**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.

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

Counter-Plaintiffs,

v.

ANDREA ROSSI and LEONARDO CORPORATION,

Counter-Defendants,

And

J.M. PRODUCTS, INC., et al.,

Third-Party Defendants.

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**PLAINTIFFS' MOTION FOR SANCTIONS FOR BAD FAITH LITIGATION CONDUCT**

Plaintiffs, Andrea Rossi and Leonardo Corporation, by and through their undersigned counsel, move the Court for the entry of sanctions against Defendants, Thomas Darden, Industrial Heat, LLC and IPH International B.V., (collectively "Defendants"), for engaging in bad faith

litigation conduct[1], including but not limited to striking their pleadings, and as grounds therefore state:

**Brief Introduction**

Defendants, through their agents, are tampering with witnesses and/or otherwise harassing individuals in abuse of the judicial process. Plaintiff, Dr. Andrea Rossi, may currently be under consideration by the Royal Swedish Academy of Sciences for a Nobel Prize related to his E-Cat technology – the same technology that is the subject matter of the present lawsuit. Defendants in this case have known this fact for some time, even sharing this information with their investors/potential investors (*See* Ex. 1). During times relevant to the matters in this action, several professors from accredited universities throughout Europe, including Dr. Giuseppe Levi and Dr. Bo Hoistad, had previously tested Dr. Rossi's technology, and co-authored a report validating its efficacy (*See* Ex. 2, the "Lugano Report"). Defendants not only dispute the efficacy of the technology, but also, by extension, the Lugano Report – and this is a pivotal issue for Defendants' case. Defendants and/or their agents, including but not limited to Dewey Weaver and Uzi Sha (and upon information and belief, their purported attorney, Zalli Jaffe), have harassed, threatened and attempted to bribe these professors into withdrawing their support of the Lugano Report – all in an attempt to damage the reputation of Dr. Rossi, make less likely his ability to receive the prestigious Nobel Prize, and materially impact the evidence introduced in the present case. Such harassment and threats are abusive, made in bad faith, and are quite possibly criminal in nature. Plaintiffs request that this Motion be filed under seal pursuant to Local Rule 5.4, as further publicity regarding this matter may further harm Dr. Rossi's chances of receiving the Nobel Prize.

[1] It must be noted that this motion is directed solely at Defendants' and their agents. Plaintiffs do not allege or believe that Defendants' counsel in this matter had knowledge of, or otherwise participated in, any of the facts set forth herein.



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**Relevant Procedural History and Material Facts**

On April 5, 2016, Plaintiffs filed their Complaint in the above-styled action. The Complaint pertained, generally, to Andrea Rossi's invention of the low energy nuclear reactor popularly known as the "Energy Catalyzer" or "E-Cat", and the Defendants' failure to pay Plaintiffs Eighty Nine Million Dollars ($89,000,000.00) for the successful testing of the same pursuant to a License Agreement. Defendants' defenses and counterclaims are premised on their claim that the E-Cat technology does not work, and that Plaintiffs have provided no proof that it does. The Lugano Report is indisputably just the sort of proof Defendants disclaim.

During the course of validating and testing the E-Cat, in or around March 2014, a number of independent professors—Giuseppe Levi, Evelyn Foschi, Bo Hoistad and Hanno Essen (the "Professors")—independently tested the E-Cat in Lugano, Switzerland. The Professors then published a report on October 6, 2014 detailing the results. The report, titled "Observation of abundant heat production from a reactor device and of isotopic changes in the fuel" ("Lugano Report"), concludes that "the performance of the E-Cat reactor is remarkable" and produces heat energy "compatible with nuclear transformations…" (*See* Ex. 2, the "Lugano Report", p. 30). The Lugano Report, and its distinguished group of Professors/signatories, provides tremendous evidence directly in opposition to Defendants' defenses and counterclaims.

Defendants, knowing full well the problems that the Lugano Report and its Professors pose to their case, have engaged in efforts to discredit it and them. On October 14, 2016, the Defendants propounded their Second Request for Production to Plaintiffs wherein Defendants requested "[a]ll Communications between [Plaintiffs] and "Giuseppe Levi, Evelyn Foschi, Torbjorn Hartman, Bo Hoistad, Roland Pettersson, Lars Tegner and/or Hanno Essen." Plaintiffs objected to the request, in part, on the grounds that



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> "Defendants seek only to harass and intimidate Plaintiffs through this request as Defendants know that some, or all, of the above individuals participate in the nomination process for the Nobel Prize and their involvement in this matter could jeopardize any consideration Plaintiffs may be receiving for such nomination."

