

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. )

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

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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.; HENRY )  
JOHNSON; FABIO PENON; UNITED )  
STATES QUANTUM LEAP, LLC; )  
FULVIO FABIANI; and JAMES A. BASS, )  
 )  
Third-Party Defendants. )

**DEFENDANTS'/COUNTER-  
PLAINTIFFS' MOTION FOR  
SUMMARY JUDGMENT AND  
MEMORANDUM OF LAW IN  
SUPPORT THEREOF**

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## **INTRODUCTION**

Pursuant to Federal Rule of Civil Procedure 56, Defendants Tom Darden (“Darden”), John T. Vaughn (“Vaughn”), Industrial Heat, LLC (“Industrial Heat”), IPH International B.V. (“IPH”), and Cherokee Investment Partners, LLC (“Cherokee”) hereby move for summary judgment on all remaining Counts of the Complaint (Counts I, III, IV, and VI), and Industrial Heat and IPH (Counter-Plaintiffs) hereby move for summary judgment on all Counts of the Fourth Amended Answer, Additional Defenses, Counterclaims, and Third-Party Claims (“AACT”), in the above-captioned case. Accompanying this motion is a statement of material facts as to which it is contended that there does not exist a genuine issue to be tried.

As explained below, there can be no genuine dispute as to any material fact regarding the claims in Counts I (breach of contract), III (unjust enrichment), IV (misappropriation), and VI (fraud and deceit) of the Complaint, or regarding the claims in Counts I (breach of contract), II (breach of contract), III (fraudulent inducement), IV (violation of the Florida Deceptive and Unfair Trade Practices Act), and V (breach of contract) of the AACT. Accordingly, Defendants/Counter-Plaintiffs are entitled to judgment as a matter of law.

## **BACKGROUND**

Plaintiffs Andrea Rossi (“Rossi”) Leonardo Corporation (“Leonardo”) (collectively, “Plaintiffs”) claim to have invented a technology called the “E-Cat,” capable of producing far more energy than it consumes. In October 2012, Industrial Heat entered into a License Agreement whereby Rossi and Leonardo granted to Industrial Heat a license with Plaintiffs to license and obtain this E-Cat technology (the “E-Cat IP”). Under that Agreement, Industrial Heat agreed to one absolute payment and two conditional payments. It would pay \$1.5 million entering the Agreement, \$10 million if Plaintiffs could complete a 24-hour “Validation Test” using a plant containing a collection of E-Cat reactors (the “1 MW Plant”), and \$89 million if thereafter Plaintiffs could operate the 1 MW Plant for 350 out of 400 days at the same level (or better) than the initial Validation Test (the “Guaranteed Performance” test).

In October 2012, Industrial Heat paid Leonardo \$1.5 million. On April 29, 2013, a day before the Validation Test, the parties executed the First Amendment to the License Agreement (“First Amendment”). Afterwards, the Validation Test took place in Ferrara, Italy and Industrial Heat assigned certain of its rights under the License Agreement to IPH. Following the



Validation Test, IPH paid Leonardo an additional \$10 million. In exchange, Plaintiffs purportedly transferred all of the E-Cat IP to Industrial Heat and IPH.

Leonardo delivered to 1 MW Plant to Industrial Heat in August 2013. Nearly a year later, in June 2014, Plaintiffs advised Industrial Heat that they had found a “customer” in Doral, Florida that allegedly had a commercial need for the steam produced by the 1 MW Plant. That customer turned out to be Third-Party Defendant J.M. Products, Inc. (“J.M. Products”), which had been recently incorporated by Third-Party Defendant Henry Johnson (“Johnson”). Industrial Heat entered into an agreement (the “Term Sheet”) with J.M. Products and Leonardo that involved sending the 1 MW Plant to J.M. Products’ facility in Doral.

From February 2015 to February 2016, Plaintiffs claim to have been operating the 1 MW Plant in Doral for J.M. Products and, in doing so, achieving results that would satisfy the criteria for the “Guaranteed Performance” test under the License Agreement.

Plaintiffs filed their eight-count Complaint (“Compl.”) against Defendants in April 2016. [D.E. 1]. In ruling on Defendants’ motion to dismiss, the Court dismissed four of the counts but sustained four of the counts. [D.E. 24]. Thereafter, Defendants answered the Complaint and Industrial Heat and IPH asserted counterclaims or third-party claims against Plaintiffs, J.M. Products, Johnson, James Bass, Fulvio Fabiani (“Fabiani”) and his company, United States Quantum Leap (“USQL”). After several rounds of briefing, the Court has upheld all of the counterclaims and third party claims, which are now contained in the AACT. [D.E. 132].

## **LEGAL STANDARD**

### **I. Summary Judgment Standard**

A motion for summary judgment must be granted “if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). Whereas “[a]n issue of fact is ‘material’ if, under the applicable substantive law, it might affect the outcome of the case, [a]n issue of fact is ‘genuine’ if the record taken as a whole could lead a rational trier of fact to find for the nonmoving party.” *Hickson Corp. v. N. Crossarm Co., Inc.*, 357 F.3d 1256, 1259-60 (11th Cir. 2004). A moving party “may discharge [its] ‘initial responsibility’ by showing that there is an absence of evidence to support the nonmoving party’s case or by showing that the nonmoving party will be unable to prove its case at trial.” *Id.* (quoting *United States v. Four Parcels of Real Prop.*, 941 F.2d 1428, 1437-38 (11th Cir. 1991)).

Once the movant bears its initial burden, summary judgment must be granted if the nonmovant “fails to make a showing sufficient to establish the existence of an element essential to that party’s case as to which that party will bear the burden of proof at trial.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *see also Hickson Corp.*, 357 F.3d at 1260. Ultimately, “[the] court must decide ‘whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.’” *Id.* (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251 (1986)).

## **II. Breach of Contract Elements**

To prevail on a breach of contract claim, a party must prove the existence of a contract and a material breach of the contract. *Vital Pharm., Inc. v. Balboa Capital Corp.*, No. 14-62469-CIV, 2016 WL 4479370, at \*4 (S.D. Fla. Aug. 25, 2016); *Burger King Corp. v. Huynh*, No. 11-22602-CIV, 2011 WL 6190163, at \*5 (S.D. Fla. Dec. 5, 2011) (quoting *Vega v. T-Mobile USA, Inc.*, 564 F.3d 1256, 1272 (11th Cir. 2009)). The party must also have performed (or been excused from performing) its obligations imposed by the contract prior to the other party’s breach. *See Marshall Const., Ltd. v. Coastal Sheet Metal & Roofing, Inc.*, 569 So.2d 845, 848 (Fla. Dist. Ct. App. 1990). A party often also seeks to prove some damages to compensate it for another party’s breach (either on summary judgment or at a trial), but Florida law is clear that proof of actual damages is not necessary to prevail on a breach of contract claim. *See, e.g., See MSM Golf, L.L.C. v. Newgent*, 853 So.2d 1086, 1087 (Fla. Dist. Ct. App. 2003); *Destiny Const. Co. v. Martin K. Eby Const.*, 662 So.2d 388, 390 (Fla. Dist. Ct. App. 1995); *Beverage Cannery, Inc. v. Cott Corp.*, 372 So.2d 954, 956 (Fla. 3rd DCA 1979). Thus, this Court has granted summary judgment on liability for breach of contract and for nominal damages, even where actual damages and proximate cause have not been proven. *Jeld-Wen, Inc. v. Nebula Glass Intern., Inc.*, 05-60860-CIV, 2007 WL 5960207, at \*13 (S.D. Fla. May 15, 2007); *Alhassid v. Bank of Am., N.A.*, 14-CIV-20484, 2015 WL 11216721, at \*5 (S.D. Fla. Sept. 14, 2015).

## **ARGUMENT**

### **I. Industrial Heat and IPH Are Entitled to Summary Judgment on Complaint Count I and AACT Count I.**

Summary judgment must be entered in favor of Industrial Heat and IPH on (a) their breach of contract claim against Plaintiffs in Count I of the AACT and (b) Plaintiffs’ breach of contract claim in Count I of the Complaint.

Under the License Agreement, Industrial Heat was to make an initial \$1.5 million payment to Leonardo, which it made. Defs.' Statement of Material Facts in Support of Mot. for Summary Judgment ("SOMF") ¶ 4. Thereafter, Leonardo and Rossi were to successfully perform the Validation Test to be entitled to an additional \$10 million payment. The Validation test was to be performed using the 1 MW Plant, which for a 24 hour period had to produce at least six times the energy it consumed in the form of "steam ... consistently 100 degrees Celsius or greater." License Agreement (SOMF Ex. 1) § 4. The Validation Test was to be certified by an Expert Responsible for Validation ("ERV"), who would "measure the flow of the heated fluid" from the 1 MW Plant and the temperature difference "of the fluid before and after the E-CAT reaction." *Id.* The 1 MW Plant would involve at least 54 E-Cat reactors. SOMF ¶ 5.

Roughly one week before the Validation Test was to be performed, Rossi told Industrial Heat that the full 1 MW Plant could not be tested under Italian law, but Italian law would allow testing of a smaller number of reactors:

This morning I had a meeting with the Health Office of the Province of Ferrara, which has to authorize the 24 hours test (it is unthinkable to make it without authorization, we could be stopped by the police upon a phone call due to the noise of the air escape of the condensers, because we must dissipate the energy not having any possible utilization for it.) We found an acceptable solution. He explained to me that the Italian Law "DPR (Decreto del Presidente della Repubblica) # 551- Dec. 21 1999 requests an authorization for any plant that makes more than 35 kWh/h and this authorization takes at least 6 months. But we are advantaged, because LENR do not exist in the known technology, therefore when we say 35 kWh we say kWh consumed, because plants that produce more than the energy they consume "do not exist." Now,  $35 \times 6 = 210$  kW[.] Therefore if we can consume up to 35 kWh/h without authorization, this implies that in our LENR case I can produce up to 210 kWh/h, which is a consistent amount of energy. ...

