UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 1:16-CV-21199-CMA/O'Sullivan

ANDREA ROSSI, *et al.*,

Plaintiffs,

v.

THOMAS DARDEN, *et al.*,

Defendants,
_____/

PLAINTIFFS' MOTION FOR RULE 11 SANCTIONS

Plaintiffs, Andrea Rossi and Leonardo Corporation ("Plaintiffs"), by and through undersigned counsel, hereby move this Court for sanctions pursuant to Rule 11, Fed. R. Civ. P., and §57.105, Florida Statutes, against Defendants, Industrial Heat, LLC, IPH International, B.V., Thomas Darden, John T. Vaughn, and Cherokee Investment Partners, LLC (collectively, "Defendants") and their counsel. In support of this Motion, Plaintiffs state as follows:

The gravamen of the underlying case is that Plaintiffs entered into a written, signed, and valid contract for the licensing of certain intellectual property for which Defendants now refuse to pay. Defendants have denied allegations in the Complaint which they know to be true and have brought a number of frivolous claims which lack any basis in law or fact and that are directly controverted by the evidence immediately available to Defendants and in their possession. Specifically, Defendants:

- deny the fact that the test being undertaken in Doral, Florida by Engineer Fabio Penon was the "Guaranteed Performance Test" contemplated in paragraph 5 of the License Agreement

including amendments thereto, despite their subject matter expert's and licensed electrical contractor's testimony to the contrary.

- claim that they were unable to replicate any of Plaintiffs' claimed E-Cat testing results "or otherwise generate measurable excess energy," squarely contradicts Defendants' sworn claims to the contrary in their WIPO Patent Application number WO 2015/127263 A2 filed on August 27, 2015;
- assert that Plaintiffs wrongfully provided or disclosed, without prior consent and without a non-disclosure agreement, E-Cat fuel samples or information to scientists for study and publication, while in possession of written evidence that directly proves otherwise;
- maintain that Plaintiffs "breached the license agreement [by]…failing to report and pay taxes on payments/revenue made under the License Agreement," while being fully advised that there is neither a legal or factual basis for such; and

Rather than presenting viable defenses to their failure to abide by the terms of their agreement, Defendants attempt to mislead the Court and deflect this Court's attention from Defendants' wrongdoing in an effort to intentionally increase Plaintiffs' costs of litigation and to confuse the issues before the Court. Sanctions are appropriate.

MEMORANDUM OF LAW

I. Rule 11 Penalizes Parties and Counsel Who Advance Factual Contentions That Have No Evidentiary Support Formed Without Reasonable Inquiry.

Rule 11(b) of the Federal Rules of Civil Procedure states, in pertinent part, that:

> By presenting to the court a pleading, written motion, or other paper—whether by signing, filing, submitting, or later advocating it—an attorney or unrepresented party certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:

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> (1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation;
>
> (2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law; [and]
>
> (3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery….

Fed. R. Civ. P. 11(b) (emphasis supplied).

Rule 11 requires district courts to sanction attorneys and the parties they represent when they prosecute baseless claims. *Pelletier v. Zweifel*, 921 F.2d 1465, 1469 (11th Cir. 1991). Rule 11 imposes an affirmative duty on counsel to make "some pre-filing inquiry into both the facts and the law" so that counsel can be in a position to certify that a complaint is well grounded in both fact and law. *See Worldwide Primates, Inc. v. McGreal*, 87 F.3d 1252, 1254 (11th Cir. 1996); *Access 4 All, Inc. v. Casa Marina Owner, LLC*, 458 F.Supp.2d 1359, 1364 (S.D. Fla. 2006); *Universal Communication Systems, Inc. v. Turner Broadcasting System, Inc*., 2005 WL 3956648, at *1 (S.D. Fla. August 29, 2005).

