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

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; UNITED STATES QUANTUM LEAP, LLC; FULVIO FABIANI; and JAMES A. BASS,

Third-Party Defendants.

DEFENDANTS'/COUNTER-PLAINTIFFS' STATEMENT OF MATERIAL FACTS IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

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Defendants Thomas Darden ("Darden"), John T. Vaughn ("Vaughn"), and Cherokee Investment Partners, LLC ("Cherokee") (collectively, "Defendants") and Defendant-Counter-Plaintiffs Industrial Heat, LLC ("Industrial Heat") and IPH International, B.V. ("IPH"), in accordance with Rule 56 of the Federal Rules of Civil Procedure and Local Rule 56.1, submit the following statement of material facts as to which they contend there does not exist a genuine issue to be tried:

1. On October 26, 2012, Industrial Heat, Leonardo Corporation, a New Hampshire Corporation ("Leonardo NH"), Plaintiff Andrea Rossi ("Rossi"), and AmpEnergo, Inc. ("AEG") executed and entered into a License Agreement. *See* Ex. 1, a true and correct copy of the License Agreement.

2. Plaintiff Leonardo Corporation, a Florida corporation ("Leonardo FL") did not execute and was not a party to the License Agreement.[1] *See id.*

3. There are no provisions in the License Agreement requiring Industrial Heat to keep confidential the E-Cat IP (as that term is defined in the License Agreement). *See id.*

4. On or about October 26, 2012, Industrial Heat made the initial payment of $1.5 million to Leonardo NH as specified in the Section 3.2(a) of the License Agreement. *See* Compl. ¶ 47; 4th Am. AACT at 8.

5. The 1 MW Plant was to involve at least 54 E-Cat reactors for the 24-hour Validation Test contemplated in Section 4 of the License Agreement. *See* Rossi Dep. (excerpts of which are attached hereto as Composite Ex. 2) 151:1-2.

6. On April 23, 2013, Rossi represented to Industrial Heat that: (a) he had met with Health Office of the Province of Ferrara; (b) that the Health Office had to authorize the 24-hour Validation Test contemplated in Section 4 of the License Agreement; and (c) that, because of the requirements of Italian law, he planned to test only 25% of the number of reactors contemplated in the License Agreement. *See* Ex. 2 at 151:1-2; Ex. 3 (4th Am. Answer, Additional Defenses, Countercls., & Third-Party Claims ("4th Am. AACT") Ex. 9).

[1] For the sake of simplicity, a reference to "Leonardo" means Leonardo FL and/or Leonardo NH.

7. On April 24, 2013, Rossi represented to Industrial Heat that Italian law would allow the Validation Test to be done using 30 reactors. *See* Ex. 4 ([IH-00098392-00098396]).

8. On or about April 29, 2013, Industrial Heat, Leonardo NH, Rossi, and AEG executed and entered into a First Amendment to the License Agreement ("First Amendment"). *See* Ex. 5, a true and correct copy of the First Amendment.

9. Leonardo FL was not a party to the First Amendment. *See id.*

10. Rossi is not the owner of Leonardo FL. *See* Ex. 2 at 38:21-39:17.

11. Neither Industrial Heat nor IPH ever consented to any assignment by Leonardo NH of Leonardo NH's rights under the License Agreement or First Amendment to Leonardo FL. *See* Darden Decl. (attached hereto as Ex. 6) at ¶ 8.

12. On or about April 29, 2013, Industrial Heat and IPH entered an Assignment and Assumption of License Agreement ("Assignment and Agreement"). *See* Ex. 7, a true and correct copy of the Assignment and Assumption.

13. Rossi and Leonardo NH consented to the Assignment and Agreement. *See* Ex. 5 § 1;

14. On or about April 29, 2013, Leonardo NH and Rossi executed a Certificate certifying to IPH that the representations and warranties in the License Agreement, as amended by the First Amendment, remained true and correct. *See* Ex. 8, a true and correct copy of the Certificate.

15. Immediately prior to commencing the Validation Test, Rossi claimed that Italian law was even more restrictive, and only would permit using 18 E-Cat reactors for the test. *See* Ex. 6 at ¶ 9.

16. In fact, the Ferrara Health Office told Rossi that he could proceed with the Validation Test without any restriction on the number of reactors to be tested. *See* Ex. 2 at 148:12-149:7, 149:19-23;

17. Industrial Heat relied on Rossi's false representations regarding Italian law in entering into the First Amendment. *See* Ex. 6 at ¶ 7; Darden Dep. (excerpts of which are attached hereto as Composite Ex. 9) 200:5-15.

18. During the purported Validation Test that commenced on April 30, 2013, 18 E-Cat reactors were operated as "Unit A" (as "Unit A" is defined in the First Amendment). *See*

Penon Dep. (excerpts of which are attached hereto as Composite Ex. 10) 149:25-151:12, 154:6-13; Ex. 11 (Penon Dep. Ex. 8).

19. The purported Validation Test that commenced on April 30, 2013 and concluded on May 1, 2013 was not performed for a duration of twenty-four consecutive hours (but rather for only 23.5 hours). *See id.*

20. The purported Validation Test that commenced on April 30, 2013 did not "measure the flow of the heated fluid and the Delta T between the temperature of the fluid before and after the E-Cat reaction," as specified in the First Amendment. *See id*.

