UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

ANDREA ROSSI and LEONARDO CORPORATION,

Plaintiffs,

v.

THOMAS DARDEN; JOHN T. VAUGHN; INDUSTRIAL HEAT, LLC; IPH INTERNATIONAL B.V.; and CHEROKEE INVESTMENT PARTNERS, LLC,

Defendants.

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

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

Counter-Plaintiffs,

v.

ANDREA ROSSI and LEONARDO CORPORATION,

Counter-Defendants,

and

J.M. PRODUCTS, INC.; HENRY JOHNSON; UNITED STATES QUANTUM LEAP, LLC; FULVIO FABIANI; and JAMES A. BASS,

Third-Party Defendants.

DEFENDANTS' OPPOSITION TO PLAINTIFFS' STATEMENT OF MATERIAL FACTS IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT

Defendants, pursuant to Federal Rule of Civil Procedure 56 and Local Rule 56.1, respond to Plaintiffs' Statement of Undisputed Material Facts in support of their Motion for Partial Summary Judgment ("Pl. SOMF") [D.E. 214] as follows:

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

1. Admitted that Dr. Andrea Rossi ("Rossi") claims to be the inventor and owner of a disruptive technology that provides for the creation of heat energy in a safe an efficient process using a combination of unique fueling agents and catalysts, and that 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). Defendants deny that Rossi's E-Cat technology works as claimed by Plaintiffs. *See* ¶ 27 *infra*.

2. Denied. As the corporate representative of Cherokee Investment Partners, LLC testified, Cherokee Investment Partners, LLC is not an investment company – it is an investment manager, providing investment management services such finding investments, sourcing investments, investigating investments and raising capital for investments. Cherokee Dep. (excerpts of which are attached hereto as **Composite Ex. 1**) 12:15-22. "Cherokee Investment Partners, LLC does not make investments." *Id.* 36:21-37:1. The website to which Plaintiffs refer, http://cherokeefund.com, is a website for the entire "Cherokee" group of companies which include investment companies such as Cherokee Investment Partners II, LP, Cherokee Investment Partners III, LP, and Cherokee Investment Partners, IV, LP.

3. Admitted.[1]

4. Admitted.

5. Admitted.

6. Admitted.

7. Admitted that on April 29, 2013, the parties executed the First Amendment to the License Agreement ("First Amendment"), and that the First Amendment purported to revise sections 3.2(a) (time for Validation), 4 (Validation Protocol), and 16.7 (Assignment of the

[1] Plaintiffs' Exhibits are only labeled by the CM/ECF numbering system, and not by slip sheet. However, it appears that the CM/ECF numbering does not match up with Plaintiffs' citations. For example, Plaintiffs cite to the Industrial Heat deposition transcript as Exhibit 3, but that transcript is labeled as Exhibit 4. In an effort to make things less confusing, Defendants will not note every time the Exhibit citation and Exhibit label do not match, but will only note when the Exhibit referred to does not stand for the proposition cited.

License Agreement). However, the First Amendment was fraudulently induced, and therefore did not revise the License Agreement. *See* ¶¶ 111-112 *infra*.

8. Admitted.

9. Admitted.

10. Admitted that in October 2013 IH and Rossi executed a proposed Second Amendment to the License Agreement (the "Proposed Second Amendment"). Denied that the Proposed Second Amendment revised Section 5 (Guaranteed Performance) of the License Agreement. *See* ¶¶ 115-117, *infra*.

11. Admitted.

II. Performance by Plaintiffs

A. Delivery of the 1MW Plant and Validation

12. Admitted.

13. Admitted that Section 4 of the License Agreement governs Validation. Denied that the First Amendment was sufficient to amend Section 4, because it was procured by Rossi's fraud. *See* ¶¶ 111-112, *infra*.

14. Admitted that the parties conditionally accepted Fabio Penon ("Penon") as the ERV for the Validation Test, but, Defendants requested that another person from one of the big testing companies be on the testing team, and that request was not honored. Pl. SOMF Ex. 10.

15. Admitted that Plaintiffs and Defendants mutually agreed to the Validation Protocol contained in Exhibit A to the First Amendment. However, Defendants' agreement was procured by Rossi's fraud. *See* ¶¶ 111-112 *infra*.