Rule 11 sanctions are proper when a party files a pleading that has no reasonable factual basis or a party files a pleading in bad faith for an improper purpose. *Worldwide Primates*, 87 F.3d at 1254; *Pelletier*, 921 F.2d at 1514; *Universal Communications*, 2005 WL 3956648 at *1. Both prongs are met here, as the Defendants' assertions have no reasonable factual basis and were clearly filed for an improper purpose as discussed more fully below.

II. Sanctions Are Warranted Under Florida Statute §57.105.

Similarly, "[t]he purpose of § 57.105 is to discourage baseless claims, stonewall defenses and sham appeals in civil litigation by placing a price tag through attorney's fees awards on losing

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parties who engage in these activities." *Klayman v. Judicial Watch, Inc.*, 2015 US App. LEXIS 23022 * (11th Cir. Fla. Feb. 17, 2015); *citing Schwartz v. Million Air, Inc.*, 341 F.3d 1220, 1227 (11th Cir. 2003) (quotation omitted) (deciding a case under a previous version of §57.105); *see also Wendy's of N.E. Fla., Inc. v. Vandergriff*, 865 So.2d 520, 523 (Fla. Dist. Ct. App. 2003) (stating that, after § 57.105 was amended in 1999, "the central purpose of §57.105 is, and always has been, to deter meritless filings"). Florida Statute §57.105 states, in relevant part, that:

> At any time in any civil proceeding or action in which the moving party proves by a preponderance of the evidence that any action taken by the opposing party, **including, but not limited to, the filing of any pleading or part thereof**, the assertion of or response to any discovery demand, the assertion of any claim or defense, or the response to any request by any other party, was taken primarily for the purpose of unreasonable delay, the court shall award damages to the moving party for its reasonable expenses incurred in obtaining the order, which may include attorney's fees, and other loss resulting from the improper delay.

Fla. Stat. §57.105(2) (2016)(emphasis supplied). For the reasons set forth below, the imposition of sanctions against the Defendants is proper and required pursuant to both Rule 11, Fed. R. Civ. P. and §57.105, Florida Statute.

III. Defendants' Claims Are Frivolous and Brought for an Improper Purpose.

In the Eleventh Circuit, a court confronted with a motion for Rule 11 sanctions must first determine whether the party's claims are objectively frivolous—in view of the facts or law—and then, if they are, whether the person who signed the pleadings should have been aware that they were frivolous; that is, whether he would have been aware that the claims are frivolous had he made a reasonable inquiry. *Id.* If the party failed to make a reasonable inquiry, then the court must impose sanctions despite even the party's good-faith belief that the claims were sound. *Footman v. Cheung*, 139 Fed. Appx. 144, 146 (11th Cir. 2005), citing *Worldwide Primates*, 87

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283 Catalonia Avenue, Suite 200, Coral Gables, Florida 33134 • (305) 377-0086

F.3d at 1254. Moreover, Rule 11 sanctions should be imposed when a party pursues litigation in bad faith or for an improper purpose. *See, e.g., Pelletier*, 921 F.2d at 1514, 1517-18; *Universal Communications*, 2005 WL 39956648 at *2-3. Litigation is pursued for an improper purpose when the party filing an action knows the action is frivolous but pursues the action to seek redress for injuries it has been unable to recover for in prior actions. *See Pelletier*, 921 F.2d at 1514; *Universal Communications*, 2005 WL 3956648 at * 3 (granting sanctions where plaintiffs filed complaint for the purpose of exerting political and business pressures upon a defendant in another lawsuit, and to obtain discovery it had been denied in another lawsuit).

Certain of Defendants' claims lack any good-faith basis in law or fact, are not supported by the facts available to Defendants, and are not supported by the law. Accordingly, the Court must impose sanctions on Defendants for wasting the Court and Plaintiffs' time and resources.

A. Defendants' Claim That They Could Not Replicate the E-Cat Results Contradicts the Facts to Which Defendants Have Sworn.