21. Industrial Heat paid $10 million to Leonardo on or about May 2, 2013. *See* Compl. ¶ 58; 4th Am. AACT at 10.

22. Industrial Heat also paid $3,219,950 to AEG on or about August 12, 2013. *See* AEG Dep. (excerpts of which are attached hereto as Composite Ex. 12) 190:23-191:8; Ex. 13 ([AE000255-000256]).

23. In August 2013, the E-Cat Unit was delivered to Industrial Heat at its facility in North Carolina. *See* Compl. ¶ 59; 4th Am. AACT at 10. The "E-Cat Unit" is defined in the License Agreement as the "Plant" and is sometimes referred to as the "1 MW E-Cat Unit" or the "1 MW Plant."

24. Rossi and Leonardo did not commence a "Guaranteed Performance Test" in 2013 or 2014. In fact, they did allegedly commence such a test until 2015. *See* Compl. ¶ 66; Pls.' Resp. & Objections to Industrial Heat's 1st Req. for Admissions (attached hereto as Ex. 14) at Resp. Nos. 36 & 37.

25. Rossi and Leonardo did not complete any "Guaranteed Performance Test" within the time period set forth in Section 5 of the License Agreement. *See id.*; Ex. 1 § 5.

26. In October 2013, Industrial Heat and Rossi executed a proposed Second Amendment to the License Agreement (the "Proposed Second Amendment"), which is dated "October __, 2013." *See* Ex. 15, a true and correct copy of the Proposed Second Amendment.

27. AEG did not sign the Proposed Second Amendment. *See id.* AEG, which stood to earn money if a "Guaranteed Performance Test" was successful, understood that their considered refusal to sign the Proposed Second Amendment rendered the document invalid. *See* Ex. 12 at 79:2-18, 87:2-11; Ex. 16 ([IH-00089736-00089743]).

28. Leonardo NH did not sign the Proposed Second Amendment. *See* Ex. 15.

29. Leonardo FL did not sign the Proposed Second Amendment. *See id.*

30. IPH did not sign the Proposed Second Amendment. *See id.*

31. On April 30, 2014, Rossi admitted that the Proposed Second Amendment was not effective because AEG did not sign it. *See* Leonardo Corp. Dep. (excerpts of which are attached hereto as Composite Ex. 17) 195:19-196:24; Composite Ex. 18 (AEG Dep. Ex. 15; Leonardo Corp. Dep. Ex. 15).

32. Industrial Heat also recognized that the Proposed Second Amendment was not effective absent the signatures of all relevant parties. *See* Industrial Heat Dep. (excerpts of which are attached hereto as Composite Ex. 19) at 202:11-16.

33. The Proposed Second Amendment addressed the testing of "a six cylinder Hot Cat unit reasonably acceptable to [Industrial Heat]" (the "Six Cylinder Unit"), not the E-Cat Unit that was the subject of the License Agreement and the First Amendment. *See* Ex. 15.

34. The Six Cylinder Unit in the Proposed Second Amendment is separate and distinct from the 1 MW E-Cat Unit or 1 MW Plant as referenced in the License Agreement, the First Amendment, and the Complaint. The Six Cylinder Unit is a round, tub unit containing six hot cat reactor units and is used to heat oil rather than water. *See* Ex. 2 at 172:21-173:8, 174:5-8; Ex. 17 at 196:25-197:13; Ex. 20 (Rossi Dep. Ex. 12).

35. The Six Cylinder remains in North Carolina and was never sent to Florida. *See* Ex. 2 at 174:22-25; Ex. 6 at ¶ 15.

36. What Rossi and Leonardo used for their purported "Guaranteed Performance Test" in Florida was the 1 MW Plant, not the Six Cylinder Unit. *See* Ex. 14 at Resp. No. 1.

37. Rossi claims that, after performance of the "test," he dismantled a heat exchanger and all associated piping that supposedly dissipated heat generated by the 1 MW Plant during the purported "Guaranteed Performance Test." *See* Ex. 17 at 271:1-272:2.

38. Neither Industrial Heat nor IPH ever sub-licensed the E-Cat IP for profit. *See* Ex. 6 at ¶ 16; Ex. 19 at 40:25-41:10.

39. Neither Industrial Heat nor IPH ever created a product or service that could be sold based on the E-Cat IP. *See id.*

40. Neither Industrial Heat nor IPH were ever able to replicate the results Rossi and Leonardo claimed using the E-Cat IP. *See* Ex. 6 at ¶ 16; Ex. 9 at 100:7-101:5; Ex. 12 at 210:6-10; Ex. 19 at 40:25-41:10, 148:13-149:17, 150:14-151:4, 182:6-8; Vaughn Dep. (excerpts of

which are attached hereto as Composite Ex. 21) 106:14-107:1, 128:24-129:9, 249:7-14); Ex. 22 (AEG Dep. Ex. 20).