SOMF ¶ 6.

Rossi later agreed that Italian law would allow the Validation Test to be done using 30 reactors. SOMF ¶ 7. In reliance on this, the First Amendment was created and executed, which allowed the Validation Test to be done using "30 individual E-Cat reactors, ... tested for a period of 24 hours." SOMF ¶ 8 & Ex. 5. Then, just before the Validation Test was to begin, Rossi claimed that Italian law was even more restrictive and would only permit using 18 e-cat reactors for the Validation Test. SOMF ¶ 15. On that basis, the Validation Test was conducted using only 18 E-Cat reactors. SOMF ¶ 18. The Validation Test lasted 23.5 hours and did not involve measuring the flow of the heated fluid out of the e-cat reactors. SOMF ¶ 19.

**A. Plaintiffs Lack Standing to Bring a Breach of Contract Claim Based on the Alleged Failure to Pay \$89 Million under the License Agreement.**

The sole breach identified in Complaint Count I is the alleged failure to make the contingent \$89 million payment under the License Agreement. As is clear from the Agreement (Section 3.2(c)), that payment – if in fact it were due – would only have to be made to Leonardo Corp., a New Hampshire corporation (“Leonardo-N.H.”). *See* License Agreement (SOMF Ex. 1) § 3.2(c). Moreover, Rossi has testified that he is no longer the owner of Leonardo or Leonardo-N.H. SOMF ¶ 10. Rossi thus has no standing to assert a breach of the License Agreement for the alleged failure to pay money to Leonardo-N.H. In addition, Leonardo claims it is the successor to Leonardo-N.H. because Leonardo-N.H. was merged into it. But Leonardo-N.H. still exists, so Plaintiff Leonardo appears not to be a proper party either. SOMF ¶ 106.

**B. Rossi Intentionally Deceived Industrial Heat into Agreeing to Test Fewer E-Cat Units for the Validation Test in Ferrara, Italy.**

Rossi’s claim that the Validation Test had to be limited to 30 e-cat reactors, and then later to only 18 e-cat reactors, in order to comply with Italian law was an intentionally false statement. As Rossi testified at his deposition (and confirmed at his deposition as the corporate representative for Leonardo), he did meet with a Ferrara Health Office official but was told there was no mechanism under Italian law to authorize the Validation Test. According to Rossi, however, the official told him he could go forward with his test as long as his neighbors did not complain. SOMF ¶ 16; Rossi Dep. (SOMF Ex. 2) 148:12-149:7 (“But if you find some kind of an agreement with your outdoor-with your neighbor, we don’t come.”). Thereafter, Rossi claims, he went to those who lived near where the Validation Test site was to be conducted and got them to agree not to call government authorities as long as the Validation Test did not make too much noise. Rossi Dep. (SOMF Ex. 2) 149:19-23 (Rossi testifying that neighbors told him “[y]ou don’t make too much noise, and we can accept it because we want to sleep”).

There is no dispute that the License Agreement exists, that Industrial Heat complied with its obligations under that Agreement prior to the validation test (it had paid Leonardo the initial \$1.5 million). *See* SOMF ¶¶ 1, 4. There also can be no dispute that Leonardo and Rossi breached the License Agreement because they only used 18 E-Cat reactors for the Validation Test, and that Industrial Heat and IPH were damaged as a result of the breach both for having made the subsequent payment of \$10 million under License Agreement §§ 3.2(b) and 4, and for

not having the initial \$1.5 million payment to Leonardo returned (among other damages). *See* SOMF ¶¶ 4, 15; License Agreement (SOMF Ex. 1) § 3.2(b).

The First Amendment does not change this conclusion. First, it was procured by Rossi's fraud on behalf of Leonardo. Rossi falsely represented that Italian law prohibited the Validation Test as set forth in the License Agreement but allowed the testing of fewer E-Cat reactors (30, to be specific). *See* SOMF ¶¶ 6, 7. Industrial Heat relied on this false representation in entering into the First Amendment. SOMF ¶ 17; *see also* Darden Dep. (SOMF Ex. 9) 200:5-15 ("How about . . . running the fraction of the units in the Ferrara test. You know, what's that about. I mean, we thought it was all legitimate like, okay, well, I guess there's some law that says...you can't run an energy device larger than whatever the size was."). Rossi and Leonardo cannot avoid their breach of the License Agreement by fraudulently inducing an amendment to the Agreement. *See Mazzoni Farms, Inc. v. E.I. DuPont De Nemours and Co.*, 761 So.2d 306, 313 (Fla. 2000). Second, Rossi and Leonardo did not even comply with the First Amendment. That amendment required the testing of 30 E-Cat reactors, but Rossi and Leonardo only tested 18 E-Cat reactors. *See* SOMF ¶¶ 7, 8, 18; 1st Amendment (SOMF Ex. 5) Ex. A.

Finally, the subsequent payment of \$10 million to Leonardo does not excuse Rossi and Leonardo's contract breach. The payment does not modify the License Agreement, which could only be "amended, superseded, canceled, renewed or extended, and the terms hereof may be waived, only by a written instrument signed by the Parties or, in the case of a waiver, by the Party waiving compliance." License Agreement (SOMF Ex. 1) § 16.9. Moreover, any reduction in the number of reactors (down to 18) was not supported by any additional consideration by Rossi or Leonardo, but rather was procured by their fraud. Rossi and Leonardo cannot alter their contractual obligations by fraud. *See D & M Jupiter, Inc. v. Friedopfer*, 853 So.2d 485, 489 (Fla. Dist. Ct. App. 2003); *see also Okeechobee Resorts, L.L.C. v. E Z Cash Pawn, Inc.*, 145 So.3d 989, 993 (Fla. Dist. Ct. App. 2014); *Energy Smart Indus., LLC v. Morning Views Hotels-Beverly Hills, LLC*, 660 Fed. App'x. 859, 863 (11th Cir. 2016).

For the foregoing reasons, Industrial Heat and IPH are entitled to summary judgment on Count I of the AACT for breach of contract.<sup>1</sup> They are also entitled to summary judgment on

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<sup>1</sup> Industrial Heat and IPH's damages are not limited to the \$1.5 million and \$10 million payments made to Leonardo discussed above. Industrial Heat also made a payment to AEG based on Rossi and Leonardo achieving Validation that was not required because Rossi and

Count I of Plaintiffs' Complaint for breach of contract because there can be no subsequent breach, as alleged by Plaintiffs, for Industrial Heat and/or IPH not making an additional \$89 million payment under the License Agreement after Rossi and Leonardo previously breached the Agreement by not correctly performing the validation test. This not only constituted a prior breach of the License Agreement barring Plaintiffs' claim of a subsequent breach, *see Marshall Construction*, 569 So.2d at 848, but also allowed for the termination of the Agreement. *See* License Agreement (SOMF Ex. 1) § 4.

**C. Plaintiffs Breached the License Agreement by Failing to Abide by the Terms of the Validation Protocol.**

The Validation Test not only failed based on the testing of too few E-Cat reactors. The License Agreement, both as originally drafted and even if amended by the First Amendment, required not only that the Validation Test include more reactors than tested, but also required that the testing period be 24 hours and that the measurement for the testing measure "the flow of the heated fluid" from the E-Cat reactors. License Agreement (SOMF Ex. 1) § 4. Neither of these requirements was met: As reflected in the validation report by Penon, the testing was only conducted for 23.5 hours and a flow meter was used to measure the flow of the fluid entering into the E-Cat reactors, but no flow meter (or other device) was used to measure the flow of the heated fluid out of the e-cat reactors. *See* SOMF ¶ 19.

As explained in Section I.B. *supra*, the fact that Plaintiffs did not comply with the validation testing requirements of the License Agreement means that Industrial Heat and IPH are entitled to summary judgment on Count I of the AACT for breach of contract as well as on Count I of the Complaint for breach of contract.

**D. Plaintiffs Breached the License Agreement Prior to the Date Plaintiffs Claim They Were Entitled to an \$89 Million Payment Because Plaintiffs Failed to Achieve "Guaranteed Performance" As Defined by the License Agreement.**

Industrial Heat and IPH are also entitled to summary judgment on Plaintiffs' Count I for additional reasons. Count I is predicated on Plaintiffs' contention that they properly performed the "guaranteed performance" test provided for in the License Agreement as a predicate to Leonardo being entitled to an additional \$89 million payment. But this is indisputably incorrect.

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Leonardo did not achieve Validation, and Industrial Heat and IPH paid for additional sums to Plaintiffs as well as to others following the Validation Test (mainly reimbursements for expenses or payments for services) that they never should have had to pay. *See* SOMF ¶ 22.

The License Agreement is crystal clear as to when Rossi and Leonardo were to conduct any “guaranteed performance” test:

Payment of the amount set forth in Section 3(c) above is contingent upon the Plant 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 immediately following delivery of the Plant to the Company [*i.e.*, Industrial Heat] (“Guaranteed Performance”).”

License Agreement (SOMF Ex. 1) § 5.

