

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA**

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

ANDREA ROSSI et al.,

Plaintiffs,

v.

THOMAS DARDEN, et al.,

Defendants.

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

Counter-Plaintiffs,

v.

ANDREA ROSSI and LEONARDO
CORPORATION,

Counter-Defendants,

And

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

Third-Party Defendants.

PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

Plaintiffs, Andrea Rossi and Leonardo Corporation (collectively, "Plaintiffs") move, pursuant to Federal Rule of Civil Procedure 56 and Local Rules 7.1 and 56.1, for summary judgment as to Defendants' Counterclaims Counts I, II, and IV, and Affirmative Defenses numbers 1-5, 7, and 8, and states:

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Introduction

In May of 2015, Defendants successfully sold approximately 4% of their company for \$50 million – equating to a \$2 billion valuation. In soliciting this deal, Defendants touted Plaintiffs’ intellectual property as the centerpiece, and most advanced, of several different Low Energy Nuclear Reaction (“LENR”) technologies in their portfolio. Just a few months later, after working with Plaintiffs for over three years, Defendants, for the first time, expressed to Plaintiffs their dissatisfaction with Plaintiffs’ performance under the parties’ license agreement and with the underlying technology. It is no coincidence that this written communication was provided between two distinct points in time: (1) the date in which Defendants received \$50 million and (2) the date in which Defendants were obligated to pay Plaintiffs \$89 million.

At its essence, this is an action for breach of an intellectual property license agreement (“License Agreement”). Neither side has claimed the agreement is ambiguous or otherwise unclear. At the time the License Agreement was executed, the underlying technology had not yet gained general acceptance in the scientific community. As such, the parties agreed to the achievement of certain test parameters as conditions precedent to two payments due under the License Agreement. First, the technology had to pass a 24-hour test (the “Validation Test”) in order for Leonardo to be entitled to a \$10 million payment. Second, the technology had to pass a 400-day test (“Guaranteed Performance Test” or “GPT”) in order for Leonardo to be entitled to an \$89 million payment. The License Agreement required the parties to agree upon an independent third party arbiter, defined in the License Agreement as an expert responsible for validation (“ERV”). The parties agreed upon the ERV, the ERV performed his agreed-upon duties, and the ERV issues two reports: one showing the technology passed the Validation Test, and one showing the technology passed the GPT. After the ERV issued his first report, Plaintiffs demanded and received payment of the \$10 million. After the ERV issued his second report, Plaintiffs demanded payment of the \$89 million.

Instead of making payment, Defendants have created numerous defenses and counterclaims in an attempt to avoid their contractual obligation. Significantly, despite claiming (1) they had no contractual obligation to pay the \$89 million after October 2013, and (2) they suspected that the GPT was being performed in some type of fraudulent manner as of its inception in February 2015, Defendants allowed Plaintiffs to continue to perform under the License Agreement without providing any notification of either until, at the earliest, November 2015. The reason for this conduct is readily apparent: Defendants were soliciting from investors funding in excess of \$50 million, premised on Plaintiffs’ technology, during the time period in which the GPT was being performed. Once the

funding closed in May of 2015, Defendants no longer needed Plaintiffs, setting the stage for the present lawsuit.

Plaintiffs are entitled to summary judgement as to their breach of contract claim, and to Defendants' applicable defenses and counterclaims.

Statement of Undisputed Material Facts

I. The Parties, the Agreement and Amendments, and the Assignments.

1. Plaintiff, Dr. Andrea Rossi (“Rossi”) is the inventor and owner of a disruptive technology that provides for the creation of heat energy in a safe and efficient process using a combination of unique fueling agents and catalysts. Rossi has successfully patented this technology globally, receiving patents from, *inter alia*, the USPTO (patent no. 9,115,913 B1) and WIPO (patent no. 2016/018851 A1). *See* Rossi Aff. ¶ 1, appended hereto as **Ex. 1**.

2. Defendant Cherokee Investment Partners, LLC (“Cherokee”) holds itself out as “an investment company that blends capital with creativity, experience and resolve provide superior financial, environmental and social returns for investors, partners and communities.” *See* Cherokee Depo. Tr., appended hereto as **Composite Ex. 2**, at 21:12-20; CherokeeFund.com, appended hereto as **Composite Ex. 2-A**.

3. Defendant Thomas Darden (“Darden”) is the CEO of Cherokee, and Defendant John T. Vaughn (“Vaughn”) is the Venture Investment Manager of Cherokee. *See* <http://cherokeefund.com/team/>, appended hereto as **Composite Exhibit 2-A**

4. Defendant Industrial Heat, LLC (“IH”) was formed on October 24, 2012, two days before the License Agreement at issue was executed. *See* IH Depo. Tr., appended hereto as **Composite Ex. 3**, at 42:2-6.

5. On October 26, 2012, Leonardo, Rossi, and IH entered into a License Agreement for the purchase and territorial license of Rossi’s Energy Catalyzer intellectual property (the “E-Cat IP”). *See* License Agreement, appended hereto as **Ex. 4**, at 18.

6. Section 3 of the License Agreement provided that the total purchase price for the license was One Hundred Million Five Hundred Thousand Dollars (\$100,500,000), payable in 3 tranches:

- a. \$1.5 million upon execution;
- b. \$10 million upon successful completion of a 24 hour validation test (“Validation”); and
- c. \$89 million upon successful completion of a 400-day guaranteed performance test (“Guaranteed Performance”).

7. On April 29, 2013, the parties executed the First Amendment to the License Agreement, appended hereto as **Ex. 5**; Countercl. ¶ 46. The First Amendment revised, *inter alia*, sections 3.2(a) (time for Validation), 4 (Validation Protocol), and 16.7 (Assignment) of the License Agreement. *See id.*

8. Section 3.2(a) of the License Agreement governs the purchase of the 1MW Plant for \$1.5 million. That section, as amended by the First Amendment, states in pertinent part:

Upon execution of this Agreement, the Company will pay to Leonardo One Million Five Hundred Thousand Dollars (\$1,500,000) which amount shall be deemed to include full payment for the Plant. In the event the Plant is not delivered or Validation is not achieved within the time period set forth in Section 4, the full \$1,500,000 will be refunded to the Company within two business days of its request. *A refund of the \$1,500,000 will not be provided for any other reason and no other refund will be provided for any reason.* ... The Plant will be available for Validation and delivery on April 30, 2013.... (emphasis added, **Ex. 4.**)

9. On April 29, 2013, IH assigned its rights under the License Agreement to IPH. *See* Assignment and Assumption of License Agreement appended hereto as **Ex. 6**; Countercl. ¶ 47.

10. In October 2013, Defendant IH, Rossi and Leonardo executed the Second Amendment to the License Agreement, appended hereto as **Ex. 7**; Countercl. ¶ 62. As explained *infra*, the Second Amendment revised section 5 (Guaranteed Performance) of the License Agreement. *Id.*

11. On or about September 12, 2014, IH and IPH entered into an amended agreement intended to clarify the Assignment and Assumption of License Agreement. *See* Am. and Restated Assignment and Assumption of License Agreement (“Amended and Restated Assignment”), appended hereto as **Ex. 8**; Countercl. ¶ 47. The Amendment, *inter alia*, (a) clarified that the 1MW Plant was the only interest that in the License Agreement that would remain IH’s property; and (b) IPH would pay \$460,000 in consideration for the assignment of the remaining interests under the License Agreement. *See Ex. 8* ¶ 2.

II. Performance by Plaintiffs.

A. Delivery of the 1MW Plant and Validation.

12. In October 2012, pursuant to section 3.2(a) of the License Agreement, IH tendered the \$1.5 million payment for the 1MW Plant. *See* Countercl. ¶ 4; **Composite Ex. 3** at 105:9-15; Darden Depo. Tr., appended hereto as **Ex. 9**, at 115:25-116:4.

13. Section 4 of the License Agreement, as amended by the First Amendment, governs Validation. The amended section states, in pertinent part:

The Validation will be made in the factory of Leonardo in Ferrara, Italy on April 30th and May 1, 2013.... “Validation” will be deemed successful and achieved when the expert responsible for validation (“ERV”) certifies that the performance standards for the Plant set forth in Exhibit A to [the First Amendment] have been met. ... The ERV will be chosen by mutual agreement between Leonardo and the Company.... (**Ex. 4.**)

14. The parties mutually agreed to designate Fabio Penon as the ERV. *See* IH-00099334-36 (4/24/2013 email between Rossi and Darden), appended hereto as **Ex. 10**; **Composite Ex. 9** at 85:1-21; **Composite Ex. 3** at 128:2-11.

15. Plaintiffs and Defendants mutually agreed to the Validation Protocol contained in Exhibit A to the First Amendment to the License Agreement. *See* **Composite Ex. 3** at 115:4-25, 121:7-11; IH-00058504 (4/13/2015 Memo from Weaver to Darden, Mazzarino, and Vaughn), appended hereto as **Ex. 11**. Defendant Darden, IH engineer T. Barker Dameron, and IH's intellectual property consultants at Deep River Ventures all reviewed the Validation Protocol prior to its being approved. *See id.*

16. The Validation test took place in Ferrara, Italy on April 30 and May 1, 2013. *See* Countercl. ¶ 56; **Composite Ex. 9** at 97:14-18.

17. The agreed-upon ERV certified the results of the Validation test on May 7, 2013. *See* Countercl. ¶ 56; IH-00015632 (Validation Results), appended hereto as **Ex. 12**.

18. Prior to this lawsuit, IH never requested a refund of the \$1.5 million purchase price. *See* **Composite Ex. 3** at 108:5-18, 109:24-110:2; Vaughn Depo. Tr., appended hereto as **Composite Ex. 13**, at 63:25-64:23.

19. After Plaintiffs filed the present lawsuit and over three years after the Validation Test took place, Defendants, for the first time, claimed that the data and results of the Validation Test had been manipulated, but provided no evidence in support thereof. *See* **Composite Ex. 3** at 152:21-154:25. IH's Engineer and purported expert witness, Joseph Murray testified that he had no evidence of any manipulation of data or nefarious activities. *See* Murray Tr., appended hereto as **Composite Ex. 14**, at 257:15-20; 340:4-12.

20. Section 3.2(b) of the License Agreement provides that upon successful Validation of the Plant, IH would pay Plaintiffs, through an escrow agent, \$10 million. *See* Countercl. ¶ 58; *see also* **Composite Ex. 9** at 97:19-22.

21. Section 3.2(b) of the License Agreement provides: "On the date the Escrow Agent pays the \$10,000,000 to Leonardo, the License will commence and Leonardo and Rossi will immediately transfer, and the Validation Agent (as defined in Schedule 3.2(b)) will deliver, to the Company all E-Cat IP." *See* **Ex. 4**.

22. Schedule 3.2(b) to the License Agreement defines the Validation Agent as "one or more United States patent attorneys ... and a nuclear engineer ... to be selected by Leonardo." *See* **Ex. 4**.

23. Leonardo, Rossi, and IPH agreed upon Ruggero Giunti, a nuclear engineer, as the Validation Agent, and the Validation Agent reviewed the transferred IP. *See Composite Ex. 13* at 142:2-5; Rossi_00008733 appended hereto as **Ex. 15**.

24. Plaintiffs transferred all E-Cat IP to Defendants. *See Ex. 1* ¶ 14; Countercl. ¶ 95.

25. The Validation Agent provided his written statement that Leonardo had delivered to IH all E-Cat IP. *See IH-00044266* (IP Verification Notice), appended hereto as **Ex. 16**.

26. On June 9, 2013, after Validation, IH released, through an escrow agent, the \$10 million payment in satisfaction of section 3.2(b) of the License Agreement. *See Countercl. ¶¶ 58, 94; Composite Ex. 9* at 97:19-22; **Composite Ex. 3** at 142:12-16; **Composite Ex. 13** at 142:6-16; IPH Depo. Tr., appended hereto as **Composite Ex. 17**, at 102:24-103:22.