41. Rossi and Leonardo did not enter into any confidentiality agreements with third parties regarding the E-Cat IP. *See* Pls.' Resp. & Objections to Industrial Heat's 2d Set of Interrog. (attached hereto as Ex. 24) at Resp. No. 18.

42. Rossi and Leonardo have neither suffered nor alleged any cognizable damages as result of the fraud alleged in Count VI of the Complaint that are distinct from damages they claim to have been suffered as a result of alleged breaches of the License Agreement. *See* Compl. ¶ 117, Prayer for Relief ¶ H.

43. Rossi has made public disclosures on his website, Journal of Nuclear Physics ("JONP"), revealing specific terms of the License Agreement. Specifically, Rossi publicly disclosed that 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* JONP (excerpts of which are attached hereto as Composite Ex. 25) at July 2, 2015 & Dec. 21, 2015; Industrial Heat's Resp. & Objections to Rossi's 2d Set of Interrog. (attached hereto as Ex. 26) at Resp. Nos. 1-4.

44. Rossi made these public disclosures without written advance approval from either Industrial Heat or IPH. *See* Ex. 6 at ¶ 11.

45. Rossi and Leonardo filed the License Agreement in the public docket of this Court without written advance approval of Industrial Heat or IPH. *See* Compl. Ex. B.

46. By letter dated February 17, 2016, Jones Day on behalf of IPH requested Rossi and Leonardo to assign to IPH the Licensed Patents (as defined in the License Agreement) with respect to the Territory (as also defined in the License Agreement). Jones Day enclosed an assignment with the letter. A true and correct copy of the February 16, 2016 letter and the assignment enclosed therewith is attached hereto as Ex. 27.

47. Rossi and Leonardo did not execute the assignment as requested by letter of February 16, 2016. *See* Pace Decl. (attached hereto as Ex. 28) at ¶ 6.

48. Leonardo filed over one hundred patent applications relating to the Licensed Patents (as defined in the License Agreement) without informing IPH. *See* IPH's Resp. & Objections to Rossi's 1st Set of Interrogs. (attached hereto as Ex. 29) at Resp. No. 5 & Ex. A.

49. Leonardo abandoned over one hundred patent applications relating to the Licensed Patents (as defined in the License Agreement) without prior written notice to IPH. *See id.*

50. Leonardo charged Industrial Heat and IPH for fees and expenses associated with Leonardo's patent activities, and Industrial Heat and IPH paid those fees and expenses. *See* Composite Ex. 30 ([IH-00131929]; [IH-00014673]; [IH-00003745-00003746]; [IH-00013195-00013196]; [IH-00092023-00092024]; [IH-00011989-0011990]; Leonardo Corp. Dep. Ex. 7).

51. Rossi and Leonardo are engaged in designing and developing what are classified as "E-Cat Products" under the License Agreement with persons or entities other than Industrial Heat and IPH. *See* Ex. 25 at Feb. 9, 11, 13, 18, 20, 21, & 22, March 25 & 30, April 27, June 26, & July 23, 2016; Ex. 29 at Resp No. 2.

52. Rossi and Leonardo have engaged in design and development activities with ABB Group and Hydro Fusion, Ltd. *See* Ex. 17 at 234:21-235:3; Ex. 25 at June 4, June 14, July 16, July 23, July 24, Aug. 8, Oct. 2, Oct. 6, & Nov. 15, 2016; Ex. 29 at Resp. No. 3.

53. The IRS Form 1120 for the year 2012 filed by Leonardo FL, as produced by Plaintiffs in this action, is attached as Exhibit 31 ([Rossi_00011665-00011684]).

54. The IRS Form 1120X for the year 2013 filed by Leonardo FL, as produced by Plaintiffs in this action, is attached as Composite Exhibit 32 ([Rossi_00011685-00011704]; [Rossi_00011715-00011734]; [Rossi_00011736-00011751]).

55. The IRS Form 1040NR for the year 2013 filed by Rossi, as produced by Plaintiffs in this action, is attached as Exhibit 33 ([AE000358]).

56. Beginning in June 2014, Rossi, on behalf of Leonardo, repeatedly stated to Industrial Heat that he had "found" a "customer" with its own facility Florida, and that this "customer" had a commercial need for, and was going to use in a chemical manufacturing process, steam that Rossi and Leonardo intended to produce from the 1 MW Plant. *See* Ex. 2 at 183:9-184:5, 199:9-16; Ex. 9 at 164:19-23; Ex. 19 at 215:3-10, 229:17-21, 232:15-23; Ex. 21 at 180:8-22, 181:7-17, 194:17-20, 198:16-20, 267:18-268:4, 268:23-269:4; Composite Ex. 34 (4th Am. AACT Ex. 16; Rossi Dep. Exs. 13 & 14; [IH-00011175-00011176]).

57. Rossi also represented, on behalf of Leonardo, that this "customer" was affiliated with Johnson Matthey, plc ("Johnson Matthey"), a British multinational specialty chemical company with over £10 billion in revenue. *See* Ex. 9 at 172:6-173:12, 185:18-186:2, 186:9-18;

Ex. 19 at 213:25-214:9, 215:3-10, 229:21-230:5; 231:22-232:23; Ex. 21 at 180:13-181:25, 194:9-16; Composite Ex. 35 ([IH-00090895-00090896]).