There is no dispute that Rossi and Leonardo did not complete any “guaranteed performance” test within the time period set by the License Agreement. As they admit in their Complaint, the 1 MW Plant was delivered to Industrial Heat in August 2013. SOMF ¶ 23. As they also admit in their Complaint, they did not commence a “guaranteed performance” test either in 2013 or even in 2014. Instead, they did not allegedly commence such a test until 2015. SOMF ¶ 24. By no later than October 2013, however, Rossi and Leonardo could no longer comply with the License Agreement requirement to operate the 1 MW Plant for “a period of 350 days (even if not consecutive) within a 400 day period commencing on the date immediately following delivery of the 1 MW Plant to the Company.” License Agreement (SOMF Ex. 1) § 5.<sup>2</sup>

In an effort to avoid this obvious and correct outcome, Plaintiffs contend that a Proposed Second Amendment to the License Agreement (“Proposed Second Amendment”) provided them with additional time to commence a “guaranteed performance” test. This contention fails for at least two independent reasons.

First, the Proposed Second Amendment was not effective because it was not signed and executed by all parties. *See* SOMF ¶¶ 26-30. The general rule on enforceability of contracts where all parties are not signatories is that “a contract not signed by all of the parties, but otherwise valid, may be upheld against a signing party, unless the nature or the wording of the contract indicates that his signature was conditioned upon all other parties signing the contract.” *Skinner v. Haugseth*, 426 So.2d 1127, 1131 (Fla. Dist. Ct. App. 1983). The Proposed Second Amendment is little more than a page long, but Section 3 makes the parties’ intentions expressly clear: “This Amendment may be executed in counterparts . . . *provided that one or more*

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<sup>2</sup> After the passage of 51 days following delivery of the Plant to IH, Rossi and Leonardo could no longer operate the Plant for 350 out of 400 days “immediately following delivery.”

*counterparts collectively shall contain the signatures of all Parties to this Amendment.”*

(emphasis added). Proposed 2d Amendment (SOMF Ex. 15) § 3.<sup>3</sup>

The Proposed Second Amendment was not effective because it was not signed by either AEG or IPH (or, for that matter, by Rossi in his individual capacity). SOMF ¶¶ 27, 30; Proposed 2d Amendment (SOMF Ex. 15). Both were essential to any Agreement modification. Most of Industrial Heat’s rights under the Agreement had previously been assigned to IPH (with Rossi and Leonardo’s consent) under an Assignment and Assumption of the License Agreement (“Assignment Agreement”). See 1st Amendment (SOMF Ex. 5) § 16.7; Assignment Agreement (SOMF Ex. 7); SOMF ¶¶ 12, 13. Altering what would constitute “guaranteed performance” under the Agreement would directly impact those rights. In addition, AEG could have received an additional payment if Rossi and Leonardo satisfied the Agreement’s “guaranteed performance” requirement. SOMF ¶ 27. AEG thus had a direct interest in any change to the Agreement that would alter what had to be done to satisfy guaranteed performance. See *id.*

Not surprisingly, the parties recognized that the Proposed Second Amendment was not effective absent the signatures of all the relevant parties. SOMF ¶¶ 27, 32. Indeed, even Rossi admitted that the Proposed Second Amendment was not effective because AEG did not execute it. See SOMF ¶ 31.

Second, even if the Proposed Second Amendment was effective, it is crystal clear that the “guaranteed performance” test thereunder could not be conducted using the 1 MW Plant; rather, a different “Six Cylinder Unit” needed to be used for any such test:

Payment of the amount set forth in Section 3(c) above is 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”).

Proposed 2d Amendment (SOMF Ex. 15) § 5.

There is no question that what Rossi and Leonardo used for their alleged “guaranteed performance” test was the 1 MW Plant, not the Six Cylinder Unit. These devices are clearly

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<sup>3</sup> This is distinguishable from the contract at issue in *Skinner*, where there was “nothing in the contract specifying [Defendant’s] intent not to go through with the sale if [Plaintiff] did not sign.” *Skinner*, 426 So.2d at 1131. The Proposed Second Amendment dictated that it was ineffective unless all parties signed at least one counterpart.



distinct: The latter is a round, tub unit containing six hot cat reactor units and is used to heat oil rather than water. SOMF ¶ 34. The Six Cylinder Unit remains in North Carolina and was never sent to Florida, for testing or otherwise. SOMF ¶ 35.

In short, Plaintiffs' Count I for breach of contract fails because Plaintiffs did not fulfill their obligation regarding "guaranteed performance" under the License Agreement, which was a condition precedent to either Industrial Heat and IPH being obligated to pay \$89 million under the Agreement. *See* License Agreement (SOMF Ex. 1) § 5 (if guaranteed performance is not achieved, "the Company shall not be required to pay any amount pursuant to Section 3[.2](c)").

**E. Plaintiffs Breached the License Agreement by Failing to Measure the Flow of the Heated Fluid During the Purported Guaranteed Performance Test.**

Defendants are entitled to summary judgment in their favor on the respective parties' claims for breach of contract because, even if the Proposed Second Amendment is effective, Plaintiffs failed to comply with the requirements for achieving "guaranteed performance" under the License Agreement. That performance had to be "at the same level (or better) at which Validation was achieved," which in turn required Penon to "measure the flow of the heated fluid." License Agreement (SOMF Ex. 1) §§ 4, 5. According to Penon's own testimony, he never measured the heated fluid as required by the License Agreement. SOMF ¶ 20. This failure, like the prior breaches by Plaintiffs, precluded Plaintiffs' right to seek a payment of \$89 million from Industrial Heat. As a result, Plaintiffs' claim for breach of contract fails because the requirements of the License Agreement were not satisfied.

**F. Plaintiffs' Prior Breaches of the License Agreement Entitle Industrial Heat and IPH to Summary Judgment on Count I of the Complaint.**

Because Plaintiffs' breaches of the License Agreement were prior to any alleged breach of the Agreement by Industrial Heat or IPH, Plaintiffs cannot prevail on Count I. It is well established that a "[p]rior material breach of a contract excuses further performance by the other party." *See Managed Care Sols., Inc. v. Cmty. Health Sys., Inc.*, 10-60170-CIV, 2012 WL 12861133, at \*6 (S.D. Fla. May 14, 2012), report and recommendation adopted, 10-60170-CIV, 2012 WL 12861134 (S.D. Fla. June 4, 2012) (citing *Cheezem Dev. Corp. v. Intracoastal Sales & Serv., Inc.*, 336 So.2d 1210, 1212 (Fla. 2d DCA 1976) ("As the party who initially committed a substantial breach of the contract, Intracoastal was not entitled to avail itself of a claimed subsequent breach by Cheezem.") (citing *Chatlos v. Morse Auto Rentals, Inc.*, 183 So.2d 854,

855 (Fla. 3d DCA 1966)). Summary judgment in favor of Industrial Heat and IPH on Count I of the Complaint is thus warranted.

## **II. Industrial Heat and IPH Are Due Summary Judgment on Complaint Count III.**

Summary judgment must be entered in favor of Industrial Heat and IPH on Plaintiffs' claim for unjust enrichment in Count III of the Complaint. That Count alleges that Industrial Heat and IPH would be unjustly enriched if allowed to retain the license granted under the License Agreement without paying Plaintiffs \$89 million. Compl. ¶ 91.

To prevail on such a claim, Plaintiffs must establish that: (1) Plaintiffs conferred a benefit on Industrial Heat and IPH; (2) Industrial Heat and IPH voluntarily accepted and retained the benefit conferred; and (3) the circumstances are such that it would be inequitable for Industrial Heat and IPH to retain the benefit without paying the value thereof to Plaintiffs. *See Porsche Cars N. Am., Inc. v. Diamond*, 140 So.3d 1090, 1100 (Fla. Dist. Ct. App. 2014) (citing *Fito v. Attorneys' Title Ins. Fund, Inc.*, 83 So.3d 755, 758 (Fla. Dist. Ct. App. 2011)).

A party cannot pursue a quasi-contract claim for unjust enrichment if an express contract exists concerning the same subject matter as the party's claim for unjust enrichment. *See Diamond "S" Dev. Corp. v. Mercantile Bank*, 989 So.2d 696, 697 (Fla. Dist. Ct. App. 2008) (citing *Ocean Commc 'ns, Inc. v. Bubeck*, 956 So.2d 1222, 1225 (Fla. Dist. Ct. App. 2007)). Hence, Count III fails as a matter of law because the License Agreement is an express contract (a fact which neither side disputes) that concerns the same subject matter as Plaintiffs' claim for unjust enrichment claim – namely, a license of the E-Cat IP to Industrial Heat. Compl. ¶ 89.

Furthermore, Plaintiffs' unjust enrichment claim is fatally flawed because it ignores the reality that the alleged benefit conferred – the “license to use the E-Cat IP,” *id.* – was only conferred per the terms of the License Agreement. If the Agreement is valid, then Industrial Heat and/or IPH have all the benefits created by the Agreement, including a license of the E-Cat IP and the right to sub-license the E-Cat IP to whomever they choose. If the Agreement is not valid, then Industrial Heat and IPH do not have the supposed benefit that is the basis of Count III – they would not have a “license to use the E-Cat IP.” Compl. ¶ 89.

An unjust enrichment claim also requires proof that Plaintiffs “directly conferred a benefit on [Industrial Heat and IPH]; an indirect benefit is insufficient.” *Swiss Watch Int'l v. Movado Grp.*, No. 00-7703-CIV, 2001 WL 36270979, at \*4 (S.D. Fla. Sept. 5, 2001); *see also Kopel v. Kopel*, No. SC13-992, 2017 WL 372074, at \*5 (Fla. Jan. 26, 2017) (“[t]o prevail on an

unjust enrichment claim, [a] plaintiff must directly confer a benefit to the defendant”). No such direct benefit was conferred here because the license was without value – the undisputed evidence is that neither Industrial Heat nor IPH ever sub-licensed the E-Cat IP for profit, never created a product or service that could be sold based on the E-Cat IP, and indeed never were able to generate the results Rossi and Leonardo claimed using the E-Cat IP. *See* SOMF ¶¶ 38-40.