Defendants' claim that they were unable to replicate any of Plaintiffs' claimed E-Cat testing results "or otherwise generate measurable excess energy," Defs.' Third Amended Answer ¶¶ 9, 65, 67 and 96, squarely contradicts Defendants' claims to the contrary in their WIPO Patent Application number WO 2015/127263 A2 filed on August 27, 2015. *See* Ex. A. In Table 7 of the patent application, IH represented that it was in fact able to achieve measurable levels of excess energy during a [16]-day test:

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Table 7

File No.	Consumption (W)	Radiation (W)	Convection (W)	TOT. (W)	Rods (W)	Joule heating (W)	COP	Net Production (W)
1	815.86	1740.98	387.34	2128.32	307.98	37.77	3.13	1658.21
2	799.84	1733.30	386.46	2119.76	307.98	36.98	3.18	1664.88
3	791.48	1724.95	385.23	2110.18	307.98	36.49	3.20	1663.17
4	790.69	1729.30	385.49	2114.79	307.98	36.41	3.21	1668.49
5	785.79	1676.89	381.43	2058.32	307.98	36.13	3.16	1616.64
6	923.71	2381.64	427.64	2809.28	352.82	42.43	3.59	2280.82
7	921.91	2416.68	429.64	2846.32	352.82	42.18	3.64	2319.41
8	918.24	2407.26	429.16	2836.42	352.82	41.89	3.64	2312.89
9	917.90	2392.29	427.82	2820.11	352.82	41.75	3.62	2296.78
10	913.40	2348.43	425.64	2774.07	352.82	41.93	3.59	2255.42
11	904.77	2373.08	427.23	2800.31	352.82	41.52	3.65	2289.88
12	906.98	2397.95	428.56	2826.51	352.82	41.60	3.67	2313.95
13	910.47	2401.80	429.87	2831.67	352.82	41.62	3.67	2315.64
14	908.13	2394.93	428.70	2823.63	352.82	41.55	3.67	2309.87
15	905.01	2451.10	432.02	2883.12	352.82	41.46	3.75	2372.39
16	906.31	2454.71	431.47	2886.18	352.82	41.25	3.74	2373.94

In Figure 18D, Defendants provide a chart measuring COP production over the 16-day period:

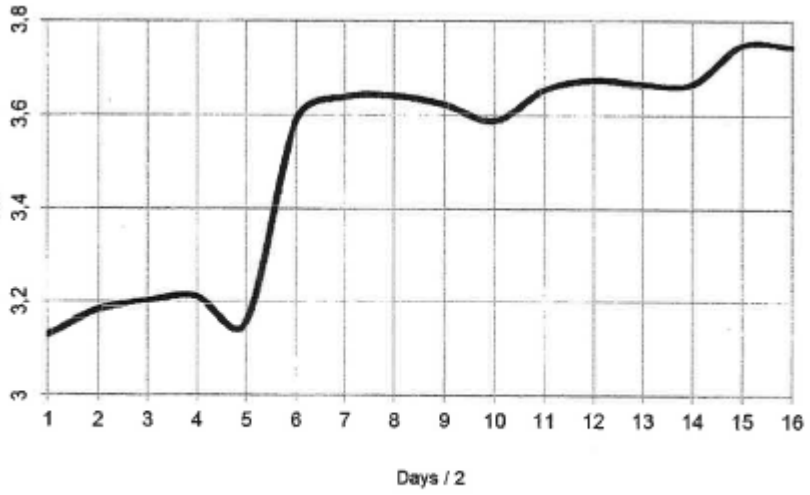

FIG. 18D

Defendants go on to clarify in the application that the "COP values quoted here refer only to the performance of the reactor running at the capacity selected, not at its maximum potential, any evaluation of which lies beyond the purposes for which this test was designed" and that "it is not known what are [*sic*] the limits of the current technology are, in terms of performance and life span of the charges." Defs.' Patent App. at 31. In the Abstract to the Application, Defendants

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represent that the amount of energy produced by the device "is far more than can be obtained from any known chemical sources in the small reactor volume." *Id*. at 1.