58. This "customer" was Third-Party Defendant J.M. Products, Inc. ("J.M. Products"), who at the time was known as J.M. Chemical Products, Inc. *See* Ex. 2 at 183:9-184:11; J.M. Products Dep. (excerpts of which are attached hereto as Ex. 36) 66:22-67:2; Johnson Dep. (excerpts of which are attached hereto as Ex. 37) 88:8-21, 97:13-18; Composite Ex. 38 (Johnson Dep. Exs. 11 & 12).

59. Rossi asserted to Industrial Heat that having a "real customer" with a need for steam would be an independent check on how the 1 MW Plant would operate, in that the "customer's" purchase of the Plant's steam would confirm that such steam was being produced. *See* Ex. 17 at 242:21-243:2; Ex. 34 at 4th Am. AACT Ex. 16.

60. The original drafts of a proposed Term Sheet, by which Industrial Heat would agree to move the 1 MW Plant from its facility in North Carolina to the "customer's" facility in Florida, were prepared by Rossi and named the "customer" as Johnson Matthey. *See* Composite Ex. 39 ([IH-00007120-00007123]; [IH-00007129-00007131]).

61. Every attempt made by Industrial Heat to investigate or contact the "customer," a counter-party to the proposed Term Sheet, was rebuffed by Rossi, on the basis that Johnson Matthey did not want its name associated with the venture at the time. *See* Ex. 9 at 177:11-178:2; Ex. 19 at 228:4-11; Ex. 21 at 198:7-20, 199:20-200:3, 271:7-16; Composite Ex. 40 ([IH-00090826-00090827]; [IH-00007113-00007114]; [IH-00007117-00007118]);

62. On July 28, 2014, Industrial Heat, Rossi, and Third-Party Defendant Henry Johnson ("Johnson") met in North Carolina to discuss moving the 1 MW Plant from Industrial Heat's facility in North Carolina to J.M. Products' facility in Florida. Ex. 9 at 173:21-174:2; Ex. 37 at 230:18-231:6. Prior to the meeting, Rossi had told Industrial Heat that the purpose of the meeting would be to meet a Johnson Matthey representative. *See* Ex. 9 at 171:14-172:3, 174:3-11; Ex. 19 at 226:1-6, 226:14-227:2; Ex. 21 at 205:8-9, 270:21-24. During the meeting, Rossi introduced Johnson as J.M. Products' president, and further represented (with Johnson's acquiescence and adoption) that J.M. Products was affiliated with Johnson Matthey. *See* Ex. 9 at 174:12-175:11; Ex. 19 at 226:6-13, 228:4-11; Ex. 21 at 203:6-9, 203:15-20, 204:11-21, 205:17-23, 269:8-270:6; Ex. 37 at 237:13-22. Both Rossi and Johnson further represented that J.M. Products had its own facility in Florida, and was intending to use steam produced by the 1 MW

Plant in a chemical manufacturing process. *See* Ex. 9 at 175:12-176:14, 180:7-12, 181:5-14; Ex. 37 at 237:13-22.

63. Following the July 28, 2014 meeting, Rossi continued to make representations to cause Industrial Heat to believe that J.M. Products was affiliated with Johnson Matthey, and that publicly identifying Johnson Matthey would lose J.M. Products as a "customer." *See* Composite Ex. 41 ([IH-00011864]; [IH-00011871-00011872]; [IH-00011867-00011870]);

64. Also following the July 28, 2014 meeting, Rossi changed the "customer" in the proposed Term Sheet to J.M. Products, insisting that Johnson Matthey did not want its involvement in the venture to be known. *See* Ex. 9 at 185:18-186:8; Ex. 21 at 194:9-16, 274:14-20, 275:7-8, 275:15-20, 275:25-276:3; Ex. 42 ([IH-00089932-00089938]).

65. Further, on August 6, 2014, Johnson, on behalf of J.M. Products, signed a representation that J.M. Products "[was] owned by an entity formed in the United Kingdom." *See* Ex. 37 at 239:15-240:2, 247:16-249:25; Composite Ex. 43 (Johnson Dep. Exs. 50, 51, & 52).

66. From the time Rossi first raised the "customer" with Industrial Heat to the time the Term Sheet was executed, J.M. Products 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, it did not have any operations at all. *See* Ex. 2 at 191:18-192:1; Ex. 36 at 34:9-14; Ex. 37 at 31:19-25, 35:13-15, 90:25-91:3, 219:19-221:15, 222:3-24, 235:19-236:2.

67. Also during this time period, J.M. Products was not in any way affiliated with Johnson Matthey; it was owned by a U.S. trust over which Johnson had control as trustee. *See* Ex. 2 at 202:8-203:11; Ex. 36 at 111:11-112:7, 204:21-205:19; Ex. 37 at 14:21-15:12, 171:13-173:3, 240:7-20, 243:20-244:1.

68. The only connections between J.M. Products and Johnson Matthey were 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 subsidiary in the United States (to mine them for platinum sponge contained therein). *See* Ex. 2 at 201:14-203:11; Ex. 17 at 215:14-218:14, 221:8-223:16; Ex. 36 at 104:3-112:17; Ex. 37 at 125:8-127:25; Ex. 44 (Leonardo Corp. Dep. Ex. 17).