For the foregoing reasons, Industrial Heat and IPH are entitled to summary judgment on the unjust enrichment claim in Plaintiffs’ Complaint (Count III).

### **III. Defendants Are Entitled to Summary Judgment on Complaint Count IV.**

Because Plaintiffs licensed the E-Cat IP to Industrial Heat and later, through an assignment, to IPH – and because each entity was allowed to grant sublicenses to the E-Cat IP to anyone it selected (License Agreement (SOMF Ex. 1) § 1) – there is no question of material fact as to whether Plaintiffs protected the E-Cat IP from disclosure as required for Count IV’s misappropriation claim. To prove a claim for misappropriation of trade secrets, a plaintiff must prove that “(1) the plaintiff possessed secret information *and took reasonable steps to protect its secrecy* and (2) the secret it possessed was misappropriated, either by one who knew or had reason to know that the secret was improperly obtained or by one who used improper means to obtain it.” *Del Monte Fresh Produce Co. v. Dole Food Co., Inc.*, 136 F. Supp. 2d 1271, 1291 (S.D. Fla. 2001) (citing Fla. Stat. § 688.002) (emphasis added).<sup>4</sup> Thus, under the first step, “[f]or there to be actionable misappropriation, the party asserting trade secret protection bears the dual burden of describing the alleged trade secret information *and also showing that it has taken reasonable steps to protect this secrecy.*”<sup>5</sup> *Levenger Co. v. Feldman*, 516 F. Supp. 2d 1272, 1287 (S.D. Fla. 2007) (emphasis added) (citing *Amer. Red Cross v. Palm Beach Blood Bank, Inc.*, 143 F.3d 1407, 1410 (11th Cir. 1998)); *see also Del Monte Fresh Produce Co.*, 136 F. Supp. 2d at 1291 (“To qualify as a trade secret, the information that the plaintiff seeks to protect

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<sup>4</sup> Although Plaintiffs fail to cite it in the Complaint, “Florida’s Uniform Trade Secrets Act preempts common law torts concerning trade secret misappropriation.” *Treiber v. StorCOMM, Inc.*, No. 303CV1040J32MMH, 2005 WL 2012275, at \*4 (M.D. Fla. Aug. 16, 2005) (citing Fla. Stat. § 688.008(1); *All Pro Sports Camp, Inc. v. Walt Disney Co.*, 727 So.2d 363, 367 (Fla. 1999)).

<sup>5</sup> Plaintiffs also failed to meet their obligation of describing “with reasonable particularity” the confidential information or trade secrets which they claim that Defendants misappropriated. *Levenger Co.*, 516 F. Supp. 2d at 1287. Summary judgment in Defendants’ favor is warranted for this additional reason.

must derive economic value from not being readily ascertainable by others and must be the subject of reasonable efforts to protect its secrecy.”) (citing *Amer. Red Cross*, 143 F.3d at 1410).

In this case, Plaintiffs cannot show that they “took reasonable steps to protect [the] secrecy” of the E-Cat technology because they willingly—and virtually without limitation, including as to confidentiality—transferred the E-Cat technology to Industrial Heat and later to IPH under the License Agreement and the Assignment Agreement, respectively. See License Agreement (SOMF Ex. 1); SOMF ¶ 3; *Del Monte Fresh Produce Co.*, 136 F. Supp. 2d at 1291. As the United Supreme Court has explained, “[i]f an individual discloses his trade secret to others who are under no obligation to protect the confidentiality of the information . . . his property right is extinguished.” Thus, by definition, there was no misappropriation here. *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1002 (1984).

Indeed, neither Industrial Heat nor IPH were under any obligation under the License Agreement to keep the E-Cat technology confidential; both were authorized to grant sublicenses to anyone they selected. SOMF ¶ 3. Instead, the non-disclosure obligation extended *only to Plaintiffs* under the License Agreement, the terms of which thus dictate entry of summary judgment in Defendants’ favor on Count IV. See License Agreement (SOMF Ex. 1) § 16.4; *Ussc Holdings Corp. v. TK Prods., LLC*, No. 3:16-cv-00398-RJC-WGC, 2016 WL 7116009, at \*4-5 (D. Nev. Dec. 6, 2016) (in determining whether plaintiffs “employed reasonable measures to maintain the secrecy of its trade secrets,” the court must conduct a “review and interpretation of the Agreement” by asking, “[f]or example, does the Agreement contain non-disclosure or confidentiality provisions relative to trade secrets?”) (citation omitted). Indeed, Plaintiffs do not even allege that either Industrial Heat or IPH had an obligation to maintain the confidentiality of the E-Cat technology under the License Agreement. Cf. *id.* at \*4 (“[Plaintiff] has not asserted that the terms of the License Agreement prohibited Plaintiffs from divulging trade secrets.”). They do not because they cannot.

By signing the License Agreement authorizing the use or disclosure (including sub-licensing) of the E-Cat IP by Industrial Heat and IPH, Plaintiffs did the *opposite* of protecting the secrecy of their intellectual property; they surrendered to Industrial Heat and IPH the right to hold confidential, or disseminate, the E-Cat IP. See SOMF ¶ 3; *Treiber*, 2005 WL 2012275, at \*4 (concluding that, by asserting “that defendant breached the confidentiality clause of the

license agreement by misusing confidential information to which it was entrusted,” “plaintiff has not plead” a claim for misappropriation of trade secrets).

In denying Defendants’ Motion to Dismiss ([D.E. 24]), the Court identified as a question of fact for discovery whether Plaintiffs took steps to protect their trade secrets by signing individual confidentiality agreements with Defendants. [D.E. 24] at 12 (construing allegations in Plaintiffs’ favor “at the motion-to-dismiss phase”). There are, however, no such separate confidentiality agreements. Moreover, while any confidentiality agreements Plaintiffs had with third parties would have no bearing on whether *Defendants* misappropriated the E-Cat IP, the Court need not even reach that issue. When asked in an interrogatory about third-party confidentiality agreements, Plaintiffs identified none.<sup>6</sup> See SOMF ¶ 41.

By the same token, Defendants did not obtain the E-Cat IP (including any potential trade secret therein) by improper means or disclose it without Plaintiffs’ consent. *Del Monte Fresh Produce Co.*, 136 F. Supp. 2d at 1291 (setting forth remaining elements of misappropriation). As explained *infra*, summary judgment is warranted on Plaintiffs’ fraud and deceit claim, so it cannot form the basis for the argument that Defendants obtained trade secrets by improper means. Moreover, the alleged fraudulent inducement does not go to the right of Industrial Heat and IPH to have, and to license others to have, the E-Cat IP under the License Agreement. Plaintiffs do not and cannot dispute that Industrial Heat and IPH made the payments to Plaintiffs under the Agreement (to the tune of \$11.5 million) to trigger and warrant the E-Cat IP transfer pursuant to the Agreement. License Agreement (SOMF Ex. 1) § 1.1, 3.2(b). Moreover, there has been no disclosure of whatever might be claimed to constitute a trade secret within the E-Cat IP. Defendants maintained the confidentiality of the undisclosed E-Cat IP (even assuming *arguendo* that it constituted a trade secret). For example, Darden did not share the recipe for the “secret sauce” even with Vaughn, much less with any third party. Defendants did so not because such was required by the License Agreement, but to protect *Industrial Heat’s and IPH’s* rights in

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<sup>6</sup> Plaintiffs also objected to the propriety of Defendants’ interrogatory seeking information regarding their alleged third-party confidentiality agreements. Of course, Plaintiffs cannot have it both ways; they cannot endeavor to create a question for discovery by putting the existence of third-party confidentiality agreements at issue then claim that they are an improper subject of discovery. *Cf. Network Tallahassee, Inc. v. Embarq Corp.*, No. 4:10cv38-RH/WCS, 2010 WL 4569897, at\*1 (N.D. Fla. Sept. 20, 2010) (“The party may object to discovery or not, but the party cannot have it both ways.”).

the E-Cat IP. Nevertheless, Defendants' protection of the E-Cat IP for their own interests means that Plaintiffs can show no improper disclosure of that IP.

Because there is no genuine dispute of a material fact, this Court should enter summary judgment for Defendants as to Count IV.

**IV. Defendants Are Entitled to Summary Judgment on Complaint Count VI.**

In denying Defendants' motion to dismiss, the Court held that in Count VI, Plaintiffs had "alleg[d] a plausible fraudulent inducement claim," and that "it [wa]s possible discovery [would] reveal separate damages" for this claim. [D.E. 24] at 19. Under Florida law, a fraud or misrepresentation claim requires "(1) a false statement of fact (2) known by the defendant to be false at the time it was made, and (3) made for the purpose of inducing the plaintiff to act in reliance thereon; (4) action by the plaintiff in reliance on the correctness of the representations; and (5) resulting damages to the plaintiff." *Stowell v. Ted S. Finkel Inv. Servs., Inc.*, 641 F.2d 323, 325 (5th Cir. 1981) (quotation omitted). As a matter of law, Plaintiffs in this case cannot show that a false statement was knowingly made for the purpose of inducing reliance. Nor can they show any resulting damages. Indeed, Count VI is simply a misfired attempt to recast their breach of contract claim as a fraud claim. Because governing law requires that Plaintiffs allege and prove separate damages for fraud, and because the parol evidence rule bars Plaintiffs' unfounded allegations that Industrial Heat and IPH are not the true parties in interest regarding the License Agreement, summary judgment is warranted on Count VI.

