relation to the purported Guaranteed Performance, it references the E-Cat Unit/Plant. *See, e.g.*, Compl. ¶¶ 18, 59-61, 64, 66-67, 71-73, 79.

Dated: September 2, 2016

Respectfully submitted,

/s/ Christopher R.J. Pace

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on September 2, 2016, 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/ Christopher R. J. Pace
Christopher R.J. Pace