69. Rossi, on behalf of Leonardo, and Johnson, on behalf of J.M. Products, each made these representations regarding the "customer" to induce Industrial Heat to sign a Term Sheet to allow Rossi and Leonardo to move the 1 MW Plant to Florida. *See* Ex. 2 at 192:21-25, 200:1-3;

Ex. 9 at 177:11-178:2, 185:18-186:8; Ex. 19 at 191:13-16, 192:15-20, 215:6-10, 218:9-13, 226:1-228:11, 236:22-237:20; Ex. 34; Ex. 37 at 230:18-231:6, 232:9-19, 234:2-235:18, 237:13-22.

70. In reliance on these representations, Industrial Heat entered into a Term Sheet on or about August 13, 2014 with Leonardo and J.M. Products. *See* Ex. 9 at 156:24-162:5, 164:19-167:14, 169:21-24, 180:15-181:3, 191:21-23; Ex. 19 at 191:21-24, 213:25-214:19, 215:20-216:12, 217:12-221:3, 231:24-232:20; Ex. 21 at 182:5-183:8, 184:7-15, 185:3-10, 197: 8-16, 198:7-201:2, 267:18-268:7, 272:5-12, 276:19-277:9. A true and correct copy of the final executed Term Sheet is attached hereto as Exhibit 45.

71. Industrial Heat would not have entered into the Term Sheet or allowed Rossi to remove the 1 MW Plant to Florida if Industrial Heat had known that the "customer" had no affiliation with Johnson Matthey or any other publicly traded company, and no real manufacturing process or need for steam or heat. *See* Ex. 6 at ¶ 14; Ex. 19 at 218:2-221:3.

72. Rossi rented the premises at 7861 N.W. 46th Street, Doral, FL 33166 (the "Doral Facility") on behalf of Leonardo. *See* Ex. 2 at 200:9-17; Ex. 36 at 24:25-25:9, 72:7-20, 83:6-17; Ex. 37 at 40:25-41:6, 110:12-111:18, 123:10-17; Composite Ex. 46 (Johnson Dep. Ex. 15; J.M. Products Dep. Ex. 3).

73. After the 1 MW Plant moved to the Doral Location, Rossi, acting at times for Leonardo, and at other times for J.M. Products, took the following steps to create the intentionally false illusion that J.M. Products was a "real customer" of Leonardo using steam produced by the 1 MW Plant:

a. Distinguishing J.M. Products from Rossi and Leonardo in communications with Industrial Heat and with others, and instructing others to do the same. *See* Composite Ex. 47 (Leonardo Corp. Dep. Ex. 20; Johnson Dep. Exs. 17 & 23; AEG Dep. Ex. 28; Bass Dep. Ex. 20; Rossi_00004860).

b. Holding out Third-Party Defendant James Bass ("Bass") as J.M. Products' "Director of Engineering." *See* Bass Dep. (excerpts of which are attached hereto as Composite Ex. 48) 157:2-15.

c. Representing J.M. Products as having its own operations and a use for the 1 MW Plant's steam. *See* Ex. 19 at 285:6-23; Ex. 47 at Leonardo Corp. Dep. Ex. 20.

d. Representing J.M. Products as being satisfied with the power it was purportedly receiving from the 1 MW Plant. *See* Ex. 47 at Leonardo Corp. Dep. Ex. 20.

e. Representing J.M. Products as being affiliated with Johnson Matthey. *See* Ex. 9 at 179:16-180:12; Ex. 19 at 229:21-230:5; Ex. 49 ([IH-00011231]).

74. After the 1 MW Plant moved to the Doral Location, Johnson, acting for J.M. Products, took the following steps to create the intentionally false illusion that J.M. Products was a "real customer" of Leonardo using steam produced by the 1 MW Plant:

a. Sending letters to Industrial Heat on the amount of power J.M. Products was receiving and offering to pay for such power. *See* Ex. 9 at 294:16-295:18; Ex. 19 at 288:16-18; Ex. 21 at 246:14-17; Ex. 37 at 120:15-121:1, 167:24-168:2,168:13-169:3, 170:22-171:3; 172:23-173:12, 174:17-21, 178:23-179:3, 179:16-25; Composite Ex. 50 (Johnson Dep. Exs. 18, 32, 34, 35, 36, 37, 38, & 39; Rossi Dep. Ex. 21).

b. Sending letters to Industrial Heat representing J.M. Products to be an "Advanced Derivatives of Johnson Matthew Platinum Sponges." *See* Ex. 37 at 123:10-124:4, 171:13-173:3; Ex. 50 at Johnson Dep. Exs. 34 & 35.