27. After Plaintiffs filed the present lawsuit, Defendants claimed, for the first time, that Plaintiffs breached the License Agreement by failing to provide all E-Cat IP. *See Countercl. ¶¶ 9, 97*. Defendants' only evidence to support this claim is their purported inability to replicate the technology. *See IH's Responses and Objections to Rossi's Second Set of Interrogatories no. 6*, appended hereto as **Ex. 18**.

B. The License Agreement Contains No Replication Requirement.

28. The term "replicate" does not appear, in any variation of the term, in the License Agreement or amendments thereto. *See Ex. 4* (License Agreement); **Ex. 5** (First Amendment); **Ex. 7** (Second Amendment); **Composite Ex. 13** at 149:9-12.

29. IH, through its representative Vaughn, testified that Defendants did not explicitly include a replication requirement in the License Agreement because "we were trying not change [Dr. Rossi's] language unless we felt absolutely we needed to." *See Composite Ex. 13* at 149:25-150:6.

30. Defendant IPH, the only entity that has the contractual right to the E-Cat IP, has no knowledge or evidence about its own claims regarding its purported inability to replicate. *See Composite Ex. 17* at 25:25-26:17, 41:11-42:7.

31. Defendants could not point to a single document in which they notified Plaintiffs of their alleged inability to replicate the technology. *See Composite Ex. 3* at 151:16-23; **Composite Ex. 13** at 150:9-151:15.

32. Defendants had reported, on numerous occasions, their ability to replicate. *See, e.g. Composite Ex. 3* at 163:23-164:25; IH-00095250-52 appended hereto as **Ex. 19**.

33. IH's corporate representative testified that it is possible that Defendants could not "replicate" any results because (a) Defendants are lying about their inability to replicate; (b) IH did not

have competent scientists or engineers working for it when it tried to replicate; (c) IH used faulty equipment in its attempts to replicate; or (d) IH used inferior materials for the catalyst. *See Composite Ex. 3* at 159:10-161:4.

C. The Guaranteed Performance Test (“GPT”).

34. Section 5 of the License Agreement originally made payment under the License Agreement contingent upon the following factors:

- a. the 1MW E-Cat 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 (defined as “the Guaranteed Performance” or “GPT”);
- b. the test was to commence immediately following the delivery of the 1MW Plant to Defendants;
- c. the ERV (as previously defined in Section 4 of the License Agreement)¹ will confirm in writing the Guaranteed Performance. The ERV was, pursuant to the agreement, the final and binding arbiter as to whether Guaranteed Performance was achieved.

35. Section 5 of the License Agreement, as amended by the Second Amendment, governs the GPT. The amended section states, in pertinent part:

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”). Each of Leonardo and Rossi will use their commercially reasonable best efforts to cause Guaranteed Performance to be achieved, including making repairs, adjustments and alterations to the Six Cylinder Unit as needed to achieve Guaranteed Performance. The ERV (or another party acceptable to the Company and Leonardo) will be engaged to confirm in writing the Guaranteed Performance. Guaranteed Performance will not be deemed achieved unless such written confirmation is received or waived by the Company.

36. Section 3.2(c) of the License Agreement provides: “Within five business days following 350 days of operation of the Plant during which the Guaranteed Performance has been achieved as required by Section 5 ... the Company will pay to Leonardo Eighty Nine Million Dollars (\$89,000,000)....” *See Ex. 4.*

37. The parties often referred to the GPT as the “350 day test” or the “400 day test.” *See Ex. 1 ¶ 5; Dameron Depo Tr.* at 152:24-153:9, appended hereto as **Ex. 20; Composite Ex. 13** at 144:8-15, 146:17-21.

¹ Section 4 provides, in pertinent part: “The ERV will be chosen by mutual agreement between Leonardo and [Defendants] and Leonardo and [Defendants] shall bear the ERV’s costs fifty-fifty.”

38. The 1MW Plant was delivered to Defendants in August 2013. *See Composite Ex. 3* at 216:6-19; Countercl. ¶ 59; IH-00124716-20 (9/23/2013 email from Vaughn to Darden), appended hereto as **Ex. 21**.

39. In October 2013, Defendant IH, Rossi and Leonardo executed the Second Amendment to the License Agreement, which extended the time for the commencement of the GPT. *See Ex. 7*.

40. In addition to the Second Amendment, Defendants' internal and external communications reflected Defendants' agreement that the time for commencement of the GPT had been extended. *See* IH-00122484-508 (investment memoranda), IH-00107550-52 (9/11/2014, email from Vaughn to Mazzarino and Darden), IH-00106452-74 (IH Business Plan), appended hereto as **Composite Ex. 22**.

41. The parties had previously agreed that Fabio Penon was the ERV under the License Agreement. *See* IH-00099334-36, appended hereto as **Ex. 23; Composite Ex. 9** at 85:1-21; **Composite Ex. 3** at 128:2-11. The License Agreement did not provide for multiple ERVs. *See Ex. 4* (License Agreement). At no time prior to November of 2015 did any of the Defendants ever object to Mr. Penon as the ERV for the GPT, either in writing or orally. *See Ex. 1* ¶ 12; **Composite Ex. 3** at 125:1-127:1.

42. The parties agreed to substitute the 1MW Plant for the Six Cylinder Unit for purposes of the GPT. *See Composite Ex. 13* at 144:8-15; IH-00107550-52 (9/11/2014 email from Vaughn to Darden and Mazzarino) appended hereto as **Ex. 24; Ex. 1** ¶¶ 16-17.

43. In or around December 2014, in furtherance of the parties' agreement, IH shipped the 1MW Plant from North Carolina to Florida in preparation to begin the GPT. *See Composite Ex. 9* at 156:24-157:2; **Composite Ex. 3** at 214:21-215:1; 215:20-216:5; **Ex. 1** ¶ 16. IH's corporate representative, Defendant Vaughn, testified that, IH was still willing to pay for performance at this time. *See Composite Ex. 3* at 189:1-18.

44. In or around February 2015, the ERV submitted a protocol for the GPT ("GPT Protocol") to both Rossi and Darden that clearly identified the equipment to be tested as the 1MW Plant. *See* IH-00007018 (2/10/2015 email chain between Rossi, Penon, and Darden), appended hereto as **Ex. 25**. Defendant Darden provided recommendations and proposed modifications to the GPT Protocol, stating, "These are just suggestions – I am sure you can find the best way to do this." *See* IH-00019121-25 (2/18/15 e-mail from Darden to Penon, whereupon Darden responded: "Thanks do [*sic*] very much for your important work. This evaluation will have the eyes of the world on it once we release any information."), appended hereto as **Ex. 26**.

45. At no time prior to November of 2015 did any of the Defendants ever object to the GPT Protocol. *See* **Ex. 1** ¶ 21; **Composite Ex. 13** at 142:12-22; **Composite Ex. 9** at 212:4-6.

46. In fact, Defendants told their own purported witness, Mr. Rick Smith, that they agreed to the GPT Protocol. *See* Smith Depo. Tr. at 108:13-22, appended hereto as **Composite Ex. 27**.

47. Both before and after the commencement of the GPT, IH had reported that it had achieved positive COP in its tests of the E-Cat technology. *See* IH-00096250-52 (7/16/2013 email from Vaughn to Darden), IH-00060748-49 (12/2/2013 email chain between Vaughn and D. Weaver), appended hereto as **Composite Ex. 28**.

48. IH could not point to a single document wherein any Defendant informed Plaintiff that IH could not replicate the E-Cat Technology. *See* **Composite Ex. 3** 150:9-151:23.

49. The GPT began in February 2015 and concluded in February 2016. *See* **Composite Ex. 3** at 245:18-19; **Composite Ex. 13** at 211:17-213:11, 247:7-14; **Ex. 1** ¶ 19-20; IH-00019126-28 (“Tom reported that the 400-day test is about to commence.”), appended hereto as **Ex. 29**.

50. From the day the Guaranteed Performance Test began in February 2015, through the day it ended in February 2016, Dr. Rossi consistently apprised Defendants, in writing, of the status thereof. *See, e.g.*, IH-00006766-67 (6/17/2015 email chain between Rossi and J. Pike); IH-00007017 (2/18/2015 email chain from Rossi to Darden); IH-00011219 (8/30/2015 email chain between Rossi and D. Pike); IH-00011240 (2/21/2015 email from J. Pike to Rossi); IH-00011241 (2/2/2015 email from Rossi to J. Pike) ; IH-00011244 (11/1/2015 email from Darden to Rossi); IH-00011264 (3/25/2015 email from J. Pike to Rossi, Darden, Vaughn and Mazzarino); IH-00011347 (6/7/2015 email chain between Rossi, J. Pike, and D. Pike); IH-00011351 (6/17/2015 email chain between Joe Pike, Rossi, and Darden) , appended hereto as **Composite Ex. 30**. IH’s investors often responded to such updates with excitement. *See, e.g.*, IH-00011240 (2/21/2015 email from J. Pike to Rossi); IH-00011241 (2/2/2015 email from Rossi to J. Pike) ; IH-00011244 (11/1/2015 email from Darden to Rossi); IH-00011264 (3/25/2015 email from J. Pike to Rossi, Darden, Vaughn, and Mazzarino); IH-00011351(6/17/2015 email chain between J. Pike, Rossi, and Darden), appended hereto as **Composite Ex. 31**.

51. Rossi himself on most days spent over 16 hours per day for over the course of the 350+ day test in an extremely hot and uncomfortable working environment, performing the GPT. *See* **Ex. 1** ¶ 22-23.

52. The ERV submitted quarterly reports to Plaintiffs and Defendants during the course of the GPT. *See* IH-00006768-82 (5/28/2015 Penon report email to Darden and Rossi); IH-00006739-42

(10/22/2015 Penon report email to Darden and Rossi); IH-00006696-710 (1/12/2016 Penon report email to Darden and Rossi), appended hereto as **Composite Ex. 32**.

53. During the performance of the Guaranteed Performance Test, Defendant IH brought investors to tour the facility where Plaintiffs were performing the GPT. *See Composite Ex. 3* at 247:17-248:4; **Composite Ex. 9** at 225:14-226:9; IH Amended Responses to Rossi's First Set of Interrogatories, No. 5, appended hereto as **Ex. 33**.

54. IH encouraged Rossi to discuss the status of the GPT and the technology with their investors during these site visits. *See Ex. 1* ¶ 24.

55. In May of 2015, during the course of the GPT, Defendant IH closed on a \$50 million investment by non-party Woodford Investment Funds. *See Composite Ex. 3* at 170:9-14, 204:25-205:5; 206:6-207:6; IH-00021986 (4/21/2015 IH memo from Darden to P. Lamacraft); IH-00080193 (5/15/2015 email chain between Darden and J. Spear, S. Hartanto, P. Lamacraft, N. Woodford, and S. Saha); IH-00099714 (3/4/2016 email chain between P. Lamacraft and Vaughn); IH-00112920 (11/2/2015 IH Business Development memo), appended hereto as **Composite Ex. 34**.

56. Woodford Investment Funds later claimed that "Rossi's technology was a core element of [this] investment." *See* IH-00099714 (3/4/2016 email chain between P. Lamacraft and Vaughn), appended hereto as **Ex. 35**.

57. On or about March 29, 2016, the ERV confirmed the Guaranteed Performance in writing pursuant to section 5 of the License Agreement, which report showed that the 1MW Plant achieved a COP in excess of 6.0 for 350 out of 400 days. *See* IH-00006661-90 (3/29/2016 Penon final report email to Darden and Rossi), appended hereto as **Ex. 36**.

58. On March 29, 2016, Plaintiffs demanded payment of the \$89 million pursuant to the License Agreement; Defendants refused to pay the amount owed. *See* Countercl. ¶¶ 74, 80.

59. Defendant Darden claimed that, after the plant was installed in Florida, Rossi removed instrumentation and monitoring access, and therefore Darden knew at that time that the test would not be a "fully transparent bona fide test" and he realized that "something bad was going on down there." *See Composite Ex. 9* at 187:23-188:10.

60. At no time prior to November of 2015 did Defendants provide any notice, whether in writing or orally, that they believed that Leonardo had violated the License Agreement. *See Ex. 1* ¶ 26; **Composite Ex. 3** at 202:17-203:4, 186:9-17, 202:17-203:4, 203:22-204:9; **Composite Ex. 17** at 140:6-15.