Reading in conjunction Defendants' counterclaim allegation that they were never able to achieve measurable levels of excess energy with their representations that they did achieve measurable energy in excess of what "can be obtained from any known chemical sources in the small reactor volume" lead to two possible conclusions: (1) Defendants' counterclaim allegation is frivolous or (2) Defendants' perjured themselves when they filed their sworn patent application. Regardless of whether Defendants perjured themselves in filing the patent application or misrepresented the facts to this Court, such actions are sanctionable.

Additionally, Defendants affirmatively represented to their investors, on numerous occasions, that they had independently verified measurable excess energy production. At the same time Defendants were allegedly failing to "generate any measurable excess energy", they were touting the excess energy recorded by their own engineer during independent testing as well as during the Validation Test. In fact, Engineer Thomas B. Dameron, III, the Defendants' subject matter expert and sole engineer, testified as follows:

Q. Again, let me tell you the problem that I'm having, and I'm hoping you can help me resolve.

Industrial Heat has represented that they replicated a test on their own, which resulted in a COP of 1.3.

They have also made an affirmative representation in this case that they have never been able on their own to replicate any measurable excess heat, any, whether it's reliable or not reliable.

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Those two statements to me seem inconsistent, and I'm asking you, sir, if you have knowledge to which one, if either, are correct?

MR. PACE: Objection to form.

A. I can't say that we never had a result that was -- let's see if I can say this right -- we probably had results greater than one, 1.3 might be an answer. I think that reliably, repeatedly, repeating those results has not happened. So at some point in time there could have been a result of 1.3 that we thought was good.

Deposition of Thomas B. Dameron, III, Dec. 1, 2016, pg. 114-15.

Engineer Dameron further testified that:

Q. Sir, you said that you had done tests where the COP was greater than one, right?

A. Correct.

Q. That means that you were able to measure the coefficient of performance, and your result was presumptively a measurement that you took and calculated, correct?

A. Right.

Q. And so if one -- correct me if I'm wrong, one means the amount of energy going in or amount of power going in is the same amount that comes out, correct?

A. Right.

Deposition of Thomas B. Dameron, III, Dec. 1, 2016, pg. 114-15.

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B. Defendants' Claim That Plaintiffs Disclosed E-Cat IP "without prior consent" Lacks Factual Basis.

Defendants assert that Plaintiffs wrongfully provided or disclosed, without prior consent and without a non-disclosure agreement, E-Cat fuel samples or information to scientists for study and publication. (DE 78, ¶107-08).

Contrary to the Defendants allegation in their Amended Counterclaim, Plaintiffs did not provide samples of the E-Cat fuel to the scientists who prepared the Lugano Report. As the Lugano Report itself reads, the scientists themselves took samples of the fuel both before and after the experimental E-Cat run in order to analyze the efficacy and accuracy of the E-Cat. Lugano Report at 1-2. What's more, the fuel composition was detailed in Plaintiffs' patent application number 13/420,109, which was public at the time that the Lugano Report was drafted.

In addition, Defendants' allegation that they did not consent to the disclosure of E-Cat information to scientist Norman Cook (DE 78, ¶107(b)), is contradicted by evidence in Defendants' own possession. On February 5, 2015, Rossi emailed Defendants Darden, Vaughn, and other IH and/or IPH representatives informing them that Professor Cook wanted to publish a report on the theoretical underpinnings of the E-Cat, and that the paper would form part of Defendants' intellectual property. *See* Ex. B. Rossi confirmed to Defendants that they would have the opportunity to review the article before its publication. *Id*.

Again, on March 17, 2015, Rossi emailed Defendants Darden, Vaughn, and other IH and/or IPH representatives the final version of the Cook report which incorporated edits that IH had itself required Rossi to make. *See* Ex. C. Defendants had the opportunity to, and did, review the Cook Report's contents before its publication. Defendants approved the contents of the Cook Report, and knew that it was going to be published – with their consent – in the Journal of Physics. *Id*.