As a result of Plaintiffs' objection, Judge O'Sullivan conducted a discovery hearing. During the hearing, the Court limited discovery with respect to the Professors, expressly stating that:

> Okay. I'm only going to allow you to get the communications regarding the E-Cat testing, not all communications between them. I find that it's not relevant, there's no showing that they were anything but independent. You know, in the other area you're able to come to me and show me that Rossi was – you know, this company was actually Rossi. Here, you know, you're talking about five people who are, you know, respected people. Even in your own allegations you indicate that they're respected, whatever, people, with institutions, prominent institutions in other countries.
>
> […]
>
> If you're ever going to subpoena these people, let them know ahead of time.

(*See* Ex. 3, Jan. 10, 2017 Transcript, pp. 25-27).

Plaintiffs have only recently learned that, throughout this pending litigation, the Defendants and/or their agents have repeatedly harassed the Professors in an effort to (1) jeopardize Dr. Rossi's Nobel Prize nomination; (2) to materially impact the merits of this action; and to (3) coerce the Professors to withdraw their conclusions formalized in the Lugano Report.

I. Coercion of Dr. Giuseppe Levi

During the course of the last year, Dr. Giuseppe Levi has received numerous communications from known representatives of Defendants[2]. These representatives, offered to bribe Dr. Levi to withdraw his support of the Lugano Report. Additional details and additional

[2] Dr. Levi disclosed this information to Dr. Rossi and undersigned counsel for the first time in mid-February 2017.



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instances of such harassment of Dr. Levi are provided in the Declaration of Dr. Giuseppe Levi (Ex. 4). For example, Dr. Levi declares:

> On four (4) occasions, certain individuals from Israel have contacted me directly or indirectly to speak to me about the Lugano Report. It is my conclusion that their intention was to offer me money if I would agree to recant my support therefor.

*See* Ex. 4, ¶4. Dr. Levi's conclusion is grounded in fact and common sense. He further explains that he was approached by individuals who first made contact through his Rabbi (Ex. 4, ¶5), that the individuals claimed they were connected to large investors who were planning to research new energy sources for Israel, and that "big earnings" could be made. (Ex. 4, ¶6). The individual promised to pay Dr. Levi money for cooperating, and wanted him to urgently write a report regarding how to measure the energy output of a "Lugano-type" reactor. (Ex. 4, ¶8). The individual asked numerous questions about Dr. Levi's relationship with Dr. Andrea Rossi, and, it was Dr. Levi's belief that he was being offered money to recant his support for the results contained in the Lugano Report. (Ex. 4, ¶8). Finally, Dr. Levi confirmed that he refused the bribe, and maintains his full support of the results contained in the Lugano Report. (Ex. 4, ¶9)

Notably, as set forth in the Declaration of Dr. Giuseppe Levi, one individual who repeatedly harassed and attempted to bribe Dr. Levi is Uzi Sha. Defendant Darden had provided Uzi Sha personal contact information for individuals associated with this litigation on at least one occasion. (See Ex. 5.) On information and belief, Defendant Darden and/or the other Defendants similarly provided Uzi Sha with Dr. Levi's name and/or personal information, and Uzi Sha's harassment of Dr. Levi has been undertaken on behalf, and under the direction, of the Defendants.

Relatedly, in the same e-mail in which Darden communicates with Uzi Sha, he also communicates with an individual named Zalli Jaffe. Defendants claim that communications with Zalli Jaffe fall under the attorney-client privilege, as they claim that Zalli Jaffe is an attorney in



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Israel who provided legal services to Defendants. Israel is not a territory covered by the License Agreement between the parties. In this matter Magistrate Judge O'Sullivan has ruled that at least one e-mail between Darden and Zalli Jaffe is protected by the attorney-client privilege[3]. Plaintiffs believe that Defendants are using the privilege as a shield to hide their wrongful and potentially illegal acts. However, based on Zalli's connection to Uzi Sha, and based on Sha's attempts to bribe Dr. Levi, Plaintiffs seek full transparency into (a) the relationships of Zalli and Sha to Defendants, (b) the nature of the work they were engaged to provide (whether it be legal work or otherwise) and (c) all other communications between them.