**A. Defendants Are Entitled to Summary Judgment on Count VI Because Plaintiffs Fail to Adduce Evidence of Separate Damages for Fraud.**

Defendants are entitled to summary judgment on Count VI because Plaintiffs fail to adduce evidence regarding separate damages for fraud as distinct from damages stemming from an alleged breach of the License Agreement. "Florida law provides for an election of remedies in fraudulent inducement cases: rescission, whereby the party repudiates the transaction, or damages, whereby the party ratifies the contract." *Mazzoni Farms, Inc. v. E.I. DuPont De Nemours & Co.*, 761 So.2d 306, 313 (Fla. 2000). However, "[i]t is well settled that a party may not recover damages for both breach of contract and fraud unless the party first establishes that the damages arising from the fraud are separate or distinguishable from the damages arising from the breach of contract." *Williams v. Peak Resorts Int'l Inc.*, 676 So.2d 513, 517 (Fla. 1996) (citing cases for the proposition that a plaintiff cannot get damages for fraud that duplicate damages for breach of contract).

Here, Plaintiffs allege that Defendants misrepresented that (a) Industrial Heat and Cherokee had funds in excess of \$100 million to pay Plaintiffs for the license of the E-Cat IP; (b) upon completion of the Guaranteed Performance test, Industrial Heat would pay Plaintiffs the full amount of the license fee; (c) Industrial Heat and Cherokee are the same and/or Industrial Heat is a wholly owned subsidiary of Cherokee; and (d) Cherokee would guarantee the payment of the license fee by Industrial Heat. Compl. ¶ 112. Plaintiffs further allege that Defendants intentionally failed to disclose that they intended to breach the License Agreement. *Id.* These claims of fraud relate exclusively to the alleged breach of the License Agreement; no separate damages are alleged anywhere in the Complaint. SOMF ¶ 42. Quite to the contrary, what the facts reveal here are that Industrial Heat and IPH have paid Plaintiffs \$11.5 million (along with various expenses over time), and yet they do not have an E-Cat product to sell and they are not earning licensing revenue from any E-Cat IP.

Plaintiffs have neither identified separate damages for fraud nor alleged pre-contract fraudulent conduct that is unrelated to their breach of contract claim. SOMF ¶ 42. Thus, there is nothing for the jury to decide on Count VI and summary judgment is warranted for Defendants.

**B. Plaintiffs' Fraud Claim Cannot Be Proven Because Evidence of Defendants' Alleged Misrepresentations Is Barred by the Parol Evidence Rule.**

Second, Plaintiffs' fraud claim cannot be proven at trial as a matter of law because any evidence of Defendants' alleged misrepresentations regarding the true party in interest under the License Agreement is barred by the parol evidence rule.

Plaintiffs' fraudulent inducement claim is predicated on them allegedly being falsely told that Cherokee would be a party to or guarantor of the License Agreement to ensure that Plaintiffs were paid. Compl. ¶ 112. Of course, no such guarantee can be found anywhere in the License Agreement itself, which conspicuously fails to mention Cherokee or any Cherokee-named entity in its eighteen pages of dense, single spaced text. *See* License Agreement (SOMF Ex. 1). Thus, the License Agreement is the beginning and end of the matter here.

Florida law makes clear that the parol evidence rule “forbids a party from providing evidence of prior or contemporaneous representations to vary or contradict the clear and unambiguous terms of a contract” because “the effect of introducing such promises . . . would be to vary the terms of the parties' Agreement.” *Eclipse Med., Inc. v. Am. Hydro-Surgical Instruments, Inc.*, 262 F. Supp. 2d 1334, 1343 (S.D. Fla. 1999). In other words, there is “no relief for oral misrepresentation where specific points [are] covered in contract.” *Id.* (citing

*Typographical Serv., Inc. v. Itek Corp.*, 721 F.2d 1317, 1320 (11th Cir. 1983)). Plaintiffs argue here that Defendants orally represented that a Cherokee entity would guarantee Industrial Heat’s obligations under the License Agreement. By its terms, however, the License Agreement was between Plaintiffs and Industrial Heat. SOMF ¶¶ 1-2. Moreover, it contains an integration clause. License Agreement (SOMF Ex. 1) § 16.8. As “the Agreement’s provisions . . . are clear and unambiguous, therefore[,] any claims based on . . . alleged misrepresentations of a different [nature] simply cannot, as a matter of law, be considered.” *Eclipse Med., Inc.*, 262 F. Supp. 2d at 1343. Accordingly, because Plaintiffs as a matter of law cannot introduce evidence of the alleged promise that a Cherokee entity was the true party in interest—assuming for the sake of argument that such evidence even exists, which it does not—the Court must enter summary judgment for Defendants on Count VI.

**V. IPH Is Entitled to Summary Judgment on the AACT Count II.**

IPH is entitled to summary judgment as to Count II of the 4th Amended AACT, for various breaches of the License Agreement by Rossi and Leonardo, including Leonardo and Rossi’s failure to (i) comply with the confidentiality provision, (ii) assign licensed patents, (iii) inform and consult on patents, (iv) comply with the covenant not to compete, (v) pay taxes, and (vi) enable replication of the E-Cat technology.

Rossi and Leonardo do not dispute that a License Agreement existed between Industrial Heat, Rossi and Leonardo, and that Industrial Heat’s rights under the License Agreement were assigned to IPH by virtue of the Assignment Agreement executed on April 29, 2013. *See* SOMF ¶¶ 1, 12, 13. The undisputed facts show that Rossi and Leonardo breached the License Agreement on various occasions detailed below. Accordingly, even without and before IPH proves its damages, IPH is entitled to summary judgment as to Rossi and Leonardo’s liability for the breaches of contract and for at least nominal damages.

**A. Breach of Confidentiality Provisions**

It is indisputable that Rossi and Leonardo breached the confidentiality provision of the License Agreement. Section 16.4 specifically provides that:

No publicity release or public announcement concerning this Agreement or the transaction contemplated hereby shall be made by Leonardo, Rossi, AEG or the Company without written advance approval thereof by each of Leonardo and the Company. While this Agreement is in effect and after this Agreement terminates, each party hereto and its Affiliates shall keep confidential and shall not disclose,



the terms of this Agreement to any other person without the prior consent of each other Party hereto...

License Agreement (SOMF Ex. 1) § 16.4. Rossi and Leonardo have repeatedly made public disclosures of specific terms of the License Agreement without Industrial Heat or IPH's "written advance approval." These public disclosures by Rossi and Leonardo include statements on Rossi's website, Journal of Nuclear Physics ("JONP"), www.journal-of-nuclear-physics.com, which reveal that the License Agreement required a test of the 1 MW Plant, a test to be conducted over 400 days, a test involving 350 days of operation of the 1 MW Plant, and a guaranteed performance or "guarantees of performance" test. *See* SOMF ¶ 43.

These disclosures by Rossi and Leonardo are too numerous to list, but for example, on July 2, 2015 Rossi stated:

My uninterrupted presence in the plant installed in the factory of the Customer of IH [Industrial Heat] is due to the fact that it is our first plant installed in the factory of a Customer, operating for unlimited time. We have to be always present for at least 1 year due to our contractual agreement[.]

*See* SOMF ¶ 43; SOMF Ex. 25 at July 2, 2015. Again, on December 21, 2015, in response to a question about the timing of the "test on course" for the 1 MW Plant, Rossi stated:

It is not possible to state a precise date, because we have to complete 350 days of efficient operation within a period of 400 days from the official start up of the test on course. The 400 days will expire at the end of March, while the date the test will have been finished will depend on how many days the plant will have been stopped for ordinary and extraordinary maintenance (sic) and reparations. ...

*See* SOMF ¶ 43; SOMF Ex. 25 at Dec. 21, 2015. Rossi and Leonardo also publicly disclosed the License Agreement and all of the terms therein by publicly filing the License Agreement as an attachment to the Complaint, without any attempt to seal the attachment. *See* Compl. Ex. B. Rossi and Leonardo did not obtain Industrial Heat or IPH's written advance approval prior to making these disclosures, and therefore, were in direct violation of the License Agreement.

#### **B. Failure to Assign Licensed Patents**

Rossi and Leonardo breached the License Agreement by failing to assign to IPH the Licensed Patents as defined in § 16.1 and Exhibit A of the License Agreement. Section 10 of the License Agreement provides: "Upon the request of the Company, Leonardo and Rossi shall assign to the Company the Licensed Patents with respect to the Territory." License Agreement (SOMF Ex. 1) § 10. On February 17, 2016, counsel for Counter-Plaintiffs sent a letter to counsel for Rossi and Leonardo requesting assignment of the Licensed Patents to IPH. SOMF ¶ 46.

Rossi and Leonardo failed to execute the requested assignment in contravention of the License Agreement. *See* SOMF ¶ 47.

**C. Failure to Inform and Consult on Patent Applications and Abandonment of Patent Applications**

Leonardo breached the License Agreement by failing to inform and consult with IPH regarding patent applications. Section 7.1 contains clear directives relating to informing and consulting with IPH regarding patent prosecution and maintenance of the E-Cat IP:

For each patent application and patent under the Licensed Patents, Leonardo shall:

- ...
- (d) keep the Company currently informed of the filing and progress in all material aspects of the prosecution of such patent application, and the issuance of patents from any such patent application;
  - (e) consult with the Company concerning any decisions which could affect the scope or enforcement of any issued claims or the potential abandonment of such patent application or patent; and
  - (f) notify the Company in writing of any additions, deletions or changes in the status of such patent or patent application.