16. Admitted.

17. Admitted that the ERV certified the results of the Validation test on May 7, 2013. However, the certification was false because the Validation Test was not conducted in accordance with the terms of the License Agreement (or the First Amendment). *See* ¶ 113 *infra*.

18. Admitted.

19. Admitted that after the Plaintiffs filed the present lawsuit, Defendants claimed to Plaintiffs that the data and results of the Validation Test had been manipulated. Denied that Defendants have not provided evidence in support of their claim.

20. Admitted.

21. Admitted.

22. Admitted.

23. Admitted.

24. Denied. Rossi's conclusory, self-serving affidavit is insufficient evidence on this point. The Counterclaim states that "Leonardo and Rossi ***purportedly*** transferred and delivered all of the E-Cat IP to Counter-Plaintiffs on June 9, 2013." Countercl. ¶ 95 (emphasis added).

25. Admitted. However Defendants dispute that the E-Cat IP was actually delivered.

26. Admitted. However, this payment was procured by fraud. *See* ¶¶ 111-112 *infra*.

27. Denied. Defendants have not been able to replicate the results Plaintiffs claimed for the E-Cat technology. *See* Darden Decl. (attached hereto as **Ex. 2**) ¶ 16; Darden Dep. (excepts of which are attached hereto as **Composite Ex. 3**) 100:7-101:5; AEG Dep. (excerpts of which are attached hereto as **Composite Ex. 4**) 210:6-10; Industrial Heat Dep. (excerpts of which are attached hereto as **Composite Ex. 5**) 40:25-41:10, 148:13-149:17, 150:14-151:4, 182:6-8; Vaughn Dep. (excerpts of which are attached hereto as **Composite Ex. 6**) 106:14-107:1, 128:24-129:9, 249:7-14); **Ex. 7** (AEG Dep. Ex. 20).

28. Denied. Plaintiffs' Composite Exhibit 13 at 149:9-12 does not deal with whether the word "replicate" appears in the License Agreement.

29. Denied because Plaintiffs have taken the testimony out of context. First, Composite Exhibit 13 at 149:25-150:6 does not contain the quoted language and is not the testimony of the corporate representative of IH. What the testimony of the corporate representative of IH in fact provides is that the replication requirement is "inherent" in the License Agreement, and that replication is required by sections 12(b) and 13.1. Ex. 5 at 146:14-147:10; 148:6-150-7. The full quotation relied upon by Plaintiffs is "when Andrea drafted the agreement, we were trying not to change his language unless we felt absolutely we needed to. And when you combine 12(b) and 13.1, we believe that gets the same effect." *Id*. 149:25-150:7.

30. Denied. The IPH corporate representative did not testify that he has no knowledge or evidence about inability to replicate, but that he has "the same evidence that [IH] has to support that evidence," and that he has no knowledge "other than what [IH] knows." IPH Dep. (excerpts of which are attached hereto as **Composite Ex. 8**) 25:5-21. As detailed in paragraph 27 *supra*, Defendants have ample evidence to support their inability to replicate.

31. Denied. The cited testimony of the corporate representative of IH actually states that he does not "believe" that IH ever "in writing point[ed] to [provisions 12(b) and 13.1] and

put those in writing and [said], Dr. Rossi, you are in violation of these two provisions." The corporate representative of IH explained "we were seeing [Rossi] quite frequently in person at that time. And so it wouldn't surprise me if we did not, that it was only verbal. But I don't know. There may be some communication along those lines." Ex. 5 at 151:7-23; *see also* Ex. 3 at 123:23-124:16. Composite Exhibit 13 does not deal with notifying Rossi about Defendants' inability to replicate. Additionally, on June 1, 2015, Darden specifically told Rossi, in writing, "[w]e remain uncertain about our ability to replicate the technology, so we need to learn and understand this better." **Ex. 9** ([Rossi_00006555]).

32. Denied. The cited testimony is taken out of context, and Exhibit 19 is not IH-0009520-52. The testimony directly preceding that cited makes clear that any reports of replication were "preliminary" communications that were "later retracted." Ex. 5 at 163:11:22. When discussing mention of a 1.3 times COP, the corporate representative for IH explained, "Again, it is kind of preliminary exuberance over something that we thought had affirmed results which we were hopeful about. But later, in further analysis, did not affirm those results." *Id*.