61. As early as October 2013, Defendants did not have any intention of making their requisite \$89 million payment to Plaintiffs. *See, e.g., Composite Ex. 9* at 117-121.

62. At no time prior to November of 2015 did Defendants ever tell Rossi, in writing, that Defendants were unable to replicate the technology. *See Ex. 1* ¶ 15.

III. Defendant IPH's Counterclaim for Breach of Contract.

A. Section 16.4: Publicity; Confidentiality.

63. Section 16.4 of the License Agreement provides in pertinent part:

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 ... During the term of this Agreement, each of Leonardo, Rossi, and AEG agrees to keep the E-Cat IP strictly confidential and not disclose any of the E-Cat IP to any other party...(**Ex. 4.**)

64. Defendant IPH testified that it did not know of any evidence or proof that IPH had in support of its claim for breach of Section 16.4 of the License Agreement. *See Composite Ex. 17* at 48:24-49:19.

65. Defendant Darden testified that he did not “know how much of a disclosure would be regarded as being a violation of the [License] [A]greement.” *See Composite Ex. 9* at 263:13-16.

66. Defendant IPH testified that it had no evidence regarding its allegation that Plaintiffs disclosed that the License Agreement required a Guaranteed Performance Test of the 1MW plant in which the plant would operate for 350 of 400 days. *See Composite Ex. 17* at 49:20-50:16, 52:3-20, 52:21-53:13, 53:14-54:6.

67. Defendant IPH testified that it had no evidence regarding its allegation that Plaintiffs provided E-Cat fuel samples to the Lugano scientists and scientist Norma Cook or whether any of the Defendants authorized Plaintiffs to make such disclosures. *See Composite Ex. 17* at 54:7-55:6; 61:25-62:23.

68. With respect to purported disclosures to Professor Cook, Defendant Darden testified that Dr. Rossi told Defendants that he intended to write a paper with Professor Cook, that Defendants reviewed and suggested edits to that paper prior to publication, and that Darden could not recall what particular purported disclosure of IP violated the License Agreement. *See Composite Ex. 9* at 274:20-25, 276:14-18; IH-00018838, appended hereto as **Ex. 37**. Darden likewise admitted that he had reviewed the paper's presentation and abstract prior to publication and told Dr. Rossi that they “appeared to be safe.” *See Composite Ex. 9* at 276:21-277:6; IH-00089665-66 (3/17/2015 email chain

between Vaughn and Rossi), appended hereto as **Ex. 38**. Darden’s IP attorneys likewise reviewed the presentation and abstract. *See Composite Ex. 9* at 277:1-17. Moreover, upon learning that the published paper had been translated to Chinese, Darden congratulated Dr. Rossi, noting: “This is very exciting to think about. Now 1.5 billion people can read your paper. What a great world it is.” *See id.* at 278:1-23; IH-00007010-11 (4/10/2015 email chain between Darden, Rossi, and D. Pike), appended hereto as **Ex. 39**.

69. With respect to purported disclosures to the Lugano scientists, Defendant Vaughn testified that Industrial Heat was “very interested in the results of the [Lugano test]” and “very eager to hear their analysis.” *See Composite Ex. 13* at 108:1-15. In addition, Defendant Darden testified that he actually did not “know whether [Dr. Rossi] disclosed the fuel because [Darden did not] know what fuel was used” for the Lugano test and didn’t even know whether Dr. Rossi had actually provided a fuel sample for the test. *See Composite Ex. 9* at 270:4-10, 12-14. In fact, Darden testified that he “prepared fuel before that test” and that the fuel the Lugano scientists used “may have been the fuel that [Industrial Heat] prepared.” *See id.* at 271:2-3, 21-22. Darden likewise testified that Defendants “knew that the test was going to happen,” and orally told Dr. Rossi not to disclose the fuel formula. *See id.* at 268:1-3, 11-16. In turn, Dr. Rossi informed him that he would take a fuel sample that would not disclose the protected IP. *See id.*

70. Defendant IPH testified that IPH did not know what specific confidential information Plaintiffs disclosed in violation of section 16.4, and further indicated that he did not know of any proof or facts that IPH has in support of this claim. *See Composite Ex. 17* at 62:24-63:23.

71. With respect to IPH’s claim that Plaintiffs made “additional E-Cat fuel sample disclosures, Defendants have identified no such disclosures. *See* Countercl. ¶¶. 104-07; **Composite Ex. 9** at 240:12-17.

72. With respect to IPH’s purported damages, IPH was unable to discern how IPH was harmed, instead nothing that breach would “lead to damages.” *See Composite Ex. 17* at 56:8-19. IPH testified further that IPH could not state how much IPH had been damaged. *See id.* at 61:15-23. Defendant Darden testified that “we have not made a computation” of damages and that “we don’t know yet what damages we might have.” *See Composite Ex. 9* at 240:5-11.

73. Defendant IH stated in its responses to Plaintiffs’ interrogatories that IH “is not claiming a specific damages amount with respect to” this claim. *See Ex. 18* at 10.

B. Section 10: Recordation of License.

74. Section 10 of the License Agreement provides:

Recordation of License. Upon the request of the Company, Leonardo and Rossi shall assign to the Company the Licensed Patents with respect to the Territory or, if so requested by the Company, record this Agreement . . . as permitted or required by the laws of countries in the Territory, and any recordation fees and related costs and expenses shall be paid by the Company.” (Ex. 4.)

75. IPH’s corporate representative was unable to offer any proof or evidence with respect to any purported violation of section 10 of the License Agreement. *See Composite Ex. 17* at 63:24-64:18. IPH did not know when Plaintiffs purportedly failed to assign any licensed patents. *See id.* at 73:7-16. Defendant Darden could not point to any specific patent applications that Plaintiffs had not assigned. *See Composite Ex. 9* at 240:18-241:3.

76. With respect to purported damages, IPH could not “assign a specific dollar amount to damages” purportedly resulting from IPH’s claim. *See Composite Ex. 17* at 66:10-19 (“We have not been able to assign a value to that specific allegation.”). Defendant Darden testified that no one from IPH or IH had made any attempt to calculate purported damages, also noting that damages are “contingent upon the technology working or the patent or IP being effective for someone else who makes the technology work. So if someone else is effective then the breach will have harmed us.” *See Composite Ex. 9* at 240:4-19.

77. Defendants testified that the E-Cat IP has no value. *See, e.g., Composite Ex. 3* at 145:25-146:13; *Composite Ex. 13* at 128:14-15; *Composite Ex. 9* at 99:9-17.

C. Section 7: Patent Prosecution and Maintenance.

78. Section 7.1 of the License Agreement provides:

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

- (a) prepare, file and prosecute such patent application;
- (b) maintain such patent;
- (c) pay all fees and expenses associated with its activities pursuant to Section 7.1(a) and (b) above;
- (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. (Ex. 4.)

79. Section 7.2 provides: “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.”

80. Section 16.1 of the License Agreement defines the “Licensed Patents” as:

- Italian patent granted for process and apparatus
- USA patent pending for process and apparatus
- Europe patent pending for process and apparatus
- USA patent pending for particulars and theory
- USA patent pending for control systems
- USA patent pending for additives and catalyzers in process and apparatus
- USA patent pending for Hot Cat
- USA patent pending for direct conversion of photons into electric energy
- USA patent pending for particulars of the reactor

81. Leonardo did not abandon any patent application or patent that is a Licensed Patent without the prior written consent of IPH. *See* **Ex. 1** ¶ 25.

82. IPH’s corporate representative was unable to offer any proof or evidence that Plaintiffs had violated section 7 of the License Agreement. *See* **Composite Ex. 17** at 66:20-67:13. IPH did not know when Plaintiffs had filed or abandoned patent applications without informing IPH. *See id.* at 73:17-74:5. Nor did IPH know which patent applications, or how many, Plaintiffs had purportedly filed. *Id.* at 67:14-68:2. Moreover, Defendant Darden testified that he did not know whether there were “applications that had been filed that we were not given,” and did not “know whether [Dr. Rossi had] filed any since ... [Dr. Rossi] went to Florida.” *See* **Composite Ex. 9** at 138:5-17. Darden stated: I’m not aware. I don’t remember any. None come to mind right now.” *Id.*

83. With respect to purported damages, IPH testified that it had not differentiated the damages alleged in the prior claim with this claim. *See* **Composite Ex. 17** at 70:25-71:5. Defendant Darden testified that neither IH nor IPH had computed damages related to any purported violation of section 7. *See* **Composite Ex. 9** at 7-24.

D. Section 13.3: Covenant Not to Compete.

84. Section 13.3 states in pertinent part:

For as long as the Company or any of its subsidiaries is engaged in any business related to the E-Cat Products and . . . Leonardo, Rossi or any Affiliate are performing services for the Company or such transferee [...] and for an additional period of two (2) years after the last of Leonardo, Rossi or such Affiliate shall have ceased to provide such services, none of Leonardo, Rossi or any of their Affiliates will [...] directly or indirectly own, manage, operate, join, or have a financial interest in, control or participate in the ownership, management, operation or control of, or be employed or engaged as an employee, agent or consultant, or in any other individual or representative

capacity whatsoever, or use or permit their names to be used in connection with, or be otherwise connected in any manner with any business or enterprise (a) engaged in the design, development, manufacture, distribution, lease, rental or sale of any E-Cat Products, or the provision of any services related thereto or (b) which is competitive with the E-Cat Products, unless Leonardo or such Affiliate shall have obtained the prior written consent of the Company or such subsidiary of the Company, as the case may be. (**Ex. 4.**)

85. IPH's corporate representative testified that IPH had no information with respect to any purported violations of section 13.3 of the License Agreement. *See Composite Ex. 17* at 72:5-23. IPH did not know when Plaintiffs had purportedly violated section 13.3 of the License Agreement. *Id.* at 72:24-73:2.

86. With respect to purported damages, IPH could not specify the damages that it had purportedly suffered as a result of any purported breach of section 13.3 of the License Agreement. *See Composite Ex. 17* at 73:3-6.

87. Plaintiffs have not engaged in prohibited competition in violation of the License Agreement. *See Ex. 1* ¶ 26.

E. Section 13.5: Tax Matters.

88. Section 13.5 of the License Agreement provides in pertinent part: "The Parties shall file all necessary documentation and returns with respect to any ... revenues derived by the Parties in respect of the E-Cat IP." *See Ex. 4.*

89. Neither IH nor IPH affirmatively assert that Plaintiffs have breached section 13.5 of the License Agreement. *See Countercl. ¶ 132; Composite Ex. 17* at 77:10-15.

90. Defendants are unable to provide any evidence in support of any purported breach of section 13.5. *See Composite Ex. 17* at 74:25-75:22; **Composite Ex. 13** at 258:21-259:3.

91. With respect to purported damages, Defendant Darden testified that he had not computed any actual damages related to a claim for 1purported breach of section 13.5 of the License Agreement, and stated that he did not believe that the other Defendants had done so either. *See Composite Ex. 9* at 246:12-247:2. IPH admits that it is not aware of any damage to IH as a result of its claim related to breach of section 13.5 of the License Agreement. *See Composite Ex. 17* at 77:16-21.

F. IPH's Purported Damages Related to Their Claims for Breach of Contract.

92. IPH paid IH \$460,000 in return for the assignment of all rights to the E-Cat IP under the License Agreement. *See Composite Ex. 17* at 122:3-13; **Ex. 8** ¶ 2.

93. IPH did not pay Plaintiffs the \$1.5 million purchase price for the 1MW Plant. *See Composite Ex. 17* at 57:23-24.

94. IPH did not make the \$10 million payment to Plaintiffs as contemplated in section 3.2(b) of the License Agreement. *See Countercl. ¶ 58.*

G. Defendants' FDUTPA Claims.

95. Defendants admit that the License Agreement did not require that a customer be involved with any testing of the E-Cat IP. *See Ex. 4; Composite Ex. 3* at 216:20-24.