75. After the 1 MW Plant moved to the Doral Location, Bass took the following steps to create the intentionally false illusion that J.M. Products was a "real customer" of Leonardo using steam produced by the 1 MW Plant:

a. Holding out himself as J.M. Products' "Director of Engineering." *See* Ex. 9 at 227:21-228:6; Ex. 19 at 289:2-7, 291:23-292:1; Ex. 36 at 44:5-9; Ex. 48 at 158:7-159:17; Ex. 51 (Bass Dep. Ex. 28)

b. Representing J.M. Products as having its own operations and a use for the 1 MW Plant's steam. *See* Ex. 9 at 228:7-24, 291:8-12; Ex. 19 at 285:6-23.

c. Representing J.M. Products as being satisfied with the power it was purportedly receiving from the 1 MW Plant. *See* Ex. 9 at 295:25-296:12; Ex. 36 at 56:4-15, 61:9-18.

76. Each of Rossi, Leonardo, Johnson, J.M. Products, and Bass intended, by the actions enumerated above, to present J.M. Products to Industrial Heat as a check on, and confirmation of, claims by Rossi, Leonardo, and Fabio Penon ("Penon") that the 1 MW Plant

was operating effectively and producing a high volume of steam. *See* Ex. 17 at 242:21-243:2; Ex. 47 at Leonardo Corp. Dep. Ex. 20.

77. In reality, following the execution of the Term Sheet, 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* Ex. 36 at 31:3-25, 32:14-17, 77:16-23, 233:14-16, 237:12-15, 248:23-249:3; Ex. 37 at 19:13-21:17, 22:24-23:8, 50:16-23, 53:7-11, 198:9-11, 224:20-226:10; Ex. 48 at 71:1-15, 133:23-135:12, 136:12-19; Stokes Dep. (excerpts of which are attached hereto as Composite Ex. 52) 92:6-21, 93:21-94:6, 165:1-21, 191:16-22, 199:18-200:5.

78. In addition, Rossi and Leonardo entirely controlled and funded J.M. Products and Bass. *See* Ex. 17 at 207:24-209:13, 227:11-15; Ex. 36 at 17:6-16, 18:4-20, 22:16-23:4, 24:13-25:9; Ex. 37 at 56:13-15, 116:9-18, 117:23-118:1, 142:6-16, 144:16-146:14, 153:14-155:25, 158:5-11, 160:1-162:7, 229:8-18, 241:23-25; Ex. 48 at 96:13-20, 97:5-17, 98:1-3; Composite Ex. 53 (Johnson Dep. Exs. 16, 27, 29, 30, & 31). Moreover:

a. Bass was hired as J.M. Products' independent contractor (not employee) by Rossi, and worked under Rossi's direction. Ex. 17 at 209:14-18; Ex. 36 at 26:4-13; Ex. 37 at 59:22-60:3, 119:8-120:4, 156:1-9, 158:5-11, 162:8-163:15, 165:22-167:3; Ex. 48 at 98:1-3.

b. Johnson and Bass had little to no knowledge of J.M. Products' supposed business and operations. *See* Ex. 37 at 19:13-21:17, 22:24-23:8, 50:16-23, 53:7-11, 56:7-10, 198:9-21, 217:5-12; Ex. 48 at 27:15-28:16, 41:17-42:18, 71:1-15.

c. The monthly letters to Industrial Heat prepared on J.M. Products letterhead and signed by Johnson, which reported levels of power allegedly received from the 1 MW Plant, were drafted and the information contained therein provided by Rossi. *See* Ex. 2 at 271:11-272:2, 276:6-23; Ex. 37 at 121:2-12, 167:15-169:8, 170:9-171:3, 173:6-174:3, 179:23-179:25; Ex. 47 at Johnson Dep. Ex. 17; Ex. 50 at Johnson Dep. Exs. 34, 35, 36, 37, & 38; Ex. 54 (Johnson Dep. Exs. 18 & 33).

79. In addition, J.M. Products was not an affiliate of Johnson Matthey and was not controlled by a trust formed in the United Kingdom. Rather, it was owned by a United States trust over which Johnson had control as a trustee. *See* Ex. 2 at 202:8-203:11; Ex. 36 at 111:11-112:7, 204:21-205:19; Ex. 37 at 14:21-15:12, 171:13-173:3, 240:7-20, 243:20-244:1.

80. Rossi and Third-Party Defendant Fulvio Fabiani ("Fabiani"), acting on behalf of Third-Party Defendant United States Quantum Leap, LLC ("USQL"), provided measurement data to Fabio Penon , who in turn provided that information to Industrial Heat and IPH. Fabiani also provided his own separate measurement data to Industrial Heat and IPH. *See* Ex. 10 at 101:12-102:3, 105:6-21, 107:4-10, 115:17-116:6, 117:20-118:8, 137:6-13, 169:19-171:20, 190:2-191:3; Ex. 17 at 16:15-17:1, 29:6-16, 37:16-38:5, 156:12-19, 178:25-180:10; Ex. 21 at 256:7-22; Composite Ex. 55 (Fabiani Dep. Ex. 3; Penon Dep. Exs. 16, 19, 21, & 26); Fabiani Dep. (excerpts of which are attached hereto as Composite Ex. 56) 38:3-18, 39:11- 40:12, 44:14-48:9, 87:16-88:23, 99:5-8, 100:8-22, 142:5-10;

81. Fabiani and Penon's measurement data regarding the 1 MW Plant's power absorption were nearly identical. *See* Ex. 55 at Fabiani Dep. Ex. 3 & Penon Dep. Ex. 21; Ex. 56 at 99:5-8, 100:8-22; Murray Dep. (excerpts of which are attached hereto as Composite Ex. 57) 118:16-119:5, 147:2-13, 251:18-252:7; Composite Ex. 58 (Murray Dep. Exs. 8 & 11).