33. Denied. This paragraph completely misstates the testimony.[2]

C. <u>The Guaranteed Performance Test</u>

34. Admitted.

35. Admitted that Section 5 of the Proposed Second Amendment contains the cited language. Denied that the Proposed Second Amendment amended the License Agreement or governed the Guaranteed Performance test. *See* ¶¶115-117 *infra.*

36. Admitted.

37. Denied. The cited testimony does not stand for the proposition that the parties often referred to the guaranteed performance test as the "350 day test" or the "400 day test." Instead, the cited testimony reflects that the witnesses understood the "350 day test" to mean the

[2] With respect to whether Defendants are lying about their inability to replicate, the corporate representative testified "we did not lie about our ability to replicate." Ex. 5 at 159:11-14. With respect to whether IH did not have competent scientists or engineers, the corporate representative testified "that would seem to me that that would be equally absurd." Id. at 159:19-160:9. With respect to whether IH used faulty equipment, the corporate representative testified "I don't believe that, you know, if you were – if an expert were to go back and review all that we did and how we did it, that is not a conclusion they would come to." Id. at 160:10-17. With respect to whether IH used inferior materials, the corporate representative testified "we know what we did and we exhaustively tested this, so that we would know before entering into a conflict like this if it did, in fact, work or not. Because certainly you wouldn't be in this position if it does, in fact, work. Id. at 160:19-161:4

guaranteed performance test in the context of particular e-mails. The Vaughn testimony directly after the portion cited by Plaintiffs (but conveniently left out) actually states: "Q: And, sir, when you use the term '350-day test' or '400-day test,' is it fair to assume that you were referring to the contractual test? A: Clearly Rossi wanted it to be that, right." Ex. 6 at 144:16-21.

38. Admitted.

39. Admitted that in October 2013 IH and Rossi executed the Proposed Second Amendment. Denied that Leonardo executed it and denied that it extended the time for commencement of the Guaranteed Performance test. *See* ¶¶ 115-117 *infra*; Pl. SOMF Ex. 7 (Proposed 2d Amendment).

40. Denied. The cited documents do not state that the time for commencement of the Guaranteed Performance test had been extended.

41. Admitted that the parties conditionally accepted Penon as the ERV for the Validation Test but, Defendants requested that another person from one of the big testing companies be on the testing team, and that request was not honored. Pl. SOMF Ex. 10. Denied that the License Agreement did not provide for (in the sense of at least allowing for) multiple ERVs. Denied that "at no time prior to November 2015 did any of Defendants ever object to Mr. Penon as the ERV for the GPT, either in writing or orally." *See* Ex. 5 at 121:18-127:1.

42. Denied. The cited testimony and document do not stand for that proposition.

43. Denied. IH shipped the 1 MW Plant from North Carolina to Florida pursuant to the Term Sheet with J.M. Products, Inc., not the License Agreement. *See* **Ex. 10** (Term Sheet). The corporate representative of IH testified that despite Plaintiffs' breach, IH was still willing to pay Plaintiffs "[i]f the device could be proven to generate real high levels of energy output, such as one megawatt, real COPs such as ten, and the technology had been transferred[.]" Ex. 5 at 189:1-18.

44. Denied that in or around February 2015, the ERV submitted a protocol for the Guaranteed Performance test that clearly identified the equipment to be tested as the 1MW Plant. The protocol submitted by Penon in or around February 2015 did not pertain to the Guaranteed Performance test under the License Agreement. In fact, the protocol was called "E-Cat MW1 Energy Plant in Miami: Tests Plan", not "GPT Protocol." Admitted that Darden provided recommendations and proposed modifications to the "E-Cat MW1 Energy Plant in Miami: Tests Plan" as reflected in the cited e-mail string. However, Darden also requested that there be "more

than one way to measure the temperature in [the steam] pipe," but that request was not honored. *See* Pl. SOMF Ex. 26 at IH-00019122.

45. Denied. The cited testimony does not stand for the proposition stated. Defendants did object to the "E-Cat MW1 Energy Plant in Miami: Tests Plan" prior to November of 2015. *See* ¶ 44 *supra*.