96. IPH had no role in the decision to conduct the GPT outside of North Carolina. *See Countercl. ¶¶ 141, 145(a-b); Composite Ex. 17* at 79:1-80:14, 139:6-140:3, 174:1-15.

97. IPH had no role in the decision to engage a third-party customer. *See Countercl. ¶¶ 141, 145(a-b); Composite Ex. 17* at 79:1-80:14, 139:6-140:3, 174:1-15.

98. Defendants were admittedly only concerned with testing the E-Cat IP, and did not care about any purported customer. *See Composite Ex. 13* at 185:1-14; *Composite Ex. 3* at 191:21-24, 217:6-10. Defendants' goal was to accommodate Dr. Rossi and determine the state of the E-Cat IP. *See Composite Ex. 13* at 212:17-20. Defendants did no due diligence into the customer other than meet with its CEO, whom Defendants knew to be Dr. Rossi's real estate attorney. *See IH-00011867-70* (7/30/2014 email chain between Rossi, Vaughn, and Darden), appended hereto as **Ex. 40**.

99. IPH has no proof with respect to claim that Plaintiffs devised a scheme to conduct the GPT in Florida by creating a fake customer, thereby permitting Plaintiffs to avoid Defendants' oversight. *See Countercl. ¶¶ 68-69; 145(a-b); Composite Ex. 17* at 149:19-150:8.

100. IPH has no proof with respect to its claim that Plaintiffs deceived Defendants about third-party Defendants Henry Johnson, J.M. Products, or Jim Bass. *See Countercl. ¶¶ 69, 73, 77-78; Composite Ex. 17* at 150:20-151:6, 151:19-152:6, 152:20-153:8, 161:3-14; 164:5-14, 164:19-166:4, 171:6-19.

101. In March of 2015, well after the GPT had started, Darden admitted in an email to investors that: "We definitely are producing steam for a customer. My lack of clarity is just around, one, precisely how much, we cannot definitively represent this yet. And two, what is the nature of the customer. But these are picky nuances, not related to the core issue." *See IH-00080561-67* (3/23/2015 email chain between Darden and J. Pike), appended hereto as **Ex. 41**.

102. IPH has no information regarding its allegation that Plaintiffs and third-party defendants purportedly manipulated the operation and measurements of the Plant. *See Countercl. ¶¶ 142, 145(c);*

Composite Ex. 17 at 80:15-81:25, 128:15-129:18, 175:15-176:21. IH could point to no evidence in support of its claim that Plaintiffs had manipulated any data. *See Composite Ex. 3* at 154:2-20. IH's Engineer and purported expert witness, Joseph Murray testified that he had no evidence of any manipulation of data or nefarious activities. *See Murray Depo. Tr.* at 257:15-20, 340:4-12, appended hereto as **Composite Ex. 42**.

103. IPH has no proof with respect to its claim that Plaintiffs or third-party Defendants provided false information about the operation of the plant or steam being produced. *See Countercl.* ¶¶ 76, 145(d); **Composite Ex. 17** at 159:24-160:11.

104. IPH has no information with respect to its allegation that Plaintiffs or third-party defendants refused to provide information to Defendants. *See Countercl.* ¶ 145(e); **Composite Ex. 17** at 82:1-20.

105. IPH has no information with respect to its allegation that Plaintiffs blocked Defendants from obtaining information. *See Countercl.* ¶ 145(f); **Composite Ex. 17** at 167:19-168:9, 170:21-171:5.

106. IPH has no facts or information regarding its allegation that Plaintiffs or third-party defendants charged Defendants for services, expenses, or equipment. *See Countercl.* ¶ 145(g); **Composite Ex. 17** at 83:16-84:11.

107. IPH's has no information with respect to any element of its FDUTPA claim. *See Composite Ex. 17* at 172:22-173:7. IPH testified that it did not know how much IPH had suffered in damages stemming from its FDUTPA claim. *See id.* at 85:14-86:4. IPH also testified that it was not sure that IPH was even seeking any money damages related to the claim. *See id.* at 86:7-87:25.

108. IPH and IH readily admit that they did not pay the \$89 million sought by Plaintiffs. *See Countercl.* ¶¶ 74, 80; **Composite Ex. 17** at 108:23-25.

IV. Affirmative Defenses.

109. IPH cannot identify any evidence in support of its first affirmative defense for standing. *See Composite Ex. 17* at 112:12-113:1.

110. IPH cannot identify any evidence in support of its second affirmative defense for estoppel, waiver, and laches. *See Composite Ex. 17* at 113:15-114:5.

Memorandum of Law

I. Summary Judgment Standard.

Summary judgment is appropriate where there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law, based on discovery and disclosure documents filed in the case, any affidavits, and the pleadings. *Broward Bulldog, Inc. v. United States DOJ*, No. 16-61289-CIV-Altonaga/O'Sullivan, 2017 U.S. Dist. LEXIS 26980, at *8-9 (S.D. Fla. Feb. 27, 2017) (citing Fed. R. Civ. P. 56(a)). A factual issue is material if it is “a legal element of the claim under the applicable substantive law which might affect the outcome of the case.” *In re Denture Cream Prods. Liab. Litig.*, No. 09-2051-MD-ALTONAGA, 2016 U.S. Dist. LEXIS 121038, at *6-8 (S.D. Fla. Aug. 31, 2016) (citing *Burgos v. Chertoff*, 274 F. App'x 839, 841 (11th Cir. 2008); *Allen v. Tyson Foods Inc.*, 121 F.3d 642, 646 (11th Cir. 1997)); see also *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A factual issue is genuine “if the evidence could lead a reasonable jury to find for the non-moving party.” *Broward Bulldog*, 2017 U.S. Dist. LEXIS 26980, at *8-9; see also *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *Anderson*, 477 U.S. at 248.

The party moving for summary judgment “bears the initial burden of identifying ‘those portions of the pleadings, depositions, answer to interrogatories, and admissions on file, together with the affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact.’” *Id.* (citing *Fitzpatrick v. City of Atlanta*, 2 F.3d 1112, 1115 (11th Cir. 1993) (in turn quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986))). Federal Rule of Civil Procedure 56 “mandates the entry of summary judgment against a party who fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof of trial.” *In re Denture Cream*, 2016 U.S. Dist. LEXIS 121038, at *6-8 (citing *Jones v. UPS Ground Freight*, 683 F.3d 1283, 1292 (11th Cir. 2012) (in turn quoting *Celotex*, 477 U.S. at 322)).

II. As a Matter of Law, Plaintiff Leonardo is Entitled to Summary Judgment As to Count I of the Complaint.

To prove a claim for breach of contract, Plaintiffs must establish: “(1) the existence of a contract; (2) a material breach of that contract; and (3) damages resulting from the breach.” *Merle Wood & Assocs., Inc. v. Trinity Yachts, LLC*, 857 F. Supp. 2d 1294, 1301 (S.D. Fla. 2012) (quoting *Vega v. T-MobileUSA, Inc.*, 564 F.3d 1256, 1272 (11th Cir.2009)).

A. An Agreement Existed.

(i) The Initial Agreement.

The parties entered into the License Agreement on or about October 26, 2012. *See* Statement of Facts (“SOF”) ¶ 5. Section 3.2(c) of the License Agreement provided that within 5 days following 350 days of operation of the Plant (defined as the 1MW E-Cat unit) which the Guaranteed Performance has been achieved as required by Section 5 below, Defendants will pay to Leonardo \$89,000,000. *See* SOF ¶ 36.

Section 5 of the License Agreement, as amended, makes payment contingent upon the following factors:

1. the 1MW E-Cat 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 (defined as “the Guaranteed Performance” or “GPT”);
2. the test was to commence immediately following the delivery of the 1MW Plant to Defendants;
3. the ERV (as previously defined in Section 4 of the License Agreement)² will confirm in writing the Guaranteed Performance. The ERV was, pursuant to the agreement, the final and binding arbiter as to whether Guaranteed Performance was achieved. *See* SOF ¶ 34.

The parties agreed that Fabio Penon would serve as the ERV. *See* SOF ¶ 14. On May 7, 2013, the ERV determined that, pursuant to Section 4 of the License Agreement, Validation had been deemed successful and achieved in that the 1MW Plant had produced energy greater than the energy consumed. *See* SOF ¶ 17.

Thereafter, Defendant IH caused \$10,000,000 to be paid to Leonardo as a result of the successful and achieved Validation. *See* Countercl. ¶ 58; *see also* *See* SOF ¶ 20.

(ii) Amendment as to the Time of Performance of the GPT.

The 1MW E-Cat unit was delivered to Defendants in August of 2013. *See* SOF ¶ 38; Countercl. ¶ 59. Defendant IH and Leonardo executed a Second Amendment to the License Agreement in October of 2013, which changed Section 5 as follows: (a) the time for commencement of the Guaranteed

² Section 4 provides, in pertinent part: “The ERV will be chosen by mutual agreement between Leonardo and [Defendants] and Leonardo and [Defendants] shall bear the ERV’s costs fifty-fifty.”

Performance Test to be “the date agreed to in writing between the Parties, and (b) the equipment to be tested to be the “Six Cylinder Unit.” *See* SOF ¶ 10.

At no time prior to November of 2015 did Defendants provide any notice, whether in writing or orally, that they believed that Leonardo had violated Section 5 of the License Agreement. *See* SOF ¶ 60. Defendants’ internal and external communications reflected Defendants’ agreement that the time for commencement of the GPT had been extended. *See* SOF ¶ 40. Further, IH’s corporate representative, Defendant Vaughn, testified that, notwithstanding that Leonardo delivered the plant late, IH was still willing to pay for performance. *See* SOF ¶ 43.

The parties subsequently agreed that the 400 day period (GPT) would commence in February 2015. *See* SOF ¶ 49 (“Tom [Darden]. . . reported that the 400-day test is about to commence.”).

(iii) **Amendment as to the Equipment to be Tested for the GPT.**

The parties agreed that the unit to be tested would be the 1MW E-Cat unit. *See* SOF ¶ 42. In or around December of 2014, in furtherance of their agreement, Defendant IH shipped the 1MW E-Cat unit from North Carolina to Doral, Florida. *See* SOF ¶ 43. In or around February 2015, Penon submitted a protocol for the GPT to both Rossi and Darden. *See* SOF ¶ 44. The protocol clearly identified the equipment to be tested to be the 1MW E-Cat. *Id.* Defendant Darden even provided suggested modifications to Penon’s protocol, but agreed it would left up to Penon. *See id.* (2/18/15 e-mail from Darden to Penon, whereupon Darden responded: “Thanks do [*sic*] very much for your important work. This evaluation will have the eyes of the world on it once we release any information.”). Defendants confirmed to their own purported expert witness, Mr. Rick Smith, that they agreed to Penon’s protocol. *See* SOF ¶ 46.

B. Leonardo Performed its Contractual Obligations/Met Conditions Precedent.

The ERV submitted quarterly reports to both Defendants and Plaintiffs. *See* SOF ¶ 52. At no time prior to November of 2015 did any of the Defendants ever object to Penon as the ERV or the protocol for the GPT. *See* SOF ¶¶ 41, 45. To the contrary, during the performance of the Guaranteed Performance Test, Defendant IH brought investors to tour the facility where Plaintiffs were performing the GPT, and to ask questions of Rossi. *See* SOF ¶ 53. In fact, IH closed on a \$50mm fund-raise in May of 2015. *See* SOF ¶ 55. On or about March 29, 2016, the ERV submitted his Final Report, showing that the plant achieved a COP in excess of 6.0 for the required period of time. *See* SOF ¶ 57.

C. Defendants IH and IPH are in Breach of Contract.

It is undisputed that, Leonardo demanded payment of the \$89mm as set forth in the License Agreement. *See* Countercl. ¶ 74. It is likewise undisputed that Defendants IH and IPH refused to make that payment. *See id.* ¶ 80.

D. Plaintiff has been damaged.

Pursuant to the unambiguous language in the License Agreement, Plaintiff Leonardo is entitled to payment of \$89,000,000.00. *See* SOF ¶ 36.