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Additionally, on April 9, 2015, Daniel Pike, an affiliate of IH and IPH, informed Rossi and Darden that the Cook Report had been translated to Chinese. *See* Ex. D. Darden actually congratulated Rossi on the translation, exclaiming: "This is very exciting to think about. Now about 1.5 billion more people can read your paper. What a great world it is." *Id*.

The evidence available to Defendants makes clear that Plaintiff Rossi notified Defendants of his desire to participate in the Cook Report, Defendants did not object to or otherwise restrict Rossi's participation, and Defendants reviewed and edited the Report before it was ever published. Defendants may not conveniently ignore these facts in order to bolster their purported claims against Plaintiff, and must face sanctions for so doing.

Defendants' allegation that Plaintiffs made public comments about the E-Cat fuel sample on the internet, without prior consent, is likewise meritless. To the extent that Plaintiff disclosed any E-Cat fuel information on the internet, that information was a matter of public record available to anyone with an inquiring mind – including Defendants when they brought this meritless claim. Plaintiff did not disclose any confidential, proprietary information belonging to Defendants on the internet or elsewhere. Defendants failed to attach any exhibit showing that Plaintiffs ever made any such comments, and cannot do so because such comments do not exist. This claim is yet another fabrication designed by Defendants to distract this Court from Defendants' breach of the License Agreement.

C. Defendants' Defense of Antecedent Breach of Contract Based on Purportedly Unpaid Taxes Is Meritless, and Wholly Unsupported by Fact or Law.

Next, Defendants' Fourth Affirmative Defense, as set forth in Defendants' Third Amended Answer, Affirmative Defenses, Counterclaim and Third-Party Claims frivolously alleges, *inter alia,* that Plaintiffs "breached the license agreement [by]…failing to report and pay taxes on payments/revenue made under the License Agreement." (DE 78, ¶133). Defendants claim that

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sections 12(a) and 13.5 of the License Agreement require Plaintiffs to pay taxes related to the License Agreement and to keep the intellectual property free and clear of liens, (DE 78, ¶¶129-30), and that "on information and belief" Plaintiffs failed to pay taxes. (DE 78, ¶132). Regardless of Defendants' belief concerning Plaintiffs' obligations to pay federal income taxes, there is no basis in law or fact to assert that a federal tax lien could attach to the transferred property.

To be clear, Defendants knew, or should have known, that there is no factual basis to support Defendants' claim that Plaintiffs have failed to report and/or pay any appropriate taxes. This naked allegation is without factual or evidentiary support and is alleged for the sole purpose of harassing and intimidating the Plaintiffs. Moreover, even if such allegations were true, which they are not, such allegations would not give rise to a material breach of the License Agreement which could excuse their performance under such Agreement.

The United States Supreme Court has made abundantly clear that a federal tax lien does not "extend beyond the property interests held by the delinquent taxpayer." *United States v. Rodgers*, 461 U.S. 677, 690–91 (1982). The lien attaches to property that the taxpayer owns at the time the tax liability is assessed and to property acquired thereafter. *United States v. Barnes*, 509 F. App'x 837, 840 (11th Cir. 2012). A tax lien is assessed "at the time liability is determined." *In re Garcia*, No. 01-945-CIV, 2002 WL 31409580, at *4 (S.D. Fla. Sept. 6, 2002). Accordingly, "a tax lien cannot attach to any property interest that was transferred before the assessment." *Coutant v. U.S., Dep't of Treasury, I.R.S.*, No. 00-14163CV, 2002 WL 34382737, at *4 (S.D. Fla. Feb. 27, 2002).