46. Denied. The cited testimony refers to the "E-Cat MW1 Energy Plant in Miami: Tests Plan." That was not the protocol for the guaranteed performance test under the License Agreement. *See* ¶ 44 *supra* & ¶ 49 *infra*.

47. Denied; any such reports were determined to be inaccurate. Ex. 5 at 163:11:22.

48. Denied. *See* ¶ 31 *supra*.

49. Denied. The Guaranteed Performance test under the License Agreement could not have begun in February 2015 and ended in February 2016, as the License Agreement required any Guaranteed Performance test to be performed for "350 days (even if not consecutive) within a 400 day period commencing on the date immediately following delivery of the Plant to the Company [i.e., IH]." Pl. SOMF Ex. 4 (License Agreement) § 5. The 1 MW Plant was delivered to IH at its facility in North Carolina in August of 2013. *See* Pl. SOMF ¶ 38.

50. Denied that the Guaranteed Performance test began in February 2015 and ended in February 2016. *See* ¶ 49, *supra*. Admitted that during that time period Dr. Rossi apprised Defendants in writing of the status of the operations occurring at the facility in Doral, Florida.

51. Denied. Rossi's conclusory, self-serving declaration is insufficient evidence of this point.

52. Admitted that Penon submitted quarterly reports regarding the operation of the 1 MW Plant in Doral Florida. Denied that those reports related to the Guaranteed Performance test defined in the License Agreement. *See* ¶¶ 44, 49 *supra* & ¶¶ 115-117 *infra*.

53. Admitted that IH brought investors and potential investors to the Doral facility. Denied that Plaintiffs were performing the Guaranteed Performance test defined by the License Agreement during that time. *See* ¶¶ 44, 49 *supra* & ¶¶ 115-117 *infra*.

54. Denied. Rossi's conclusory, self-serving declaration is insufficient evidence of this point.

55. Admitted that in May of 2015 IH closed on a $50 million investment by non-party Woodford Investment Funds. Denied that the investment closed during the course of the

Guaranteed Performance test defined by the License Agreement. *See* ¶¶ 44, 49 *supra* & ¶¶ 115-117 *infra*.

56. Admitted.

57. Admitted that on March 29, 2016, Penon e-mailed a copy of the "E-Cat MW1 Energy Plant in Miami Energy Multiple Evaluation Final Report" (the "Final Report"). Denied that the Final Report confirmed the Guaranteed Performance. *See* ¶¶ 44, 49 *supra* & ¶¶ 115-117 *infra.*

58. Admitted that Plaintiffs demanded payment of $89 million and that Defendants refused to pay that amount. Denied that Defendants owed $89 million to Plaintiffs.

59. Admitted.

60. Denied. *See* Ex. 3 at 123:23-125:13.

61. Denied. The corporate representative of IH testified that despite Plaintiffs' breach, IH was still willing to pay Plaintiffs "If the device could be proven to generate real high levels of energy output, such as one megawatt, real COPs such as ten, and the technology had been transferred[.]" Ex. 5 at 189:1-18. Similarly, Darden testified that if Rossi had successful evidence that the technology worked, IH would be happy to discuss paying him more money. Ex. 3 at 120:20-121:3.

62. Denied. *See* ¶ 31 *supra*.

III. <u>Defendant IPH's Counterclaim for Breach of Contract</u>

A. <u>Section 16.4: Publicity; Confidentiality.</u>

63. Admitted.

64. Denied. The corporate representative of IPH testified that it has the "same information that [IH] has to support the allegation." Ex. 8 at 48:24-49:9.

65. Denied. Darden Dep. 263:13-16 does not contain the quoted language.

66. Denied. IPH testified that it has the "same information that [IH] has to support the allegation." Ex. 8 at 49:20-50:6, 52:3-10, 52:21-53:3, 53:14-21.

67. Denied. The corporate representative of IPH testified that it has the "same information that [IH] has." Ex. 8 at 54:7-18, 61:25-62:9.