82. The power absorption data that Fabiani and Penon provided Industrial Heat and IPH reflected that during certain time periods, the 1 MW Plant was used more power than Florida Power and Light ("FPL") was providing to the entire warehouse facility where the 1 MW Plant was located. Ex. 55 at Fabiani Dep. Ex. 3 & Penon Dep. Ex. 21; Ex. 56 at 99:5-8, 100:8-22; Ex. 57 at 254:13-260:14, 279:14-283:6, 367:8-368:7; Ex. 58; Composite Ex. 59 (Murray Dep. Exs. 12 & 13).

83. When providing measurement data to Penon, Rossi withheld information regarding (a) discrepancies between measurements taken from Leonardo's portion of the Doral Facility and measurements taken from JMP's portion of the Doral Facility; and (b) instances when the Plant had operational problems or had to be shut down. Ex. 17 at 131:9-13, 132:16-24, 250:14-251:4.

84. When the 1 MW Plant was sent to and then reassembled in Florida, Rossi, on behalf of Leonardo, redesigned its configuration in a manner that made evaluating its performance more difficult. For example, the 1 MW Plant was designed to produce steam, yet Rossi removed the steam trap and condensate line placed on the pipe intended to carry the steam out of the 1 MW Plant. Dameron Dep. (excerpts of which are attached hereto as Composite Ex. 60) 181:8-21, 184:23-185:15, 192:12-197:14, 198:24-201:13, 203:15-22; West Dep. (excerpts of

which are attached hereto as Composite Ex. 61) 88:3-16, 89:16-19, 91:3-25, 110:20-24, 139:5-11.

85. Rossi, on behalf of Leonardo, walled off a portion of the Doral Facility for the ostensible purpose of creating a space within which J.M. Products would "operate." Rossi, with Johnson and J.M. Products' concurrence, thereafter prohibited Industrial Heat personnel from entering the J.M. Products side of the Doral Facility or learning about J.M. Products' supposed operations. *See* Ex. 21 at 238:7-239:8; Ex. 36 at 38:3-6; Ex. 57 at 216:9-11, 314:10-13; Ex. 61 at 81:6-11, 82:14-17, 100:22-101:7, 157:23-158:2, 159:4-15, 178:16-19, 180:11-23, 181:7-9, 206:12-21, 210:23-212:3, 226:3-12; Composite Ex. 62 (Bass Dep. Exs. 25, 26, & 27).

86. Rossi, on behalf of Leonardo, refused to grant Joseph Murray ("Murray"), an Industrial Heat employee, access to the Doral Facility in July 2015. Johnson, on behalf of J.M. Products, complied with and enforced this refusal. Ex. 19 at 247:13-16, 258:7-9; Ex. 21 at 62:19-20, 239:23-25, 240:7-241:12; Ex. 57 at 66:14-18, 130:3-14; Ex. 63 (4th Am. AACT Ex. 19).

87. Rossi, on behalf of Leonardo, again refused to grant Industrial Heat access to the Doral Facility in December 2015. Again, Johnson, on behalf of J.M. Products, complied with and enforced this refusal. Ex. 37 at 182:11-183:6, 184:23-185:19, 187:1-14, 228:11-229:6; Composite Ex. 64 (Johnson Dep. Exs. 40 & 41).

88. Once Murray gained access to the Plant in February 2016, he was promptly able to determine that Rossi's claims about the Plant were false. *See* Ex. 57 at 145:5-8; Ex. 65 (4th Am. AACT Ex. 5).

89. The scheme orchestrated by Rossi, Leonardo, Johnson, J.M. Products, Bass, Fabiani, and USQL, including Rossi, Leonardo, Johnson, and J.M. Products' inducement of Industrial Heat to enter the Term Sheet, caused Industrial Heat and IPH to pay for (1) the Plant's transportation to Florida; (2) the procurement and delivery of equipment for the Plant's reassembly in Florida; (3) the procurement and transportation of personnel to assemble the Plant in Florida; (4) repairs and maintenance of the 1 MW Plant; (5) new equipment for the Doral Facility; and (6) personnel to work at the Doral Facility, including Barry West (an independent contractor), T. Barker Dameron (an Industrial Heat employee), Murray, and Fabiani. *See* Ex. 9 at 249:14-20, 305:21-306:5; Ex. 10 at 119:10-15; Ex. 17 at 134:24-135:4, 137:16-138:18,

141:16-142:17, 143:14-144:16, 145:11-148:24, 295:11-18; Ex. 19 at 241:19-242:8, 292:7-20; Ex. 21 at 247:1-6; Ex. 30; Ex. 57 at 82:21-83:8; Ex. 66 ([IH-00131928])

90. On or about September 1, 2013, Industrial Heat entered into a Technical Consulting Agreement with USQL, through its sole member, Fabiani ("USQL Agreement"). A true and correct copy of the USQL Agreement is attached as Exhibit 67.