License Agreement (SOMF Ex. 1) § 7.1. Similarly, Section 7.2 of the License Agreement states: “If Leonardo wishes to abandon any patent application or patent that is a Licensed Patent, it shall give the Company ninety (90) days prior written notice of the desired abandonment. Leonardo shall not abandon any such Licensed Patent except upon the prior written consent of the Company.” *Id.* § 7.2. There are over one hundred (100) patent applications relating to the Licensed Patents that Leonardo filed without informing IPH and that Leonardo abandoned without prior written notice to IPH, in contravention of the License Agreement. SOMF ¶¶ 48, 49. Leonardo also failed to keep Industrial Heat and IPH informed as to the status of those patent applications, and charged them for “fees and expenses associated with [Leonardo’s patent] activities” that Leonardo was obligated to bear.<sup>7</sup> This conduct – collectively and separately – was a breach of sections 7.1 and 7.2 of the License Agreement.

**D. Covenant Not to Compete**

Rossi and Leonardo breached the License Agreement’s covenant not to compete. The Agreement contains a clear and defined non-compete provision prohibiting Plaintiffs, while performing services for Industrial Heat and for two years thereafter, from being “connected in

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<sup>7</sup> As a result of this breach by Rossi and Leonardo, IPH has suffered damages in the form of fees and expenses charged by Leonardo and/or Rossi to IPH for preparing, filing or prosecuting patent applications that should have been borne by Leonardo. *See, e.g.*, SOMF ¶ 50.

any manner with any business or enterprise . . . engaged in the design, development, manufacture, distribution, lease, rental or sale of any E-Cat Products, or the provision of any services related thereto” absent Industrial Heat’s prior written consent. License Agreement (SOMF Ex. 1) § 13.3 (emphasis added). Notwithstanding this covenant not to compete, Rossi and Leonardo have been open in broadcasting that they are engaged in designing and developing what are classified as “E-Cat Products” under the License Agreement. SOMF ¶ 51 & Exs. 24-25. For example, Rossi has publicly stated that in June 2016 he conducted a “very important test” with a “very important customer” that was not Industrial Heat or IPH. *See* SOMF Ex. 29 at Resp. No. 3; SOMF Ex. 25 at April 27 & June 26, 2016. This constitutes a clear violation of the non-compete provision.

**E. Failure to Pay Taxes**

At least Leonardo, if not also Rossi, breached the License Agreement by failing to pay taxes on the monies received from Industrial Heat and IPH pursuant to the Agreement.

In light of past taxation issues Rossi had with the Italian government, the License Agreement has several carefully crafted provisions to ensure that Leonardo and Rossi would comply with their tax obligations as they relate to payments from Counter-Plaintiffs. *See* License Agreement (SOMF Ex. 1) §§ 12(j), 13.5, 12(a), & 12(e); AACT ¶ 125; [D.E. 140] ¶ 125.

First, the License Agreement required a representation from both Leonardo and Rossi that each has filed all necessary “tax returns or reports” and “has paid all taxes required by any jurisdiction or subdivision or agency thereof” prior to entering the Agreement. License Agreement (SOMF Ex. 1) § 12(j). Second, the License Agreement required each party to file all necessary documentation and returns as to any tax applicable to its or his “respective revenues derived . . . in respect of the E-Cat IP.” *Id.* § 13.5. Third, IPH had Rossi and Leonardo provide it with a signed certificate certifying that all of their representations and warranties from the License Agreement, which included their representations as to compliance with their tax obligations, were true and correct as of the date of April 29, 2013, and would continue to be true after Leonardo was paid \$10 million under the License Agreement. *See* SOMF ¶ 14.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

In light of the foregoing, it is clear that at least Leonardo, in breach of the License Agreement, failed properly to report and pay taxes on all of its 2012 and 2013 revenue.

**F. Failure to Enable Replication of the E-Cat Technology**

Finally, Counter-Defendants breached the License Agreement by failing to provide the intellectual property and services necessary for Counter-Plaintiffs to replicate the results claimed from the E-Cat technology. Leonardo and Rossi represented and warranted in the License Agreement that the E-Cat IP delivered under the License Agreement is “all the...intellectual property that [is] necessary or useful for the Company to develop, manufacture, make...and sell...all the products deriving from the E-Cat IP.” License Agreement (SOMF Ex. 1) §12 (b). Additionally, the License Agreement requires Rossi to “provide ongoing training and support to the Company in the use of the [1 MW] Plant and the production of the E-Cat Products...to enable it to utilize the E-Cat IP, operate the [1 MW] Plant and produce E-Cat Products.” *Id.* § 13.3. Indeed, a core aspect of the License Agreement was for Industrial Heat or IPH to be able to replicate and commercialize the E-Cat technology.

It is undisputed that Industrial Heat and IPH have never been able to produce an E-Cat product that functions in the manner Plaintiffs claim and that they have never been able to replicate the results Plaintiffs claimed from the E-Cat IP. This fact is supported by ample record evidence. *See* SOMF ¶ 40. Accordingly, Plaintiffs have failed to satisfy their obligations under License Agreement §§ 12(b) and 13.3.

**VI. Industrial Heat Is Entitled to Summary Judgment on AACT Count III.**

Industrial Heat is entitled to summary judgment in its favor on Count III of the AACT for fraudulent inducement to enter into the Term Sheet. Under Florida law, the elements of fraudulent inducement are: (1) a false statement concerning a material fact; (2) the representor’s knowledge that the representation is false; (3) an intention that the representation induce another

to act on it; and (4) consequent injury by the party acting in reliance on the representation. *Moriber v. Dreiling*, 194 So.3d 369, 373 (Fla. Dist. Ct. App. 2016) (citing *Butler v. Yusem*, 44 So.3d 102, 105 (Fla. 2010); *GEICO Gen. Ins. Co. v. Hoy*, 136 So.3d 647, 651 (Fla. Dist. Ct. App. 2013)). A party that proves fraudulent inducement may elect rescission as the remedy, which involves both voiding the contract and returning the parties to the status quo that existed before the contract was executed. *See Mazzoni Farms, Inc. v. E.I. DuPont De Nemours & Co.*, 761 So.2d 306, 313 (Fla. Dist. Ct. App. 2000).

Rossi, on behalf of Leonardo, and Johnson, on behalf of J.M. Products, made numerous false statements of material fact or omissions of material fact to Industrial Heat prior to execution of the Term Sheet (August 13, 2014) to induce Industrial Heat to enter the Term Sheet. Notably, and without a factual basis to be disputed, they represented (among other things) that: (a) J.M. Products<sup>8</sup> was affiliated with a well known United Kingdom specialty chemicals and precious metals company called Johnson Matthey, *see* SOMF ¶¶ 57, 60-64, and (b) J.M. Products had a need for, and was going to use, the steam Leonardo could produce from the 1 MW Plant in a chemical manufacturing process, *see* SOMF ¶¶ 56, 59, & 62.

As to the first false representation, Johnson further backed up the representation by signing a compliance certificate stating that J.M. Products was “owned by an entity formed in the United Kingdom.” SOMF ¶ 65. (Johnson would also later send letters representing J.M. Products to be an “Advanced Derivatives of Johnson Matthew Platinum Sponges.” *See* SOMF ¶ 74b ). As to the second false representation, Rossi and Leonardo pointed to this as an independent check on how the 1 MW Plant would operate – in other words, that a “real Customer” would be purchasing the steam produced by Leonardo to use in a real manufacturing process would confirm that such steam was in fact being produced and the 1 MW Plant was operating as promised by Rossi and Leonardo, because if it was not, this “real Customer” would certainly complain. *See* SOMF ¶ 59.

These representations were unquestionably false: J.M. Products was never affiliated in any way with Johnson Matthey. SOMF ¶¶ 67, 79. In fact, the closest the two ever came is that Rossi, on behalf of J.M. Products, once asked for a price quote from Johnson Matthey for the purchase of platinum sponge, and then later bought some filters from a Johnson Matthey

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<sup>8</sup> At the time, J.M. Products was known as J.M. Chemical Products, Inc. It later changed its name to J.M. Products. *See* SOMF ¶ 58.

subsidiary in the United States (to mine them for platinum sponge contained therein). SOMF ¶ 68. J.M. Products also did not have a chemical manufacturing process in place with a need for the steam to be produced by the 1 MW Plant. In fact, J.M. Products had no operations at the time Rossi, Leonardo, Johnson, and J.M. Products induced Industrial Heat to enter the Term Sheet. SOMF ¶ 66.

The foregoing false statements were made to induce Industrial Heat to enter into the Term Sheet and allow the 1 MW Plant to be moved from its facilities in North Carolina (where it obviously could closely monitor any operation of, and any output from, the 1 MW Plant) to an alleged J.M. Products location in Florida, removed from Industrial Heat's immediate oversight. *See* SOMF ¶ 69. (Discovery has revealed that the Florida location was rented after the Term Sheet was signed, and that it was rented by Rossi for Leonardo, which in turn walled off a portion of the location for J.M. Products to "operate." *See* SOMF ¶ 72). As expected, Industrial Heat did in fact rely on these representations and allowed the 1 MW Plant to be moved to Florida. It would not have done so had it known that J.M. Products had no affiliation with Johnson Matthey and no real manufacturing process to operate in Florida. *See* SOMF ¶¶ 70, 71.