II. Threats to Dr. Bo Hoistad

On February 15, 2017, Defendants' agent, Dewey Weaver, sent Dr. Bo Hoistad a threatening e-mail, which, in essence, attempts to blackmail and/or otherwise coerce all the Professors into changing their opinions and conclusions (*See* Ex. 6). Weaver testified that he was tasked with the job, by Defendant Industrial Heat, to engage in some discussion with Professor Hoistad (*See* Ex. 7, pg. 239:11-17). Weaver's email to Professor Hoistad states:

> Bo - I hope this email finds you well. Mats gave an interview yesterday and stated that he had recently been in contact with the Uppsala team, sharing that your Ni-H focused replication efforts were ongoing. Mats also stated that the Uppsala team had no plans to revisit the Lugano report or discuss the increasingly controversial results from that test.
>
> We are in process of learning previously unknown facts about Andrea Rossi, his E-Cat research and test methodologies as part of the ongoing litigation effort. We have learned that the material test of Lugano reactor, with an XRD system at the University of Bologna, was conducted on the reactor plug, not a piece from the main reactor body. As you may know, the plug results came back 99% pure alumina and did not match the reactor body which was made from Durapot 810. Per Cotronics, the maker of the Durapot line, 810 is between 75% to 85% alumina cement (batch dependent). We have also learned that the reactor was painted with

[3] Based on this new information, separate and apart from the present motion, Plaintiffs now seek reconsideration of Magistrate O'Sullivan's prior ruling.



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> an off-white high temp paint and that information is not accurately reflected in the Lugano report as well.
>
> During our phone conversation last summer, you stated that Levi was forceful in controlling the specific Optris IR camera emissivity / transmissivity settings and that the Uppsala contingent left that decision up to him. More information will be coming out about this in the coming months and I wanted to give you and your team a heads-up regarding any possible impact this may have on the University and / or the involved scientist.
>
> Best regards,
> Dewey

(Emphasis added.) Weaver falsely represents to Dr. Hoistad that "we[4] are in the process of learning previously unknown facts about Andrea Rossi, his E-Cat research and test methodologies." Weaver made this representation knowing it was false – as of February 2017, there were no previously unknown facts, as Industrial Heat and Weaver were fully aware of all such facts at this time. *See* Ex. 7, pg. 248-250. Further, Weaver falsely represented that the reactor body was made from Durapot 810, as opposed to pure alumina. Weaver concludes his e-mail with the not-so-subtle threat, "I wanted to give you a heads-up regarding any possible impact this may have on the University and/or the involved scientist." The implication, of course, is that these new findings will damage the reputations of not only the Professors themselves, but also, significantly, the Universities at which they work.

Finally, Weaver testified that he had e-mail communications with Professor Hanno Essen, another of the Lugano Professors. As of the date of this filing, these e-mails have not been produced to Plaintiffs, despite requests for such. Plaintiffs suspect that Weaver has made similar threats to Professor Essen.

[4] Weaver uses the word "we" but never identifies who constitutes "we." Defendants have identified Weaver as one of their agents and have repeatedly claimed that many of Weaver's communications with Defendants' counsel are privileged.



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## Legal Standard

As the United States Supreme Court has recognized, the authority to sanction parties for bad faith litigation misconduct stems not only from the Federal Rules of Civil Procedure and the United States Code, but also from the Court's inherent power to effectively manage its affairs by punishing and deterring abuses of the judicial process. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43-45, 111 S. Ct. 2123, 115 L. Ed. 2d 27 (1991). The inherent power to sanction encompasses the power to dismiss an action, which is appropriately exercised particularly where a party "commits perjury or . . . doctors evidence" that "relates to the pivotal or 'linchpin' issue in the case." *Qantum Comms. Corp. v. Star Broadcasting, Inc.*, 473 F. Supp. 2d 1249, 1269 (S.D. Fla. 2007) (citing *Vargas v. Peltz*, 901 F. Supp. 1572, 1581-82 (S.D. Fla. 1995)).

"Because of their very potency, inherent powers must be exercised with restraint and discretion." *Chambers*, 501 U.S. at 44. Therefore, the Eleventh Circuit has explained, [*16] "[t]he key to unlocking a court's inherent power is a finding of bad faith." *Byrne v. Nezhat*, 261 F.3d 1075, 1106 (11th Cir. 2001) (alteration in original) (citing *Barnes v. Dalton*, 158 F.3d 1212, 1214 (11th Cir. 1998)); see also *Quiroz v. Superior Bldg. Maint., Inc.*, 2008 U.S. Dist. LEXIS 61534, *15-16, 2008 WL 3540599 (S.D. Fla. Aug. 12, 2008).