E. Legal analysis.

As set forth above, Plaintiffs are able to establish, via undisputed facts, all of the necessary elements to prove their claim for breach of contract. Assuming, *arguendo*, that no writing exists modifying the timing of the GPT and equipment to be used therefore, the subsequent course of dealing between the parties establishes a waiver. Florida law holds that a “subsequent dealing between the parties may establish a waiver of a requirement that modifications must be made in writing,” irrespective of any anti-waiver clause present in the underlying agreement. *Dioguardi v. Giroski, LLC*, Case No. 12-23354-CIV-MARTINEZ-MCALILEY, 2013 U.S. Dist. LEXIS 192319 (S.D. Fla. Mar. 20, 2013) (quoting *In re Electric Machinery Enters., Inc.*, 416 B.R. 801, 886 (M.D. Fla. 2009)). That holding is consistent with basic contract principles, which state that “[u]nder no circumstances may the non-breaching party stop performance *and* continue to take advantage of the contract’s benefits,” *Burger King Corp. v. Hinton, Inc.*, 203 F. Supp. 2d 1357, 1365 (S.D. Fla. 2002), and that an “implied term of a contract, recognized by Florida law, is the implied covenant of good faith and commercial reasonableness,” *First Nationwide Bank v. Florida Software Servs., Inc.*, 770 F. Supp. 1537 (M.D. Fla. 1991). In other words, the Defendants are prohibited from continuing to deal with Plaintiffs, allowing Plaintiffs to continue performing their obligations pursuant to the License Agreement, and taking advantage of the benefits provided by Plaintiffs, while simultaneously stopping their own performance. Defendants have indisputably done just that – to the tune of receiving funding in excess of \$50 million. *See* SOF ¶ 55.

It is undisputed that Defendants continued to deal with Plaintiffs, and allowed Plaintiffs to continue performing their contractual obligations subsequent to the agreed-upon modifications as to the time of the commencement of the Guaranteed Performance Test and the equipment to be tested. It is undisputed that at the relevant times herein, IH owned and controlled the 1MW E-Cat Plant, and allowed for its shipment. *See* SOF ¶ 43. From the day the Guaranteed Performance Test began in

February 2015, through the day it ended in February 2016, Dr. Rossi consistently apprised Defendants, in writing, of the status thereof. *See* SOF ¶ 50. IH's investors often responded to such updates with excitement. *Id.* Rossi himself spent over 16 hours per day for over 350 days in an extremely hot and uncomfortable working environment, performing the contractual test. *See* SOF ¶ 51.

The Defendants, on the other hand, are unable to cite to even a single response wherein they disputed that the Guaranteed Performance Test was, in fact, taking place. Instead, IH admitted that it never told Rossi that the time for the Guaranteed Performance test had come and gone, or that Plaintiffs had somehow breached the License Agreement. *See* SOF ¶ 60. The ERV, Fabio Penon, provided similar updates to Defendants regarding the Guaranteed Performance Test's protocol. *See* SOF ¶ 52. Again, Defendants cannot point to a writing in which they object to, question, refuse, refute, or otherwise dispute the same.

In contrast, throughout Plaintiffs' performance of the Guaranteed Performance Test, the Defendants solicited and received in excess of \$50 million in investments premised upon such work. *See* SOF ¶ 55. The biggest investor even stated that "Rossi's technology was a core element of the initial investment." *See* SOF ¶ 56.

Notwithstanding their blatant use of Plaintiffs' technology to raise \$50 million plus, Defendants did not have any intention of making their requisite \$89 million payment to Plaintiffs as early as October 2013. *See* SOF ¶ 61. Yet, again, Defendants are unable to cite to even a single e-mail, writing, and/or other document in which they advise Plaintiffs of the same. Defendants' conduct of continued dealing with the Plaintiffs and using Plaintiffs' work to solicit millions of dollars in investments, while at the same time knowing that they never intended to perform their own obligation, is in bad faith and commercially unreasonable pursuant to Florida law. There are accordingly no genuine issues of material fact that Defendants waived any relevant provisions of the License Agreement with respect to the Guaranteed Performance Test's timing and equipment.

III. As a Matter of Law, Plaintiffs are entitled to Summary Judgment as to Defendants' Breach of Contract Claims.

To prove a claim for breach of contract, Defendants must establish: "(1) the existence of a contract; (2) a material breach of that contract; and (3) damages resulting from the breach." *Merle Wood & Assocs., Inc. v. Trinity Yachts, LLC*, 857 F. Supp. 2d 1294, 1301 (S.D. Fla. 2012) (quoting *Vega v. T-MobileUSA, Inc.*, 564 F.3d 1256, 1272 (11th Cir.2009)).

“The construction of a contract is a question of law for the courts to determine where the language used in the written contract is clear, unambiguous, and susceptible of only one interpretation.” *Esys Latin Am., Inc. v. Intel Corp.*, 925 F. Supp. 2d 1306, 1308 (S.D. Fla. 2013) (quoting *Gray v. D & J Indus., Inc.*, 875 So. 2d 683, 683 (Fla. 3d DCA 2004)). In interpreting a contract, the Court construes the contract in a way that is “reasonable, practical, sensible, and just.” *Id.* (citing *State Farm Mut. Auto Ins. Co. v. Mashburn*, 15 So. 3d 701, 704 (Fla. 1st DCA 2009)). The Court “interpret[s] the agreement as a whole, giving effect to all of its provisions.” *Megdal Assocs., LLC v. La-Z-Boy Inc.*, No. 14-81476-CIV, 2016 U.S. Dist. LEXIS 119168, at *7 (S.D. Fla. Feb. 19, 2016) (citing *Ospina-Baraya v. Heiligers*, 909 So. 2d 465, 472 (Fla. 4th DCA 2005)). The “‘plain language of the contract’ is the ‘best evidence’ of the parties’ intent, and the parties’ intent controls the contract’s construction and interpretation. *Id.* (citing *Thomas v. Vision I Homeowners Ass’n*, 981 So. 2d 1, 2 (Fla. 4th DCA 2007)).

A. Counterclaim Count I: Breach of Contract: Validation & Disclosure of E-Cat IP.

Defendants’ claim that Plaintiffs breached section 3.2(b) of the License Agreement fails as a matter of law, and the undisputed material facts entitle Plaintiffs to summary judgment against Defendants IH and IPH as to this claim. *See* Countercl. ¶¶ 92-98. Defendants ignore the terms of License Agreement, and write in new terms that suit their legal theories.

(i) Summary judgment against Defendant IH is proper.

Defendant IH’s standing to pursue this claim is limited to its ownership of the 1MW Plant. IH executed the License Agreement with Plaintiffs. *See* SOF ¶ 5. On April 29, 2013, IH assigned its rights under the License Agreement to IPH. *See* SOF ¶ 9; Countercl. ¶ 47. On or about September 12, 2014, IH and IPH entered into an amended agreement intended to clarify the Assignment and Assumption of License Agreement. *See* SOF ¶¶ 11-12; Countercl. ¶ 47. The amended agreement clarified that the 1MW Plant was the only interest that in the License Agreement that would remain IH’s property. *See id.*

a. IH purchased the 1MW Plant.

Section 3.2(a) of the License Agreement governs the purchase of the 1MW Plant for \$1.5 million. That section, as amended by the First Amendment, states in pertinent part:

Upon execution of this Agreement, the Company will pay to Leonardo One Million Five Hundred Thousand Dollars (\$1,500,000) which amount shall be deemed to include full payment for the Plant. In the event the Plant is not delivered or Validation is not achieved within the time period set forth in Section 4, the full \$1,500,000 will be

refunded to the Company within two business days of its request. *A refund of the \$1,500,000 will not be provided for any other reason and no other refund will be provided for any reason.* ... The Plant will be available for Validation and delivery on April 30, 2013.... (emphasis added) (*See* SOF ¶ 8.)

On or about October 26, 2012, pursuant to section 3.2(a) of the License Agreement, IH tendered the \$1.5 million purchase price as payment for the 1MW Plant. *See* Countercl. ¶ 4; *See* SOF ¶ 12. On April 30, 2013, Plaintiffs delivered the Plant to Ferrara, Italy for Validation. *See* Countercl. ¶¶ 50, 56. Prior to this lawsuit, IH never requested a refund of the \$1.5 million purchase price. *See* SOF ¶ 18.

Hence, as a matter of law and pursuant to section 3.2(a) of the License Agreement, IH would only be eligible for a refund of the \$1.5 million purchase price if Validation was not achieved. Yet as noted, *infra*, Validation was achieved and IH was thus not eligible for a refund of the Plant's purchase price. *See* SOF ¶ 17.

b. Validation pursuant to Section 4 of the License Agreement.

The First Amendment, Section 4 states, in pertinent part:

The Validation will be made in the factory of Leonardo in Ferrara, Italy on April 30th and May 1, 2013.... "Validation" will be deemed successful and achieved when the expert responsible for validation ("ERV") certifies that the performance standards for the Plant set forth in Exhibit A to [the First Amendment] have been met. ... The ERV will be chosen by mutual agreement between Leonardo and the Company.... (*See* SOF ¶ 13.)

Section 3.2(b) of the License Agreement provides that upon successful Validation of the Plant, IH would pay Plaintiffs, through an escrow agent, \$10 million in exchange for a territorial license of the E-Cat IP and delivery by Plaintiffs to IH of all E-Cat IP. *See* SOF ¶¶ 5, 20. Neither IH's independent ability to replicate the technology nor Plaintiffs' transfer of all E-Cat IP is a condition precedent to Validation or Plaintiffs' entitlement to the \$1.5 million payment. *See* SOF ¶¶ 28-29.

The parties mutually agreed to designate Fabio Penon as the ERV for the Validation. *See* SOF ¶ 14. Plaintiffs and Defendants, including Defendant Darden and IH engineer T. Barker Dameron, and IH's IP consultants at Deep River Ventures mutually agreed to the Validation Protocol contained in Exhibit A to the First Amendment to the License Agreement. *See* SOF ¶ 15. The Validation test took place in Ferrara, Italy on April 30 and May 1, 2013. *See* Countercl. ¶ 56; *See* SOF ¶ 16. The mutually agreed-upon ERV certified that Validation had occurred, confirmed that all the E-Cat IP had been transferred to IPH. *See* SOF ¶¶ 17, 25. Admitting that Validation was successful, on June 9, 2013, IH

released, through an escrow agent, the \$10 million payment in satisfaction of section 3.2(b) of the License Agreement. *See* Countercl. ¶¶ 58, 94; *See* SOF ¶ 26.

Given that the 1MW Plant is IH's only interest in the License Agreement, and that (a) Plaintiffs timely delivered the Plant to Ferrara Italy for Validation and (b) Validation was achieved, IH is precluded by the very terms of the License Agreement from recovering the \$1.5 million purchase price. *See* License Agreement, § 3.2(a) ("A refund of the \$1,500,000 will not be provided for any other reason and no other refund will be provided for any reason."). As such, Plaintiffs are entitled to summary judgment with respect to IH's portion of this claim.

(ii) **Summary Judgment against Defendant IPH is proper.**

Defendants³ purport to support their "conclusions"⁴ that Plaintiffs either did not deliver all E-Cat IP or did not achieve Validation (or both) by claiming that Defendants "have been unable, using the transferred E-Cat IP, to replicate the [Validation test] results" or "otherwise generate measurable excess energy." *See* Countercl. ¶ 95. Preliminarily, delivery of the E-Cat IP and Validation are separate matters governed by separate sections of the License Agreement and must be addressed accordingly. Significantly, the License Agreement does not address Defendants' independent ability to replicate any results.

a. **Validation pursuant to the License Agreement was achieved.**

As noted in section A(i)(a), *supra*, Validation is governed by section 4 of the License Agreement as amended by the First Amendment. Mr. Penon was the mutually agreed-upon ERV, the Validation occurred as required under the amended License Agreement, the results were certified, and Defendants paid \$10 million as a result of Validation. *See* SOF ¶¶ 14, 16, 26; Countercl. ¶¶ 56, 58, 94. The License Agreement does not provide that the results reported by the ERV were somehow challengeable, and the Court may not read into the License Agreement any such terms. Even if the

³ Plaintiffs' reference to Defendants in the plural is the result of Defendants' failure to delineate between the portions of Count I that apply to each Defendant individually and in no way is intended to accept that Defendant IH has any interest in the License Agreement except with respect to ownership of the 1MW Plant. As noted *supra*, the Amended and Restated Assignment granted IPH all interests in the License Agreement except with respect to ownership of the 1MW Plant. *See* SOF ¶ 8.