68. Denied. Plaintiffs mischaracterize the cited testimony.

69. Admitted with respect to the Vaughn testimony. The remainder is out of context.

70. Denied. The IPH corporate representative testified that it has the "same support that [IH] has – [IH] has to support the allegation." Ex. 8 at 62:24-63:5.

71. Denied. *See* ¶ 87 *infra*.

72. Denied. The IPH corporate representative testified that it was seeking as damages the $10 million payment it made under the License Agreement, as well as other payment made to Leonardo and Rossi to reimburse them for unnecessary services, equipment and expenses. Ex. 8 at 59:4-61:5.

73. Admitted.

B. <u>Section 10: Recordation of License</u>

74. Admitted.

75. Denied. The corporate representative of IPH testified that it has the "same information that [IH] has to support the allegation." Ex. 8 at 63:24-64:8, 73:7-13. With regard to the patent applications Plaintiffs failed to assign, Darden testified: "I think there were several. I mean, our counsel got involved in this, and I think we had conversations with Rossi and/or his counsel's office." Ex. 3 at 240:18-25.

76. Admitted as to IPH's testimony. The Darden testimony cited does not contain the quoted language.

77. Admitted that the corporate representative for IH testified that the E-Cat IP has no value. The cited testimony reflects that Vaughn testified he believed that the E-Cat technology does not work and that Darden testified he did not know if the E-Cat IP had any value.

C. <u>Section 7: Patent Prosecution and Maintenance</u>

78. Admitted.

79. Admitted.

80. Admitted.

81. Denied. Rossi's conclusory, self-serving declaration is insufficient to establish this point. Leonardo filed over one hundred patent applications relating to the Licensed Patents (as defined in the License Agreement) without informing IPH. *See* IPH's Resp. & Objections to Rossi's 1st Set of Interrogs. (attached hereto as **Ex. 11**) at Resp. No. 5 & Ex. A. Leonardo abandoned over one hundred patent applications relating to the Licensed Patents (as defined in the License Agreement) without prior written notice to IPH. *See id* at Ex. B.

82. Denied. IPH's corporate representative testified that it "has the same information that [IH] has to support that allegation." Ex. 8 at 66:20-67:3. IPH's corporate representative testified that IH would have information on when and how many licensed patent applications were filed by Leonardo and Rossi filed. *Id*. at 67:20-24, 73:17-25.

83. Denied. Plaintiffs misstate the IPH testimony and, based on the citation, it is unclear which portion of the Darden transcript Plaintiffs are referring to.

D. <u>Section 13.3: Covenant Not to Compete.</u>

84. Admitted.

85. Denied. The IPH corporate representative testified that it has the same information that IH has with respect to violations of Section 13.3. of the License Agreement. Ex. 8 at 72:5-73:2.

86. Admitted that IPH stated "we have not bifurcated…the damages in that manner."

87. Denied. Rossi's conclusory, self-serving declaration is insufficient to establish this point. Rossi and Leonardo have admitted that they are engaged in designing and developing what are classified as "E-Cat Products" under the License Agreement with persons or entities other than IH and IPH, specifically, ABB Group and Hydro Fusion, Ltd. *See* Journal of Nuclear Physics ("JONP") (excerpts attached hereto as **Ex. 12**) at Feb. 9, 11, 13, 18, 20, 21, & 22, March 25 & 30, April 27, June 4, 14 & 26, July 16, 23 & 24, Aug. 8, Oct. 2, Oct. 6, & Nov. 15, 2016; Ex. 11 at Resp No. 2 & 3; Leonardo Dep. (excerpts of which are attached hereto as **Composite Ex. 13**) at 234:21-235:3

E. <u>Section 13.5 Tax Matters</u>

88. Admitted.

89. Denied.

90. Denied. *See* 2012 IRS Form 1120 filed by Leonardo ([Rossi_00011665-00011684]), 2013 IRS Form 1120X filed by Leonardo ([Rossi_00011685-00011704], [Rossi_00011715-00011734], [Rossi_00011736-00011751]), and 2013 IRS Form 1040NR for the filed by Rossi ([AE000358]), attached hereto as **Composite Ex. 14**.