As a result of Industrial Heat being fraudulently induced to enter into the Term Sheet, it is entitled to rescission of the Term Sheet. *See Mazzoni Farms, Inc.* 761 So.2d at 313. It is also entitled to recoup the moneys it paid subsequent to entering the Term Sheet for the operation and maintenance of the 1 MW Plant while in Florida, including the expenses associated with paying for the services of Fulvio Fabiani and Barry West to assist Rossi in the operation and maintenance of the Plant. Industrial Heat would not have incurred these costs if the Term Sheet had not been entered and the 1 MW Plant had not been moved to Florida. Accordingly, these costs must be reimbursed to return to the status quo before the Term Sheet was entered. *See id.*<sup>9</sup>

#### **VII. Industrial Heat and IPH Are Entitled to Summary Judgment on AACT Count IV.**

Counter-Plaintiffs are entitled to at least partial summary judgment on Count IV of the AACT for Counter-Defendants' and Third Party Defendants' violations of the Florida Deceptive and Unfair Trade Practices Act ("FDUTPA"). The elements of a FDUTPA violation are: (1) a

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<sup>9</sup> Industrial Heat should also be allowed to recover its costs associated with this litigation because this litigation never would have arisen if the 1 MW Plant were not moved to Florida, giving Plaintiffs the cover they needed to allegedly conduct a "guaranteed performance" test away from Industrial Heat's direct oversight. Without that cover, they would not have been able to conduct their alleged test, upon which all of their claims in the Complaint are based.

deceptive act or unfair practice; (2) causation; and (3) actual damages. *Rollins, Inc. v. Butland*, 951 So.2d 860, 869 (Fla. Dist. Ct. App. 2006). FDUTPA claims can encompass a broad variety of conduct, and are not limited to parties' contractual relationships or conduct involving fraud. See Fla. Stat. § 401.204(1); *Nature's Prods., Inc. v. Natrol, Inc.*, 990 F.Supp.2d 1307, 1322 (S.D. Fla. 2013); *Deere Constr., LLC v. Cemex Constr. Materials Fla., LLC*, 198 F.Supp.3d 1332, 1342 (S.D. Fla. July 2016) (quoting *Galstaldi v. Sunvest Cmtys. USA, LLC*, 637 F.Supp.2d 1045, 1058 (S.D. Fla. 2009)). A FDUTPA claim does not require "show[ing] [that] [a] defendant was the principal actor involved in the violative acts, or that [a] defendant initiated those acts." *Galstaldi*, 637 F.Supp.2d at 1056. "[I]t is sufficient to allege that a party directly participated in a violation of the FDUTPA, even if that violation was initiated by another." *Sundance Apartments I, Inc. v. Gen. Elec. Capital Corp.*, 581 F.Supp.2d 1215, 1222 (S.D. Fla. 2008).

**A. Rossi, Leonardo, Johnson, J.M. Products, Bass, Fabiani, and USQL Engaged in a Variety of Deceptive Acts or Unfair Practices Connected with the 1 MW Plant's Operation in Florida.**

Rossi, Leonardo, Johnson, J.M. Products, Bass, Fabiani, and USQL ("the FDUTPA Defendants") participated in a variety of deceptive acts or unfair practices which collectively formed an overarching scheme to deceive Industrial Heat and IPH into allowing Rossi and Leonardo to move the 1 MW Plant to Florida and operate it there, to obtain money from Industrial Heat and IPH to which they were not otherwise entitled, and to manipulate an alleged "guaranteed performance" test.

**1. The First Part of the Scheme.**

First, Rossi, Leonardo, Johnson, and J.M. Products defrauded Industrial Heat and IPH into agreeing to relocate the 1 MW Plant to Florida. The undisputed facts proving this step in the scheme are described in more detail in Section VI *supra*.

**2. The Second Part of the Scheme.**

Second, the FDUTPA Defendants deceived Industrial Heat and IPH as to the reliability, independence, accuracy, success, and benefit of the 1 MW Plant's operations and performance in Florida. They also prevented and blocked Industrial Heat and IPH from verifying the operations and performance of the 1 MW Plant.

Rossi, Leonardo, Johnson, J.M. Products, and Bass created the intentionally false illusion that J.M. Products was a "real customer" of Leonardo using the steam produced by the 1 MW Plant. They did so to falsely substantiate the reliability and independence of the 1 MW Plant's

operations and performance. Specifically, Rossi and Bass: (a) represented J.M. Products as an entity separate from Rossi and Leonardo by, for example, distinguishing it from Rossi and Leonardo in discussions with Industrial Heat and others, *see* SOMF ¶¶ 73a; (b) held out Bass as J.M. Products' "Director of Engineering," *see* SOMF ¶¶ 73b, 75a; (c) represented J.M. Products as having its own operations and using the 1 MW Plant's steam to manufacture and process its own products, *see* SOMF ¶¶ 73c, 75b; and (d) represented J.M. Products as satisfied with the power it was purportedly receiving from the 1 MW Plant, *see* SOMF ¶¶ 73d, 75c. Johnson and J.M. Products also portrayed J.M. Products as receiving, measuring and being satisfied with the power it was purportedly receiving from the 1 MW Plant by sending monthly letters to Industrial Heat stating the amount of power it was receiving and offering to pay for such power. *See* SOMF ¶ 74a. Separately, Rossi, Leonardo, Johnson, and J.M. Products continued to portray J.M. Products as a credible company by representing that it was affiliated with Johnson Matthey. *See* SOMF ¶¶ 73e, 74b.

Rossi, Leonardo, Johnson, J.M. Products, and Bass's representations and actions were meant to present J.M. Products as a check on, and confirmation of, claims by Rossi, Leonardo, and Penon that the 1 MW Plant was operating effectively and producing an extraordinarily high volume of steam. SOMF ¶ 76. The reality, however, was far different. J.M. Products had no manufacturing process to use the steam allegedly produced by the 1 MW Plant, made no products, and had no customers other than Leonardo itself. *See* SOMF ¶ 77. Rossi and Leonardo entirely controlled and funded J.M. Products and Bass. SOMF ¶ 78. Bass was hired as J.M. Products' independent contractor (not employee) by Rossi and Leonardo, and worked under the direction of Rossi and Leonardo. SOMF ¶ 78a. Johnson and Bass had little to no knowledge of J.M. Products' supposed business and operations. SOMF ¶ 78b. The Johnson/J.M. Products monthly letters on the power J.M. Products was allegedly receiving from the 1 MW Plant were drafted and the information contained therein provided by Rossi. SOMF ¶ 78c. J.M. Products was not an affiliate of Johnson Matthey, but rather owned by a U.S. trust over which Johnson had control as trustee. SOMF ¶ 79.

Rossi, Leonardo, Fabiani, and USQL also deceived Industrial Heat and IPH as to the accuracy and success of the 1 MW Plant's operations and the accuracy of measurements of the 1 MW Plant's performance. Rossi and Leonardo (through Penon) and Fabiani and USQL (themselves and through Penon) provided measurement data to Industrial Heat and IPH (*see*



SOMF ¶ 80) that was fabricated, obtained as the result of manipulating the 1 MW Plant's operations, or incomplete such as to render it misleading. For one, the power absorption data that Fabiani and Penon provided Industrial Heat and IPH (which were nearly identical to each other, *see* SOMF ¶ 81) materially conflicted with the data provided by Florida Power and Light ("FPL"). Indeed, during certain time periods, the false data from Fabiani and Penon reflecting that the 1 MW Plant used more power than FPL was providing to the entire warehouse facility where the 1 MW Plant was located – an impossible feat even if every single light, fan and computer at the warehouse was turned off during these time periods. *See* SOMF ¶ 82. Rossi and Leonardo admitted to Industrial Heat and IPH that FPL's electrical usage data "[would] be a confirmation of the [1 MW Plant's] COP." *See* SOMF ¶ 59 & Ex. 34 at 4th Am. AACT Ex. 16. Fabiani and Penon provided fabricated electrical usage data instead of the real data from FPL in order to avoid Industrial Heat and IPH being able to use the real data as a check or confirmation of Rossi and Leonardo's claims about the 1 MW Plant's performance. Furthermore, Rossi and Leonardo withheld material information when providing data to Penon, particularly (a) discrepancies between measurements taken from Leonardo's side of the Doral facility and measurements taken from J.M. Products' side of the Doral facility; and (b) instances when the 1 MW Plant had operational problems or had to be shut down. SOMF ¶ 83. This information is material to understanding the implications and significance of Penon's data, and thus withholding it renders such data incomplete and misleading.

Rossi, Leonardo, Johnson, J.M. Products, Fabiani, and USQL prevented or blocked Industrial Heat or IPH from verifying the 1 MW Plant's operations and performance. To begin, Rossi and Leonardo altered the 1 MW Plant's setup in Florida from the design created by Industrial Heat personnel in North Carolina in order to make evaluating the 1 MW Plant's performance more difficult. SOMF ¶ 84. For example, the 1 MW Plant was designed to produce steam, yet Rossi and Leonardo removed the steam trap and condensate line placed on the pipe intended to carry the steam out of the 1 MW Plant. *See id.* These devices would have helped measure whether the 1 MW Plant was producing pure steam as claimed or just water or a combination of water and steam. In addition, Rossi and Leonardo refused to grant Industrial Heat personnel access to the Doral facility in both July and December 2015 (which refusal Johnson and J.M. Products complied with and enforced). *See* SOMF ¶¶ 86, 87. Rossi and Leonardo (again with J.M. Products' concurrence) also prohibited Industrial Heat personnel from

entering or knowing anything about J.M. Products' side of the Doral facility entirely. SOMF ¶ 85. Once an Industrial Heat engineer finally gained access to the Doral facility in February 2016, he was promptly able to determine that Rossi and Leonardo's claims about the performance of the 1 MW Plant – claims that had been backed up by the other FDUTPA Defendants – were simply impossible. *See* SOMF ¶ 88.