⁴ IH's corporate representative testified that, despite what Defendants claim in the Counterclaim, there are additional possible conclusions that one may draw with respect to Defendants' purported inability to replicate, including, *inter alia*, the conclusions that: (a) Defendants are lying about their inability to replicate; (b) IH did not have competent scientists or engineers working for it when it tried to replicate; (c) IH used faulty equipment in its attempts to replicate; or (d) IH used inferior materials for the catalyst. *See* SOF ¶ 33.

results reported by the ERV were challengeable, Defendants have presented no evidence in support of any such challenge.

As a matter of law, Plaintiffs are entitled to summary judgment against IPH with respect to this element of its claim.

b. Transfer of the E-Cat IP was achieved.

Section 3.2(b) of the License Agreement provides: “On the date the Escrow Agent pays the \$10,000,000 to Leonardo, the License will commence and Leonardo and Rossi will immediately transfer, and the Validation Agent (as defined in Schedule 3.2(b)) will deliver, to the Company all E-Cat IP.” *See* SOF ¶ 21. Schedule 3.2(b) to the License Agreement defines the Validation Agent as “one or more United States patent attorneys ... and a nuclear engineer ... to be selected by Leonardo.” *See* SOF ¶ 22.

First, Defendant IPH could not testify at deposition to any facts in support of the claim that Plaintiffs did not transfer the E-Cat IP; in fact, IPH’s corporate representative had no knowledge with respect to its own claims in this count. *See, e.g., See* SOF ¶ 30. Second, the only information concerning the purportedly missing IP that any Defendant has given is contained in IH’s interrogatory responses in which they claim that “the specific E-Cat IP Industrial Heat claims Leonardo and Rossi did not deliver, is the E-Cat IP necessary to replicate the results Rossi and Leonardo claimed from the E-Cat technology, assuming the E-Cat technology in facts works as Rossi and Leonardo claim.” *See* SOF ¶ 27. There is no requirement under the License Agreement that Defendants replicate anything.

c. There is no “Replication” requirement in the License Agreement.

The plain, clear, and unambiguous language in the contract makes no mention whatsoever of the term “replication” or any variation thereof. *See Megdal Assocs.*, 2016 U.S. Dist. LEXIS 119168, at *7. There is no provision in the License Agreement that conditions performance by any party upon Defendants’ independent ability to replicate any test result or generate any energy whatsoever.

Defendant IPH’s corporate representative testified that IPH had no knowledge about its own claims regarding its purported inability to replicate. *See* SOF ¶ 30. When asked where in the License Agreement the term “replicate” appears, Defendant Vaughn concurred that it did not. *See* SOF ¶ 28. When asked why the term “replicate” did not appear anywhere in the License Agreement, Defendant Vaughn testified that “we were trying not change [Dr. Rossi’s] language unless we felt absolutely we needed to.” *See* SOF ¶ 29. Significantly, despite working with Plaintiffs for over three years,

Defendants could not point to a single document in which they notified Plaintiffs of their alleged inability to replicate the technology. *See* SOF ¶ 31. Perhaps this is because Defendants had reported, on numerous occasions, their ability to replicate. *See* SOF ¶ 32.

It is a “commonsense principal of [contract] interpretation that ‘the absence of a provision from a contract is evidence of an intention to exclude it rather than an intention to include it.’” *Megdal Assocs.*, 2016 U.S. Dist. LEXIS 119168, at *11 (quoting *Azalea Park Util., Inc. v Knox-Fla. Dev. Corp.*, 127 So. 2d 121, 123 (Fla. 2d DCA 1961)). To the extent that Count 1 is predicated on their inability to accomplish goals not contained in the parties’ contract, Defendants’ claim fails as a matter of law.

d. IPH Suffered No Damages.

IPH’s corporate representative testified that IPH is only seeking those damages “incurred by IPH.” *See* SOF ¶ 91. IPH did not pay Plaintiffs the \$1.5 million purchase price for the 1MW Plant. *See* SOF ¶ 93. IH – not IPH – made the \$10 million payment to Plaintiffs as contemplated in section 3.2(b) of the License Agreement. *See* Countercl. ¶ 58. IPH purchased the rights to the License Agreement for \$460,000. *See* SOF ¶ 92. To the extent that IPH claims it is entitled to any damages under sections 3.2(a) or 3.2(b) of the License Agreement, those damages may not, as a matter of law, exceed the \$460,000 that it purportedly paid IH in the Amended and Restated Agreement.

B. Counterclaim Count II: Breach of Confidentiality.

Defendant IPH – the only party that brought this claim – claimed through its corporate representative that it did not know of any evidence or proof that IPH had in support of this claim for breach of Section 16.4 of the License Agreement. *See* SOF ¶ 64. Defendant Darden testified that he did not “know how much of a disclosure would be regarded as being a violation of the [License] [A]greement.” *See* SOF ¶ 65.

The confidentiality provision in section 16.4 of the License Agreement provides in pertinent part:

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 ... During the term of this Agreement, each of Leonardo, Rossi, and AEG agrees to keep the E-Cat IP strictly confidential and not disclose any of the E-Cat IP to any other party...

Defendant IPH claims that Plaintiffs violated these terms by: (a) disclosing that the License Agreement required a “Guaranteed Performance Test” of the 1MW plant in which the plant would

operate for 350 of 400 days; (b) filing an unsealed copy of the License Agreement as an exhibit to the Complaint; (c) providing E-Cat fuel samples to the Lugano scientists and scientist Norma Cook; (d) commenting on E-Cat fuel samples on the Internet; and (e) on Defendants' "information and belief," making additional E-Cat fuel sample disclosures. *See* Countercl. ¶¶. 104-07.

With respect to (a), *supra*, IPH's corporate representative testified that IPH had no evidence in support of this claim. *See* SOF ¶ 66.

With respect to (b), *supra*, such disclosure took place after Defendant IPH had already breached the License Agreement by refusing to tender full payment.

With respect to purported disclosures to Professor Cook, IPH's corporate representative testified that he did not know of any evidence or proof that IPH has in support of this claim and that he did not know whether any of the Defendants authorized Plaintiffs to make such disclosures. *See* SOF ¶ 67. Defendant Darden testified that Dr. Rossi told Defendants that he intended to write a paper with Professor Cook, that Defendants reviewed and suggested edits to that paper prior to publication, and that Darden could not recall what particular purported disclosure of IP violated the License Agreement. *See* SOF ¶ 68. Darden likewise admitted that he had reviewed the paper's presentation and abstract prior to publication and told Dr. Rossi that they "appeared to be safe." *See id.* Darden's IP attorneys likewise reviewed the presentation and abstract. *See id.* Moreover, upon learning that the published paper had been translated to Chinese, Darden congratulated Dr. Rossi, noting: "This is very exciting to think about. Now 1.5 billion people can read your paper. What a great world it is." *See id.*

With respect to purported disclosures to the Lugano scientists, IPH's corporate representative testified that he did not know of any evidence or proof that IPH has in support of this claim and that he did not know whether any of the Defendants authorized Plaintiffs to make such disclosures. *See* SOF ¶ 67. However, Defendant Vaughn testified that Industrial Heat was "very interested in the results of the [Lugano test]" and "very eager to hear their analysis." *See* SOF ¶ 69. In addition, Defendant Darden testified that he actually didn't "know whether [Dr. Rossi] disclosed the fuel because [Darden didn't] know what fuel was used" for the Lugano test and didn't even know whether Dr. Rossi had actually provided a fuel sample for the test. *See id.* In fact, Darden testified that he "prepared fuel before that test" and that the fuel the Lugano scientists used "may have been the fuel that [Industrial Heat] prepared." *See id.* Darden likewise testified that Defendants "knew that the test was going to happen," orally told Dr. Rossi not to disclose the fuel formula, and that Dr. Rossi informed him that he would take a fuel sample that would not disclose the protected IP. *See id.*

With respect to (d), supra, IPH's corporate representative testified that he did not know what specific confidential information Plaintiffs disclosed in violation of section 16.4, and further indicated that he did not know of any proof or facts that IPH has in support of this claim. *See* SOF ¶ 70.

With respect to (e), supra, despite Defendants' claim that they have information and belief that Plaintiffs made other disclosures, they were unable to identify any such disclosures. *See* SOF ¶ 71.

With respect to IPH's purportedly related damages, IPH claims that "[t]o the extent that the E-Cat IP has commercial value," IPH's ability to capture that value is harmed, and that it is likewise harmed by the ability of others to use the "License Agreement's terms in negotiations over similar agreements with IPH or its affiliates." *See* Countercl. ¶¶ 108-09.

The IH corporate representative testified that the License Agreement and E-Cat IP have no value. *See* SOF ¶ 77. Defendant Vaughn testified that the technology does not work. *See id.* Defendant Darden testified that he does not know whether the E-Cat IP has any value. *See id.*

Moreover, when asked how IPH had been harmed by the purported breach, IPH's corporate representative was unable to say, instead noting that the breach would "lead to damages." *See* SOF ¶ 72. When pressed on IPH's purported damages, IPH's corporate representative testified that he could not state how much IPH had been damaged. *See id.* Moreover, Darden testified that "we have not made a computation" of damages and that "we don't know yet what damages we might have." *See id.* Notably, Defendant IH expressly stated in response to interrogatories that it "is not claiming a specific damages amount with respect to" this claim. *See* SOF ¶ 73.

C. Counterclaim Count II: Breach re Failure to Assign Licensed Patents.

Defendant IPH claims that Plaintiffs breached section 10 of the License Agreement by refusing to assign Licensed Patents to IPH fails as a matter of law because Defendants have provided no evidence in support, and, even if it did, IPH suffered no damage as a result of the purported breach. *See, e.g.*, Countercl. ¶¶ 110-13.

Section 10 of the License Agreement provides:

Recordation of License. Upon the request of the Company, Leonardo and Rossi shall assign to the Company the Licensed Patents with respect to the Territory or, if so requested by the Company, record this Agreement . . . as permitted or required by the laws of countries in the Territory, and any recordation fees and related costs and expenses shall be paid by the Company."

The License Agreement itself is a binding contract that grants to Defendants "the exclusive right and license under the Patents and other E-Cat IP to develop, manufacture, make, have made, use,

have used, offer to sell, have offered for sale, sell, have sold, import, and have imported all the products deriving from the E-Cat IP in the Territory.” License Agreement § 1 (emphasis added). Such an exclusive license “is equivalent to an assignment.” *See Hako-Med USA, Inc. v. Axiom Worldwide, Inc.*, No. 8:06-CV-1790-T-27EAJ, 2006 U.S. Dist. LEXIS 94239, at *9 (M.D. Fla. Nov. 15, 2006) (citing *Prima Tek II, LLC v. A-Roo Co.*, 222 F.3d 1372, 1378 (Fed. Cir. 2000)). As such, the License Agreement itself confers to IPH the precise “control over the Licensed Patents” that Defendants erroneously claim they do not possess resulting in damage. *See* Countercl. ¶ 113. Moreover, to the extent that Defendants wished to “control” the Licensed Patents through recordation of the License Agreement, and thereby avoid any potential damage, it is indisputable that there is nothing in the Agreement that prevents them from so doing.

At IPH’s corporate representative deposition, IPH had no proof or evidence in support of its claim. *See* SOF ¶ 75. IPH did not know when Plaintiffs purportedly failed to assign any licensed patents. *See id.* Defendant Darden could not point to any specific patent applications that Plaintiffs had not assigned. *See id.*

With respect to damages, IPH could not “assign a specific dollar amount to damages” purportedly resulting from IPH’s claim. *See* SOF ¶ 76 (“We have not been able to assign a value to that specific allegation.”). Defendant Darden testified that no one from IPH or IH had made any attempt to calculate purported damages, also noting that damages are “contingent upon the technology working or the patent or IP being effective for someone else who makes the technology work. So if someone else is effective then the breach will have harmed us.” *See id.* As noted, *supra*, Defendants believe that the E-Cat IP has no value. *See* SOF ¶ 77.