## Analysis

A. Bad Faith.

The Defendants and their agents repeatedly harassed, and attempted to bribe the Professors with respect to the Lugano Report and Dr. Rossi. Such harassment includes coercion, intimidation, and bribery to jeopardize Dr. Rossi's Nobel Prize nomination and to materially impact the evidence underlying this action.



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It cannot be disputed that evidence that four, independent prominent Professors support the conclusion that Dr. Rossi's E-Cat technology "is remarkable" and produces heat energy "compatible with nuclear transformations" would undermine Defendants' present case. This is a "linchpin" issue of Defendants' defenses and counterclaims.

Further, it cannot be disputed that both Dewey Weaver and Uzi Sha are agents of Defendants, and were acting within the scope of their agency. Dewey Weaver has been working directly with Defendants for several years, and according to Defendants, has been heavily involved in communicating with Defendants' attorneys about the present lawsuit. Uzi Sha has been in direct communication with Defendant Darden on at least one occasion – and, according to that email message, on others too – apparently in connection with this case[5].

Neither Defendants nor these agents are unsophisticated litigants who would somehow be absolved of running afoul of criminal bribery or witness-tampering statutes through inadvertence or mistake. However, their efforts to sway the Professors to recant their support for their test and Dr. Rossi's technology was not overt or blatant, thus making it all the more egregious. Defendants were not seeking to enlist the Professors to testify truthfully, but instead made vague, ominous threats of forthcoming unidentified "evidence" that would cause them and their respective universities embarrassment. Moreover, Defendants made offers of substantial sums of money if they would disassociate themselves from the Lugano Report. This is bad faith.

[5] Although Defendant Darden refers to additional communications with Mr. Sha—and Mr. Jaffe, for that matter (*see* Ex. 5)—Defendants did not produce such communications or identify them in Defendants' privilege log. It has become apparent, however, that such communications are in furtherance of the improper behavior set forth in this Motion.



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B. No Lesser Available Sanction.

The wrongdoing here – the attempt to coerce untruthfully testimony from at least two of the Lugano Professors – is so closely intertwined with the merits of the case that a sanction must be imposed to "calibrate the scales" in response. *Qantum Comms. Corp. v. Star Broadcasting, Inc.*, 473 F. Supp. 2d 1249, 1277-78 (S.D. Fla. 2007). Monetary sanctions fail to address the severity of Defendants' acts of witness tampering and bribery, which threaten the public's trust in our system of justice and disparage the core values for which it stands. *Young v. Office of the United States Sergeant at Arms*, 217 F.R.D. 61, 71 (D.D.C. 2003) ("[S]eeking to obtain or manufacture false testimony 'strikes at the heart of the judicial system.'").

Litigants should not be left with the impression that they can abuse the judicial process and opposing parties by fabricating evidence concerning the core of their case and simply pay a fine to absolve their misdeeds. While the Plaintiffs are hesitant to request striking of Defendants' pleadings as the appropriate remedy, there does not readily appear to be any lesser sanction that would be sufficient under these facts. There is simply an absence of any non-monetary sanction short of dismissal that is an appropriate response to Defendants' acts. As this Court stated in another case involving litigants who had perjured themselves and attempted to fabricate evidence:

> Permitting this lawsuit to proceed would be an open invitation to abuse the judicial process. Litigants would infer they have everything to gain, and nothing to lose, if manufactured evidence merely is excluded while their lawsuit continues.

*Vargas v. Peltz*, 901 F. Supp. 1572, 1582 (S.D. Fla. 1995).



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## Conclusion

WHEREFORE, Plaintiffs, Andrea Rossi and Leonardo Corporation, respectfully request the Court enter an Order:

a. striking the pleadings of Defendants Thomas Darden, Industrial Heat, LLC, and IPH International B.V.;

b. prohibiting Defendants and their agents from making any further contact with the Lugano Professors;

c. alternatively, as it relates to Zalli Jaffe and Uzi Sha, (i) compelling Defendants to produce their agents, Zalli Jaffe and Uzi Sha to appear for a deposition (and evidentiary hearing, if necessary) in Miami, Florida to testify as to the nature of his engagement and facts related to his communications with Dr. Levi; and (ii) deeming communications between Defendants and Zalli Jaffe and Uzi Sha to not be attorney-client privileged communications and ordering they be produced to Plaintiffs; and

d. granting any further relief this Court deems just and proper.

Dated: March 9, 2017.

Respectfully submitted,

*/s/Brian W. Chaiken, Esq.*

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**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing was served by in the manner specified below on March 9, 2017 all counsel or parties of record on the attached Service List.

*/s/Brian W. Chaiken*
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