91. Admitted with respect to Darden's testimony. IPH did not state that it is unaware of damage to IH.

F. <u>IPH's Purported Damages Related to Their Claims for Breach of Contract</u>

92. Admitted.

93. Admitted.

94. Denied. *See* Ex. 8 at 59:18-24; 102:24-103:22.

G. Defendant's FDUTPA Claims

95. Admitted.

96. Admitted.

97. Admitted.

98. Admitted that Defendants were concerned with testing the E-Cat IP and that a goal of theirs was to accommodate Rossi to determine the state of the E-Cat IP (whether or not the technology worked). Denied that Defendants did not care about the customer they were using to test the E-Cat IP. If they were going to use a customer, they very much cared that it was a legitimate one. *See, e.g.* Ex. 3 at 141:7-9, 159:1-5, 159:21-22, 160:20-25, 162:4-5, 164:19-165:11, 191:21-23, 195:6-8; Ex. 6 at 182:24-183:5. Denied that the only due diligence conducted by Defendants was to meet with the customer's CEO. Plaintiffs' statement is expressly contradicted by the e-mail cited. Pl. SOMF Ex. 40 at IH-00011867-70 ("We are doing some legal analysis – there may be some legal requirement under new US laws that will force us to know more details about our customer, so we may need some more disclosure[.]").

99. Denied. *See* ¶¶ 122-125 *infra*; *see also* D.E. 207 at ¶¶ 56-69, 73, 78.

100. Denied. *See id.*

101. Admitted, except that it was not "well after the GPT had started". *See* ¶ 49 *supra*.

102. Denied. *See* ¶¶ 126-128 *infra*, *see also* D.E. 207 at ¶¶ 80-85.

103. Denied. *See* ¶¶ 122-128 *infra*, *see also* D.E. 207 at ¶¶ 73-88.

104. Denied. *See* ¶¶ 127-128 *infra*; *see also* D.E. 207 at ¶¶ 83, 85, 96-99, 104-105.

105. Denied. *See* ¶¶ 127-128 *infra*; *see also* D.E. 207 at ¶¶ 96-99.

106. Denied. *See* ¶ 129 *infra*.

107. Denied. *See* ¶¶ 99-106 *supra*.

108. Admitted. IPH and IH do not owe Plaintiffs $89 million.

IV. Affirmative Defenses.

109. Denied. *See* Pl. SOMF Ex. 4 (License Agreement) § 5 & ¶ 116 n. 3 & 4 *infra*.

110. Denied. *See* Def. Opp. to Pl. Mtn. for Partial Summary Judgment, § VI(B).

V. Additional Facts

111. The Validation Test contemplated in Section 4 of the License Agreement required a test of at least 54 E-Cat reactors for a 24-hour period. *See* Rossi Dep. (excerpts of which are attached hereto as **Composite Ex. 15**) 151:1-2.

112. On April 24, 2013, Rossi represented to IH that Italian law would allow the Validation Test to be done using 30 reactors. *See* **Ex. 16** ([IH-00098392-00098396]). Immediately prior to the Validation Test, Rossi claimed that Italian law was even more restrictive, and only would permit using 18 E-Cat reactors for the test. *See* Ex. 2 ¶ 9. In fact, the Ferrara Health Office told Rossi that he could proceed with the Validation Test without any restriction on the number of reactors to be tested. *See* Ex. 15 at 148:12-149:7, 149:19-23. IH relied on Rossi's false representations regarding Italian law in entering into the First Amendment. *See* Ex. 2 ¶ 7; Ex. 3 at 200:5-15.

113. During the purported Validation Test, 18 E-Cat reactors were operated as "Unit A" as defined in the First Amendment. *See* Penon Dep. (excerpts of which are attached hereto as **Composite Ex. 17**) 149:25-151:12, 154:6-13; **Ex. 18** (Penon Dep. Ex. 8). The purported Validation Test was not performed for a duration of twenty-four consecutive hours (but rather for only 23.5 hours). *Id.* The purported Validation Test did not "measure the flow of the heated fluid and the Delta T between the temperature of the fluid before and after the E-Cat reaction," as specified in the First Amendment. *Id.*

114. IH paid $3,219,950 to AEG on or about August 12, 2013. *See* Ex. 4 at 190:23-191:8; **Ex. 19** ([AE000255-000256]).

115. AEG did not sign the Proposed Second Amendment. Pl. SOMF Ex. 7 (Proposed 2d Amendment). AEG, which stood to earn money if a "Guaranteed Performance Test" was successful, understood that their refusal to sign rendered the document invalid. *See* Ex. 4 at 79:2-18, 87:2-11; **Ex. 20** ([IH-00089736-00089743]).