For their part, following the completion of the purported Guaranteed Performance test, Fabiani and USQL refused to provide Industrial Heat with data that they had collected during the purported test, despite Industrial Heat's request for and despite initially committing to produce such data. SOMF ¶¶ 96-99. Fabiani (on behalf of USQL), along with Rossi (on behalf of Leonardo and J.M. Products), also removed, modified, or destroyed data and equipment from the Doral facility following the completion of the purported "guaranteed performance test" without notifying or obtaining the consent of Industrial Heat or IPH. SOMF ¶¶ 37, 104, 105. All of this, of course, was on top of Fabiani and USQL providing fabricated data to Industrial Heat and IPH during the purported test, as noted already above.

### **3. The Third Part of the Scheme.**

Third, Rossi and Leonardo demanded payment of \$89 million under the License Agreement based on the scheme in which all the FDUTPA Defendants participated. Rossi and Leonardo claimed entitlement to \$89 million based on Penon's "final report" stating that the "guaranteed performance test" had been completed and satisfied pursuant to the License Agreement. Compl. ¶¶ 72-74; AACT at 13, 14. This illusory entitlement arose from the cumulative effect of the first two parts of the scheme: (1) Rossi, Leonardo, Johnson, and J.M. Products successfully manipulating Industrial Heat into agreeing to the 1 MW Plant's relocation to Florida and (2) all FDUTPA Defendants portraying the 1 MW Plant's operations and performance as reliable, independent, accurate, and successful. *See* Section VII *supra*.

#### **B. The FDUTPA Defendants' Deceptive Acts or Unfair Practices Caused Industrial Heat and IPH to Suffer Actual Damages.**

The scheme orchestrated by the FDUTPA Defendants damaged Industrial Heat and IPH. Industrial Heat and IPH relied on this scheme in reimbursing the FDUTPA Defendants' expenses and in incurring their own expenses. Specifically, they relied on Rossi, Leonardo, Johnson, and J.M. Products' manipulation as to the 1 MW Plant's relocation to Florida in paying for (1) the 1 MW Plant's transportation to Florida; (2) the procurement and delivery of equipment for the 1 MW Plant's reassembly in Florida; and (3) the procurement and transportation of personnel to

assemble the 1 MW Plant in Florida. *See* Section VI *supra*; SOMF ¶ 89. They also relied on the FDUTPA Defendants’ portrayal of J.M. Products and representations of measurement data and performance in paying for, among other things, (1) repairs and maintenance to the 1 MW Plant; (2) new equipment for the Doral warehouse facility; and (3) personnel to work at the warehouse and on maintenance of the 1 MW Plant (such as Barry West, T. Barker Dameron, Joe Murray, and Fabiani). *See* SOMF ¶ 89.

Furthermore, Industrial Heat and IPH clearly incurred actual damages arising from this litigation, as Rossi and Leonardo would have had no basis to sue Industrial Heat and IPH if they had not been able to use J.M. Products and the 1 MW Plant’s relocation to Florida as a cover for conducting the purported Guaranteed Performance test. *See* Section VII.A. *supra*.

### **VIII. Industrial Heat Is Entitled to Summary Judgment on the AACT Count V.**

Industrial Heat is entitled to partial summary judgment on its breach of contract claim (Count V) against Third-Party Defendants Fulvio Fabiani (“Fabiani”) and United States Quantum Leap, LLC (“USQL”) (collectively, the “USQL Defendants”) because the undisputed facts show that the USQL Defendants breached Section 6 of the parties’ Technical and Consulting Agreement (the “USQL Agreement”).

Here, a contract existed between Industrial Heat and the USQL Defendants, and the contract remained in existence at the time of the breach by the USQL Defendants. On or about September 1, 2013, Industrial Heat and USQL entered into the original USQL Agreement pursuant to which Fabiani and USQL were to provide services to Industrial Heat related to the manufacture and development of products relating to the E-Cat IP. SOMF ¶ 90. Fabiani executed a joinder to the USQL Agreement, agreeing to be bound by certain provisions contained therein, including Section 6 relating to “Rights to Materials.” SOMF ¶ 91. The USQL Agreement was renewed and extended in August of 2014, and again in July of 2015. *See* SOMF ¶¶ 92, 94. Fabiani executed joinders in connection with both of those renewals. *See* SOMF ¶¶ 93, 95. The USQL Defendants do not dispute that the termination date of the USQL Agreement was March 31, 2016. *See* SOMF ¶ 100.

Section 6 of the USQL Agreement provides:

All Confidential Information, records, files, memoranda, reports, drawings, plans, designs, specifications, tests and results, recordings, documents and the like (together with all copies thereof), including any of the foregoing that are electronically maintained, *relating to the business of Industrial Heat or the engagement of USQL [and Fabiani] pursuant to this Agreement* that USQL [and

Fabiani] shall use or prepare or come in contact with in the course of, or as a result of, the engagement of USQL [and Fabiani] under this Agreement shall *remain the sole property of Industrial Heat* or shall be deemed contracted for as a part of the services provided hereunder... *Upon termination of this Agreement or upon the prior demand of Industrial Heat*, USQL [and Fabiani] shall *immediately* return all such items and materials (and all copies thereof, including any electronically maintained copies) to Industrial Heat and shall not thereafter cause removal thereof from Industrial Heat's premises...

USQL Agreement (SOMF Ex. 67) § 6. Thus, upon termination of the contract or upon earlier demand by Industrial Heat, the contract required the USQL Defendants to provide Industrial Heat with all data and other documents they “use[d] or prepare[d] or c[a]me into contact with” in connection with the services they provided during the testing of the 1 MW Plant. *Id.* Such documents are the “sole property of Industrial Heat” or are specifically deemed contracted for as a part of the services provided. *Id.*

It is not disputed that the USQL Defendants refused to provide Industrial Heat with data and documents to which it was contractually entitled, despite repeated requests to do so. On February 23, 2016, Fabiani acknowledged that the USQL Defendants would provide Industrial Heat with “all electrical and thermal data of the system throughout the period of the test” and an “official report to bring to light all the flaws and functional deficiencies of the system,” which would also mention all “plant stop periods (total or partial)” and the reasons therefor. SOMF ¶ 96 & Ex. 70. Fabiani delivered no such data and documents to Industrial Heat. Industrial Heat repeatedly requested from the USQL Defendants copies of the promised raw thermal and electrical data as well as the final report relating to the testing in Doral. *See* SOMF ¶¶ 97-98. Industrial Heat also requested flow meter records the USQL Defendants represented they had. *Id.* Notwithstanding Industrial Heat's repeated demands for the USQL Defendants to provide it with what the USQL Agreement made Industrial Heat's sole property, the USQL Defendants refused. *See* SOMF ¶ 99. Their actions breached Section 6 of the USQL Agreement.

Additionally, Fabiani testified that he had other relevant documents and data that he did not provide to Industrial Heat, including data from thermocouples that were installed on individual E-Cat reactors in the 1 MW Plant, and e-mails to Penon that contained data about the operation of the 1 MW Plant. *See* SOMF ¶ 104. By contract, these documents and data were the “sole property” of Industrial Heat and needed to be turned over to Industrial Heat no later than “[u]pon termination of th[e USQL] Agreement.” *See* USQL Agreement (SOMF Ex. 67) § 6.

documents and data. *See* SOMF ¶ 104. This conduct constitutes a further breach of Section 6 of the USQL Agreement.<sup>10</sup>

There can be no dispute that Industrial Heat has demonstrated damages resulting from the USQL Defendants' breach. Industrial Heat paid the USQL Defendants \$10,500 per month from February 2015 through February 2016 and also paid Fabiani's monthly rent of \$1,370 during that time period. *See* SOMF ¶¶ 102, 103. Industrial Heat, however, did not get the benefit of its bargain because the USQL Defendants refused to provide Industrial Heat with the documents and data that were "the sole property of Industrial Heat" or "contracted for as a part of the services provided". USQL Agreement (SOMF Ex. 67) § 6. Partial summary judgment in favor of Industrial Heat as to Count V of the AACT is warranted. *See Vital Pharm., Inc.*, 2016 WL 4479370, at \*9.

### CONCLUSION

For these reasons, the Court should grant summary judgment in Defendants'/Counter-Plaintiffs' favor on Counts I, III, IV, and VI of the Complaint, and on all Counts of the 4th Amended AACT.

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<sup>10</sup> The USQL Defendants contend that their duty to provide data and documents to Industrial Heat pursuant to the USQL Agreement was excused based on Industrial Heat's "precedent breach" of failing to pay the final invoice under the Agreement. [D.E. 149] at 20. This argument fails. First, the USQL Defendants' breach occurred *before* any obligation of Industrial Heat to pay the final invoice. The USQL Defendants' final invoice dated March 30, 2016 was received by Industrial Heat on April 6, 2016. *See* SOMF ¶ 101. Industrial Heat had fifteen days from then to pay the invoice, so payment was due by April 21, 2016. USQL Agreement (SOMF Ex. 68) § 10. The USQL Defendants breached the USQL Agreement well before that by failing to comply with Industrial Heat's information request on March 22, 2016 (and multiple times thereafter). *See* SOMF ¶¶ 97-99. Second, notwithstanding the USQL Defendants' breach, Industrial Heat repeatedly offered to pay the USQL final invoice if the USQL Defendants would provide the documents and data they were required to provide under the Agreement, but the USQL Defendants refused to comply with their obligations under the Agreement. *See* SOMF ¶¶ 98, 99.

Dated: March 22, 2017

Respectfully submitted,

*/s/ Christopher R.J. Pace*

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on March 22, 2017, 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/ Christina T. Mastrucci*

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Christina T. Mastrucci