91. On September 9, 2013, 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." *See id.*

92. On or around August 1, 2014, the USQL Agreement was renewed and extended. *See* Ex. 6 at ¶ 12. Composite Ex. 68 ([IH-00012657-00012658]; [IH-00012659-00012666]).

93. Also on August 1, 2014, Fabiani executed a joinder to the August 2014 extension of the USQL Agreement, again agreeing to be bound by certain provisions contained therein, including Section 6 relating to "Rights to Materials." *See id.*

94. The USQL Agreement was renewed and extended again in or about July 2015. The renewal extended the USQL Agreement from September 2015 to March 31, 2016. *See* Ex. 6 at ¶ 12; Composite Ex. 69 (4th Am. AACT Exs. 28 & 29; [IH-00017713]; [IH-00017714-00017721]).

95. Fabiani also executed a joinder to the 2015 extension of the USQL Agreement again agreeing to be bound by certain provisions contained therein, including Section 6 relating to "Rights to Materials." *See id.*

96. On February 23, 2016, Fabiani acknowledged that Fabiani, on behalf of USQL, 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. *See* Ex. 70 (4th Am. AACT Ex. 21).

97. Beginning in March 2016, Industrial Heat repeatedly requested from Fabiani, on behalf of USQL, copies of the promised raw thermal and electrical data as well as the final report relating to the testing in Doral. Industrial Heat also requested flow meter records that Fabiani had represented he had. *See* Ex. 71 ([IH-00011081-00011802]).

98. In April and May 2016, Industrial Heat requested these documents and data again. *See* Composite Ex. 72 (Fabiani Dep. Ex. 11; [IH-00011074]).

99. Fabiani refused to provide Industrial Heat with the requested documents and data. *See* Ex. 19 at 270:7-22; Ex. 56 at 142:11-19; Ex. 57 at 116:18-117:3, 193:8-194:8, 352:11-353:9, 366:25-367:7; Ex. 73 (Murray Dep. Ex. 4).

100. The termination date of the USQL Agreement was March 31, 2016. *See* Ex. 56 at 82:6-19; Ex. 69 at 4th Am. AACT Ex. 29; 4th Am. AACT at 66; [D.E. 149] ¶ 152.

101. On March 30, 2016, USQL, through Fabiani, issued its final invoice to Industrial Heat. Industrial Heat received this invoice on April 6, 2016. *See* Composite Ex. 74 ([IH-00015792]; [IH-00015793-IH-00015801]; [IH-00015802]).

102. Industrial Heat paid Fabiani/USQL $10,500 per month for services under the USQL Agreement from February 2015 to February 2016. *See* Ex. 66.

103. Industrial Heat also paid Fabiani's rent in the amount of $1,370 per month during the same period. *See id.*

104. Following the termination of the 1 MW Plant testing in the Doral Facility, Fabiani, on behalf of USQL, destroyed certain data and communications regarding the 1 MW Plant's operations. *See* Ex. 56 at 33:10-37:12, 38:3-40:16, 46:3-8, 93:8-15, 138:6-13.

105. Also following termination of the 1 MW Plant testing in the Doral Facility, Rossi, on behalf of both Leonardo and J.M. Products, dismantled a heat exchanger on the J.M. Products side of the facility, as well as the pipes encompassing the exchanger, that supposedly dissipated heat for 1 MW Plant. *See* Ex. 2 at 236:10-237:18; Ex. 17 at 271:25-274:10, 277:14-17; Ex. 36 at 81:21-82:14, 84:14-85:22, 92:19-95:6, 151:5-152:20, 251:19-252:6

106. Leonardo NH still exists in good standing as a New Hampshire corporation. *See* Ex. 75.

107. A declaration by John T. Vaughn (Vice President of Industrial Heat) authenticating certain exhibits to this statement of material facts is attached hereto as Exhibit 23. A declaration by Christopher R. J. Pace, counsel for Defendants, authenticating other exhibits to this statement of material facts is attached hereto as Exhibit 28.

Dated: March 22, 2017

Respectfully submitted,

/s/ Christopher R. J. Pace

Christopher R.J. Pace
cpace@jonesday.com
Florida Bar No. 721166
Christopher M. Lomax
clomax@jonesday.com
Florida Bar No. 56220
Erika S. Handelson
Florida Bar No. 91133
ehandelson@jonesday.com
Michael A. Maugans
Florida Bar No. 107531
mmaugans@jonesday.com
Christina T. Mastrucci
Florida Bar No. 113013
cmastrucci@jonesday.com
JONES DAY
600 Brickell Avenue
Brickell World Plaza
Suite 3300
Miami, FL 33131
Tel: 305-714-9700
Fax: 305-714-9799

Bernard P. Bell
Admitted pro hac vice
Miller Friel, PLLC
1200 New Hampshire Avenue, NW
Suite 800
Washington, D.C. 20036
Tel.: 202-760-3158
Fax: 202-459-9537
Email: bellb@millerfriel.com

Attorneys for Defendants/Counter-Plaintiffs

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/ Christopher R. J. Pace
Christopher R.J. Pace