IPH’s failure to provide any evidence in support of its claim, Defendants’ failure to identify any cognizable damage as a result of Plaintiffs’ purported breach, and Defendants’ admission that damages had not even occurred are all fatal to IPH’s claim for breach of section 10 of the License Agreement. As such, summary judgment is appropriate with respect to this claim.

D. Counterclaim Count II: Breach re Failure to Inform/Consult on Patent Applications.

Defendant IPH claims that Plaintiffs failed to “inform[] and consult[] with IPH regarding patent prosecution and maintenance of the E-Cat IP” in violation of section 7 of the License Agreement is insufficient as a matter of law. *See* Countercl. ¶¶ 114-19.

IPH offered no evidence or proof in support of its claims. *See* SOF ¶ 82. IPH did not know when Plaintiffs had filed or abandoned patent applications without informing IPH. *See id.* Nor did

IPH know which patent applications, or how many, Plaintiffs had purportedly filed. *Id.* Moreover, Defendant Darden testified that he did not know whether there were “applications that had been filed that we were not given,” and did not “know whether [Dr. Rossi had] filed any since ... [Dr. Rossi] went to Florida.” *See id.* Darden stated: I’m not aware. I don’t remember any. None come to mind right now.” *See id.*

With respect to IPH’s purported damages related to this claim, IPH testified that it had not differentiated the damages alleged in the prior claim with this claim. *See* SOF ¶ 83. Defendant Darden testified that neither IH nor IPH had computed damages related to this claim. *See id.*

In contrast, Plaintiff Rossi swears in his affidavit that he never failed to inform and consult with IPH regarding patent prosecution and maintenance of the E-Cat IP. *See* SOF ¶ 81. IPH has no evidence to contradict this evidence, and therefore summary judgement is proper.

E. Counterclaim Count II: Breach of Covenant Not to Compete.

Defendant IPH’s claim that Plaintiffs have engaged in conduct “in direct conflict with [section 13.3 of] the License Agreement” fails because IPH has no evidence in support. *See* Countercl. ¶¶ 120-24.

In fact, IPH’s corporate representative testified that it had no information with respect to this claim. *See* SOF ¶ 85. IPH did not know when Plaintiffs had purportedly violated section 13.3 of the License Agreement. *Id.* Nor could IPH specify the damages that it had purportedly suffered as a result of the purported breach. *See* SOF ¶ 86. Defendants can point to no such damages because Dr. Rossi has not engaged in prohibited competition in violation of the License Agreement. *See* SOF ¶ 87.

To the extent that Defendants claim that Plaintiffs’ legitimate business activities outside of the territory defined in section 2 of the License Agreement⁵ violates the non-compete provision in section 13.3, such an argument fails as a matter of law. Reading the non-compete provision in light of the provisions of the contract as a whole, it is clear that section 13.3 is limited to competitive acts in the territory. *See Megdal Assocs.*, 2016 U.S. Dist. LEXIS 119168, at *7.

F. Counterclaim Count II: Breach re Failure to Pay Taxes.

Defendant IPH admittedly does not “assert this breach [of contract for failure to pay taxes] as a basis to recover damages from Leonardo and Rossi presently, but reserve the right to assert this claim in the event a federal tax lien is issued affecting Industrial Heat and/or IPH’s assets or rights under the

⁵ The territories include North America, Central America and the Caribbean, South America, China, Russia, Saudi Arabia, and the Arabian Emirates. *See* License Agreement § 2.

License Agreement.” See Countercl. ¶ 132. Implicit in IPH’s purported reservation of rights is an acknowledgement that it has suffered no injury or damage.

Even if, *arguendo*, Defendants’ claim were ripe, Defendants would be unable to adequately prove the damages element of any such claim. As a matter of law, any lien that the federal government might issue would attach to the property that Plaintiff owned at the time of issuance and to any property obtained thereafter, and would not extend beyond Plaintiffs’ property interests. See *United States v. Barnes*, 509 F. App’x 837, 840 (11th Cir. 2012); *United States v. Rodgers*, 461 U.S. 677, 690–91 (1982). IPH is accordingly precluded this claim, and Plaintiffs are entitled to judgment in their favor as a matter of law.

In fact, IPH admits that there is no “claim resulting from nonpayment of tax.” See SOF ¶ 89–90. IPH admits further that it is not aware of any damage to IH as a result of its claim related to this purported breach. See SOF ¶ 91. Defendant Darden also testified that he had not computed any actual damages related to this claim, and stated that he did not believe that the other Defendants had done so either. *Id.*

Plaintiffs are entitled to summary judgment with respect to this claim.

G. Counterclaim Count IV: FDUTPA.

To succeed on a claim for damages under FDUTPA a plaintiff must prove three elements: 1) a deceptive act or unfair practice; 2) causation; and 3) actual damages. *XTec, Inc. v. Hembree Consulting Servs.*, No. 14-21029-CIV, 2015 U.S. Dist. LEXIS 79134, at *33 (S.D. Fla. June 18, 2015). “A deceptive act or practice is one ‘that is likely to mislead the consumer acting reasonably in the circumstances, to the consumer’s detriment.’” *Kenneth F. Hackett & Assocs. v. GE Capital Info. Tech. Sols., Inc.*, 744 F. Supp. 2d 1305, 1312 (S.D. Fla. 2010) (citing *Millennium Commc’ns & Fulfill., Inc. v. Office of the Att’y Gen.*, 761 So. 2d 1256, 1263 (Fla. 3d DCA 2000)). “An unfair practice is ‘one that offends established public policy and one that is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers.’” *Id.* (citing *Samuels v. King Motor Co. of Fort Lauderdale*, 782 So. 2d 489, 499 (Fla. 4th DCA 2001)). To prevail on its FDUTPA claim, the Defendant must prove that “there was an injury or detriment to consumers.” *Caribbean Cruise Line, Inc. v. Better Bus. Bureau of Palm Beach Cty., Inc.*, 169 So. 3d 164, 169 (Fla. 4th DCA 2015).

(i) Defendants Cannot Show a Deceptive or Unfair Act That Harms Consumers.

As a preliminary matter, neither IH nor IPH are consumers of any good or service relating to their FDUTPA claim, and have failed to show that the alleged deceptive or unfair acts impact any

consumers whatsoever. Plaintiffs did not advertise, solicit, provide, offer, or distribute any tangible or intangible good, service, or property to Defendants or any other consumer; nor do Defendants even claim that Plaintiffs have done so. *See* Fla. Stat. § 501.203(8); Countercl. ¶ 145.

In addition, because the purported facts as alleged in Defendants' FDUTPA claim relate solely to the E-Cat IP and purported representations regarding a Florida customer, Defendant IH lacks standing to pursue the FDUTPA claim. *See* Countercl. ¶¶ 139-148. As noted *supra*, IH's only interest in the License Agreement pertains to its ownership of the 1MW Plant. Each of the purportedly unfair or deceptive acts that Defendants complain of occurred after IH purchased the 1MW Plant and after the Validation test took place. *See* Countercl. ¶¶ 4, 56; *See* SOF ¶¶ 12, 16-17. Amended section 3.2(a) of the License Agreement is clear that a refund for payment of the 1MW Plant is possible only if (a) the Plant was not timely delivered or (b) Validation was not achieved. *See* SOF ¶¶ 7-8. Defendants' FDUTPA claims are unrelated thereto, and therefore this claim, should it exist at all, belongs only to IPH, and summary judgement is proper against IH.

Yet, IPH can point to no actual proof or evidence in support of their FDUTPA claims. IPH's corporate representative testified that IPH had no information with respect to any element of its FDUTPA claim.⁶ *See* SOF ¶¶ 102-108.

Given IPH's total lack of knowledge, information, or proof with respect its own FDUTPA allegations, summary judgment against IPH is proper.

(ii) Defendants Cannot Show Causation.

With respect to causation, Defendants must "show they were actually aggrieved by the unfair or deceptive representation." *Gastaldi v. Sunvest Resort Cmty., LC*, No. 08-62076-CIV, 2010 U.S. Dist. LEXIS 9876, at *66-67 (S.D. Fla. Feb. 3, 2010). The undisputed facts, as stated *supra*, show that IH does not have standing to bring any claim and that IPH has no idea how it was purportedly aggrieved. Furthermore, Defendants were admittedly only concerned with testing the E-Cat IP, and did not care about any purported customer. *See* SOF ¶ 99.

Defendants' ultimate goal was "to accommodate [Dr. Rossi] and to determine the state of the art, whether or not it really works." *See* SOF ¶ 99. IH's corporate representative testified that Defendants "could care less about a customer." *See* SOF ¶ 99. The License Agreement did not require that a customer be involved in any way with any test under the Agreement. *See* SOF ¶ 96. Moreover,

⁶ Plaintiffs are currently seeking sanctions against Defs. IPH and Cherokee as a result of their failure to comply with Rule 30(b)(6).

Defendants did no due diligence into the customer other than meet with its CEO, whom Defendants knew to be Dr. Rossi's real estate attorney. *See* SOF ¶ 99.

Because Defendants cannot show that Plaintiff caused them harm, summary judgment is proper with respect this claim.

(iii) **Defendants Suffered No Actual Damages.**

FDUTPA permits recovery for actual damages only. *Nat'l Union Fire Ins. Co. v. Tyco Integrated Sec., LLC*, 2015 U.S. Dist. LEXIS 82646, *99 (S.D. Fla. June 24, 2015 (citing *Rollins*, 951 So. 2d at 869)). Actual damages do not include special consequential damages. *Id*; *see also Rodriguez v. Recovery Performance & Marine, LLC*, 38 So. 3d 178, 180 (Fla. 3d DCA 2010. In fact, Florida courts "specifically reject the recovery of [such] damages under FDUTPA." *Eclipse Med., Inc. v. Am. Hydro-Surgical*, 235 F.3d 1344 (11th Cir. 2000. Actual damages are measured by "the difference in the market value of the product or service in the condition in which it was delivered and its market value in the condition in which it should have been delivered according to the contract of the parties." *Tyco*, 2015 U.S. Dist. LEXIS 82646, at *99 (citing *Rollins*, 951 So. 2d at 869)).

As a preliminary matter, IPH should be barred from presenting any testimony or evidence as to its purported damages. *See* Plaintiffs' Motion for Sanctions [DE 179]. IPH's corporate representative testified that it did not know how much IPH had suffered in damages stemming from its FDUTPA claim. *See* SOF ¶ 107. In fact, IPH also testified that it was not sure that IPH was even seeking any money damages related to the claim. *See id.*

Event absent such a bar, neither IH nor IPH has presented any evidence that they ever paid Rossi or Leonardo anything as a result of the alleged deceptive acts that could constitute actual damages. To the contrary, IPH and IH readily admit that they did not pay the \$89 million sought by Plaintiffs. *See* Countercl. ¶¶ 74, 80; *See* SOF ¶ 108. Instead, IPH and IH claim that they incurred consequential damages as a result of the alleged deceptive acts, including: (a) maintenance expenses related to operating the 1MW Plant, (b) expenses related to the shipment of the equipment, and (c) travel and housing expenses. *See* Countercl. ¶¶ 141-48. Under Florida law, these purported damages are not recoverable under FDUTPA. *See, e.g., Eclipse Med., Inc. v. Am. Hydro-Surgical*, 235 F.3d 1344. As IH has no standing, and neither IH nor IPH cannot prove any actual damages, summary judgment in favor of Rossi and Leonardo is appropriate.