Here, Defendants allege that Plaintiffs granted Defendants a perpetual license for the E-Cat intellectual property underlying the License Agreement to Defendants no later than June 9, 2013. Plaintiffs received payment for the intellectual property on the same date. Plaintiffs would

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have been required to report any reportable portion of that revenue by April 15, 2014 at the earliest. According, the earliest that the United States Government could have assessed any tax liability on those proceeds would have been on April 15, 2014 assuming the taxpayer had not requested an extension. By April 15, 2014, Defendants have alleged that Plaintiffs had already granted an absolute perpetual license to Defendants for the licensed territory. Accordingly, no federal lien could ever attach to the licensed intellectual property granted to Defendants. *See Coutant*, 2002 WL 34382737, at *4. Moreover, the federal government has not assessed any liability related to income received from the sale under the License Agreement nor sought to attach any lien. As such, not only is Defendants' claim without factual and/or legal support, even if it were actionable, the claim would not be ripe.

Defendants attempt to bolster their frivolous claim with scandalous, impertinent, and irrelevant assertions that Mr. Rossi "had taxation issues with the Italian government," and that he had purportedly faced criminal charges in Italy. (DE 78, ¶126). These assertions have no relevance to the claims and issues underlying this case and clearly demonstrate the Defendants improper purpose in asserting this claim solely to embarrass, harass, and prejudice Plaintiffs.

D. Defendants' Deny Plaintiffs Allegation That the Testing of the E-Cat in Doral, Florida Was the Guaranteed Performance Test Pursuant to the License Agreement For the Sole Purpose of Increasing the Cost of Litigation

In their Complaint, Plaintiffs allege that "[u]nder the supervision of the ERV, the Guaranteed Performance Test was commenced on or about February 19, 2015…" (DE 1, ¶66). Notwithstanding overwhelming evidence to the contrary, including certain party admissions, Defendants continue to deny the fact that the test being undertaken in Doral, Florida by Engineer Fabio Penon was the "Guaranteed Performance Test" contemplated in paragraph 5 of the License Agreement including amendments thereto. Specifically, Defendants have alleged in their Third

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Amended Answer that "Defendants deny that the test referenced in Paragraph 66 was the Guaranteed Performance to be performed under the License Agreement." (DE 78, ¶66). Such denial is made in bad faith and for the sole purpose of increasing the costs of litigation in this matter.

Certainly, as of December 1, 2016, if not before, Defendants and their counsel knew that the test performed by Engineer Penon in Doral, Florida was in fact the Guaranteed Performance Test undertaken in accordance with the License Agreement. On December 1, 2016, Defendants sole engineer and subject matter expert, Engineer Thomas B. Dameron, III, testified upon inquiry that he knew that the test undertaken in Doral, Florida was the Guaranteed Performance Test, stating as follows:

Q. So sitting here today, sir, you knew that the plant was being sent to Doral, Florida for the guaranteed performance test, correct?
MR. PACE: Object to the form of the question.
A. Yes.
Q. You also knew that Engineer Penon was going to be the ERV for that test?
MR. PACE: Objection to the form of the question.
A. Correct.

Similarly, Mr. Barry West, the licensed electrical contractor hired by Defendants to be present in Doral, Florida during the Guaranteed Performance Test acknowledged that he knew that the results of the test would be determinative of the payment to Plaintiffs pursuant to the License Agreement. Specifically, Mr. West testified that:

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283 Catalonia Avenue, Suite 200, Coral Gables, Florida 33134 • (305) 377-0086

Q. Did you have an understanding as to whether or not positive results from the test in Doral, Florida would result in a large payment to be made to the Leonardo Corporation and Dr. Rossi?
A. Yeah, I found out about that.
Q. When did you find out about that?
A. A little late in the game there. I didn't know what the total contract amount was.
Q. What did you find out?
A. I found out that it was a hundred million dollars contract.

In light of the documents produced by Defendants specifically contradicting any allegation that the test in Doral, Florida was anything other than the Guaranteed Performance Test and the testimony of Defendants own representatives acknowledging that the Doral, Florida test was the "Guaranteed Performance" test, there can be no question that both Defendants and their counsel know that their denial of such allegation is frivolous. As required by Rule 11, Fed. R. Civ. P. and Florida Statute §57.105, Defendants and their counsel have been afforded ample opportunity to correct their pleadings, but have failed and/or refused to do so. Such failure or refusal warrants the imposition of sanctions against both Defendants and their counsel.

WHEREFORE, Plaintiffs respectfully request that this Court enter an Order imposing sanctions upon Defendants Industrial Heat, LLC., IPH International, B.V., Thomas Darden, John T. Vaughn, Cherokee Investment Partners, LLC., and their counsel by (a) striking the offensive pleadings; (b) awarding Plaintiffs their reasonable attorneys' fees and costs incurred in defending against such frivolous claims, defenses and pleadings; (c) awarding Plaintiffs their reasonable attorneys' fees and costs incurred in litigating this motion; and (d) granting such other and further relief the Court deems just and proper.

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200 South Andrews Avenue, Suite 600, Fort Lauderdale, Florida 33301 • (954) 566-7117
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CERTIFICATION OF COMPLIANCE WITH S.D. LOCAL RULE 7.1(a)(3)

The undersigned counsel hereby certifies that, pursuant to Local Rule 7.1(a)(3), he has conferred with counsel for Defendant Industrial Heat, LLC, and IPH International, B.V. in a good faith effort to resolve the issues, but have been unable to resolve the issues raised in this Motion.

Dated: January 10, 2017.

Respectfully submitted,

/s/ John W. Annesser
John W. Annesser, Esq. (FBN 98233)
jannesser@pbyalaw.com
Brian Chaiken, Esq. (FBN 118060)
bchaiken@pbyalaw.com
D. Porpoise Evans, Esq. (FBN 576883)
pevans@pbyalaw.com
PERLMAN, BAJANDAS, YEVOLI & ALBRIGHT, P.L.
283 Catalonia Avenue, Suite 200
Coral Gables, FL 33134
Telephone: 305.377.0086
Facsimile: 305.377.0781
Attorneys for Plaintiffs, Andrea Rossi and Leonardo Corporation

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served in the manner specified below on January 10, 2017, on all counsel or parties of record on the attached Service List.

/s/John W. Annesser
John W. Annesser

SERVICE LIST

Christopher R.J. Pace, Esq. (FBN 721166
cpace@jonesday.com
Christopher M. Lomax, Esq. (FBN 56220)
clomax@jonesday.com
Christina T. Mastrucci, Esq. (FBN 113013)
cmastrucci@jonesday.com
Erika S. Handelson, Esq. (FBN 91133)
ehandelson@jonesday.com
JONES DAY
600 Brickell Avenue, Suite 3300
Miami, FL 33131
Telephone: 305.714.9700
Facsimile: 305.714.9799
Attorneys for Defendants, Darden, Vaughn, Industrial Heat, LLC, IPH Int'l B.V., and Cherokee Investment Partners, LLC

Service via: CM/ECF

Francisco J. León de la Barra, Esq. (FBN 105327)
fleon@acg-law.com
Fernando S. Arán, Esq. (FBN 349712)
faran@acg-law.com
ARÁN CORREA & GUARCH, P.A.
255 University Drive
Coral Gables, Florida 33134
Telephone: 305.665.3400
Facsimile: 305.665.2250
Attorneys for Third-Party Defendants, JMP, Johnson, and Bass

Service via: CM/ECF

Rodolfo Nuñez, Esq. (FBN 016950)
rnunez@acg-law.com
RODOLFO NUÑEZ, P.A.
255 University Drive
Coral Gables, Florida 33143
Telephone: 305.443.2440
Facsimile: 305.443.2334
Attorney for Third-Party Defendants, Fabiani and USQL

Service via: CM/ECF