IV. Summary Judgment is Proper Against Defendants on Their Affirmative Defenses

An affirmative defense is established only when “a defendant admits the essential facts of the complaint and sets up other facts in justification or avoidance.” *Sparta Ins. Co. v. Colareta*, No. 13-60579-CIV, 2013 WL 5588140, at *2 (S.D. Fla. Oct. 10, 2013 (citing *Morrison v. Exec. Aircraft Refinishing Co.*, 434 F. Supp. 2d 1314, 1317–18 (S.D. Fla. 2005))). Such a defense is legally sufficient only where it “satisfies the heightened pleading standard” of *Twombly* and *Iqbal*, and gives “fair notice of the defense” and “the grounds upon which it rests.” *Ocean's 11 Bar & Grill, Inc. v. Indem. Ins. Corp. RRG*, No. 11-61577-CIV, 2012 WL 5398625, at *18 (S.D. Fla. Nov. 2, 2012, *aff'd sub nom. Ocean's 11 Bar & Grill, Inc. v. Indem. Ins. Corp. of DC, Risk Retention Grp.*, 522 F. App'x 696 (11th Cir. 2013); *Adams v. Jumpstart Wireless Corp.*, 294 F.R.D. 668, 671 (S.D. Fla. 2013; *see also* Fed. R. Civ. P. 8(a); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

A. Defendants' Affirmative Defense No. 1: Standing.

The gravamen of Defendants' first affirmative defense is that “Plaintiff Leonardo lacks standing...because the assignment of the License Agreement from Leonardo Corporation, Inc., a New Hampshire corporation, to Plaintiff Leonardo was invalid.” *See* Countercl. ¶¶ 21-22. This defense does not admit, justify or avoid Plaintiffs' claims, but rather seeks to re-write the allegations in the Complaint to suit their defense. Specifically, Defendants reference an ambiguous “assignment” between Leonardo Corporation, a New Hampshire corporation (“Leonardo NH”) and Plaintiff Leonardo Corporation, a Florida corporation (“Leonardo”), yet Defendant provides no factual allegations regarding such alleged “assignment” including, but not limited to, when such “assignment” occurred, the terms of such assignment, the nature of the assignment, or any other specifics regarding such purported assignment. In fact, in alleging that an “assignment” occurred, Defendants first affirmative defense denies the allegation in the Plaintiffs Complaint that Leonardo NH merged with Leonardo and that Plaintiff Leonardo “suffered harm” as a result of Defendants actions.

To the extent Defendants erroneously contend the merger between Leonardo NH and Leonardo was an “assignment,” such contention is legally untenable and specifically contradicted by Florida Law. In the instant case, the Complaint specifically alleges that Leonardo NH was merged into Plaintiff Leonardo. *See* Compl. at 1 FN 1. Florida law provides that “the title to all real estate and other property, or any interest therein, owned by each corporation party to the merger is vested in the surviving corporation without reversion or impairment” and “the surviving corporation shall thenceforth be responsible and liable for all the liabilities and obligations of each corporation party to the merger.” § 607.1106(1)(b-c), Fla. Stat. A merger “is like the uniting of two or more rivers, neither stream is

annihilated, but all continue in existence.” *Celotex Corp. v. Pickett*, 490 So. 2d 35, 38 (Fla. 1986 (citation omitted)). It is well settled in Florida that a merger of two corporations creates a “shared existence” within the surviving corporation. *Id.* (“merger merely directs the blood of the old corporation into the veins of the new, the old living in the new.”).

Accordingly, in the case of a merger, “the surviving corporation retains the interests of the merging corporations,” including contractual interests, and the surviving corporation is not considered an “assignee” and is therefore not precluded from enforcing the terms of such contract. *Ferguson Enterprises, Inc. v. Astro Air Conditioning and Heating, Inc.*, 137 So. 3d 613, 616 (Fla. 2d DCA 2014 (surviving corporation was entitled to enforce personal guarantees which were otherwise non-assignable)). Moreover, § 607.1106-07, governing mergers between two or more corporations in Florida, virtually mirrors the corresponding section of the Model Business Corporation Act (“MBCA”). Similar to § 607.1106-07, the MBCA, provides that “all property owned by, and every contract right possessed by, each corporation or eligible entity that merges into the survivor is vested in the survivor without reversion or impairment.” § 11.07, MBCA. In the official comments to § 11.07 of the MBCA, the drafters explicitly state that “[a] merger is not a conveyance, transfer, or assignment” and that “[i]t does not give rise to a claim that a contract with a party to the merger is no longer in effect on the ground of nonassignability, unless the contract specifically provides that it does not survive a merger.” *See id.* §11.07, comment ¶ 1. Assuming, arguendo, that Defendants are claiming that the merger between Leonardo NH and Plaintiff Leonardo was an “assignment” such argument fails as a matter of law.

Importantly, when asked about any evidence or support for this first affirmative defense, Defendant IPH’s corporate representative could not identify a single piece of evidence or fact. *See* SOF ¶ 109. Further, Defendants in the present case should be estopped from making this standing argument, as they have counter-sued Leonardo-Florida in this case, claiming they are the proper party to this case. *See* Countercl. ¶ 15.

Lastly, Defendants erroneously claim that Rossi lacks standing with respect to Plaintiffs’ breach of contract claims because “the payment that is the basis of that claim (Count I) is due, if at all, to Leonardo Corporation New Hampshire, not Rossi” is likewise untenable and without merit. There is no question that both Plaintiffs Leonardo and Rossi were parties to the License Agreement, in contractual privity with the Defendants IH, and subsequently IPH, and that both Rossi and Leonardo are therefore entitled to enforce the terms of the License Agreement. Despite diligent effort, the undersigned has been unable to find any authority to support Defendants’ defense that because payment

under the contract was to be directed to only one party to the contract, that the other parties to the contract lose standing to enforce the contract terms. Moreover, to the extent Defendants attempt to claim that Rossi was not damaged by Defendants breach, such claim constitutes a mere denial of Plaintiffs' allegations that "Leonardo and Rossi have been damaged" by Defendants' breach of the contract terms. Defendants' first affirmative defense is wholly untenable in fact or law.

B. Defendants' Affirmative Defense No. 2: Estoppel, Waiver, Laches.

Plaintiffs' unjust enrichment claim is against Defendants IH and IPH. This claim was plead in the alternative, should the Court deem that License Agreement is unenforceable. Plaintiffs' fraudulent inducement claim is against all five named Defendants.

Importantly, when asked about any evidence or support for this second affirmative defense, Defendant IPH's corporate representative could not identify a single piece of evidence or fact. *See* SOF ¶ 110.

i. Estoppel. To succeed on a claim for equitable estoppel, Defendants must prove: "(1) a representation of fact by one party contrary to a later asserted position; (2) good faith reliance by another party upon the representation; and (3) a detrimental change in position by the later party due to the reliance." *MSC Mediterranean Shipping Co. SA, Geneva v. Metal Worldwide, Inc.*, 884 F. Supp. 2d 1269, 1274 (S.D. Fla. 2012).

Defendants have failed to identify any evidence in support of this defense.

ii. Waiver. To succeed on a claim for waiver, Defendants must prove: "(1) the existence at the time of the waiver of a right, privilege, advantage, or benefit which may be waived; (2) the actual or constructive knowledge of the right; and (3) the intention to relinquish the right." *Dantzler, Inc. v. PNC Bank, Nat. Ass'n*, 946 F. Supp. 2d 1344, 1367–68 (S.D. Fla. 2013). Defendants fail to present evidence as to any of these elements or any facts that would purport to support a waiver. Defendants' claim that "Plaintiffs either never had, waived, or stopped [sic] from asserting their fraudulent inducement claim by agreeing to the provisions in the License Agreement..." is preposterous. If this Court were to accept such erroneous logic, every claim for fraudulent inducement would be immediately vitiated by alleging the elements of a cause of action for fraudulent inducement. Logically, Plaintiffs were fraudulently induced to do something – enter into the License Agreement. Defendants now argue that their fraud should be ignored because they were successful in duping Plaintiffs to "sign on the dotted line." There is no legal or factual support for this position, and, accordingly, Plaintiffs are entitled to judgment as a matter of law as to this defense.

iii. Laches. To succeed on a claim for laches, Defendants must prove: “(1) a delay in asserting a right or a claim; (2) that the delay was not excusable; and (3) that there was undue prejudice to the party against whom the claim is asserted. *AmBrit, Inc. v. Kraft, Inc.*, 812 F.2d 1531, 1545 (11th Cir. 1986); *see also I.C.E. Mktg. Corp. v. Gapardis Health & Beauty, Inc.*, No. 00-02280-CIV, 2014 WL 10093869 at *8 (S.D. Fla. Nov. 13, 2014), *report and recommendation adopted in part*, No. 00-CV-02280, 2015 WL 4243528 (S.D. Fla. July 13, 2015).

Defendants fail to provide any evidence of delay, much less inexcusable delay, or any evidence as to how they were somehow prejudiced as a result of such delay. It is undisputed that the present lawsuit was filed in April 2016, mere months after the underlying testing of the technology completed. Simply, there is neither legal nor factual support for the defense of laches.

C. Defendants’ Affirmative Defense No. 3: Unclean Hands.

For reasons more fully set forth in Section III(G), Defendants’ Affirmative Defense of antecedent breach must fail.

D. Defendants’ Affirmative Defense No. 4: Antecedent Breach.

For reasons more fully set forth in Section III(A-F), Defendants’ Affirmative Defense of antecedent breach must fail.

E. Defendants’ Affirmative Defense No. 5: Unlawful Actions (FDUTPA)

For reasons more fully set forth in Section III(G), Defendants’ Affirmative Defense of unlawful actions must fail.

F. Defendants’ Affirmative Defense No. 7: Proximate Cause.

This defense does not admit, justify or avoid Plaintiffs’ claims, and is instead a mere denial of the element of causation. Denial of causation is not an affirmative defense. Even if it were an affirmative defense, Defendants have produced no evidence in support of how either Plaintiffs’ or the Third-Party Defendants’ actions have resulted in Defendants being unjustly enriched. Simply, this “defense” is nonsensical and Plaintiffs entitled to judgment as a matter of law.

G. Defendants’ Affirmative Defense No. 8: Merger and Integration Clause.

Defendants’ claim that Plaintiffs’ fraudulent inducement claim is barred by the merger and integration clause in the License Agreement and the ratification provision in the First Amendment. Defendants ignore long-standing Florida law.

In Florida, “the existence of a merger or integration clause, which purports to make oral agreements not incorporated into the written contract unenforceable, does not affect the oral representations which are alleged to have fraudulently induced a person to enter into the agreement.”

TEC Serv., LLC v. Crabb, No. 11-62040-CIV, 2013 WL 11326552, at *6 (S.D. Fla. Jan. 23, 2013) (citing *McArthur Dairy, LLC v. McCowtree Bros. Dairy, Inc.*, No. 09-62033, 2011 WL 2731283, at *4 (S.D. Fla. July 13, 2011)). The Supreme Court of Florida has long held that “[t]o hold that by the terms of the contract which is alleged to have been procured by fraud, the [party] could bind the [other party] in such manner that lessee would be bound by the fraud of the [party] would be against the fundamental principles of law, equity, good morals, public policy and fair dealing.” *Oceanic Villas, Inc. v. Godson*, 4 So. 2d 689, 690 (1941).

Accordingly, as a matter of law Defendants’ affirmative defense must fail.

Conclusion

WHEREFORE, Plaintiffs, Andrea Rossi and Leonardo Corporation, respectfully request that the Court enter partial summary judgment against, Defendants with respect to Defendants’ Counterclaims Counts I, II, and IV, and Affirmative Defenses numbers 1-5, 7, and 8, and such other and further relief as this Court deems and proper.

Dated: March 22, 2017.

Respectfully submitted,

/s/ John W. Annesser

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CERTIFICATION OF COMPLIANCE WITH LOCAL RULE 7.1(a)(3)

The undersigned counsel hereby certifies that, in compliance with Rule 7.1(a)(3), Federal Rules of Civil Procedure, that undersigned counsel has conferred with counsel for Defendants in a good faith effort to resolve by agreement the issues raised in this Motion.

/s/John W. Annesser, Esq.

John W. Annesser, Esquire

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served by in the manner specified below on March 22, 2017, on all counsel or parties of record on the attached Service List.

/s/ John W. Annesser

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