116. IPH, Leonardo NH[3], and Leonardo FL[4] did not sign the Proposed Second Amendment either. *See* Pl. SOMF Ex. 7 (Proposed 2d Amendment).

---

[3] Leonardo NH exists in good standing as a New Hampshire corporation. **Ex. 55**.

[4] Rossi is not the owner of Leonardo FL. *See* Ex. 15 at 38:21-39:17.

117. Rossi admitted that the Proposed Second Amendment was not effective because AEG did not sign it. *See* Ex. 13 at 195:19-196:24; **Composite Ex. 21** (AEG Dep. Ex. 15, Leonardo Corp. Dep. Ex. 15). IH also recognized that the Proposed Second Amendment was not effective. *See* Ex. 5 at 202:11-16.

118. The Proposed Second Amendment addressed the testing of "a six cylinder Hot Cat unit" (the "Six Cylinder Unit"). *See* Pl. SOMF Ex. 7 (Proposed 2d Amendment). The Six Cylinder Unit is different from the 1 MW E-Cat Unit or 1 MW Plant as referenced in the License Agreement. The Six Cylinder Unit is a round, tub unit containing six hot cat reactors and is used to heat oil, not water. *See* Ex. 15 at 172:21-173:8, 174:5-8; Ex. 13 at 196:25-197:13; **Ex. 22** (Rossi Dep. Ex. 12). The Six Cylinder remains in North Carolina and was never sent to Florida. *See* Ex. 15 at 174:22-25; Ex. 2 ¶ 15. Plaintiffs used the 1 MW Plant for their purported "Guaranteed Performance Test," not the Six Cylinder. *See* Pls.' Resp. & Objections to Industrial Heat's 1st Req. for Admissions (attached hereto as **Ex. 23**) at Resp. No. 1.

119. Rossi has made public disclosures on JONP revealing specific terms of the License Agreement, without written advance approval from IH or IPH. Rossi publicly disclosed that that the Agreement required a test of the 1 MW Plant, a test to be conducted over 400 days, a test involving 350 days of operation of the 1 MW Plant, and a guaranteed performance or "guarantees of performance" test. *See, e.g.* Ex. 12 at July 2, 2015 & Dec. 21, 2015; IH's Resp. & Objections to Rossi's 2d Set of Interrog. (attached hereto as **Ex. 24**) at Resp. Nos. 1-4.

120. By letter dated February 17, 2016, Jones Day on behalf of IPH requested Plaintiffs to assign to IPH the Licensed Patents (as defined in the License Agreement) with respect to the Territory (as also defined in the License Agreement). Jones Day enclosed an assignment with the letter. *See* **Ex. 25**. Rossi and Leonardo did not execute the assignment as requested by letter of February 16, 2016. *See* Pace Decl. (attached hereto as **Ex. 26**) ¶ 6.

121. Leonardo charged IH and IPH for fees and expenses associated with Leonardo's patent activities, and IH and IPH paid those fees and expenses. *See* **Composite Ex. 27** ([IH-00131929]; [IH-00014673]; [IH-00003745-00003746]; [IH-00013195-00013196]; [IH-00092023-00092024]; [IH-00011989-0011990]; Leonardo Corp. Dep. Ex. 7).

122. Beginning in June 2014, Rossi, on behalf of Leonardo, repeatedly stated to IH that he had "found" a "customer," J.M. Products, Inc. ("JMP") with its own facility Florida, and that this "customer" had a commercial need for, and was going to use in a chemical manufacturing

process, steam that Plaintiffs intended to produce from the 1 MW Plant.[5] Rossi also represented that this "customer" was affiliated with Johnson Matthey, plc ("Johnson Matthey"), a British multinational specialty chemical company with over £10 billion in revenue.[6] Rossi asserted to IH that having a "real customer" with a need for steam would be an independent check on how the 1 MW Plant would operate. *See* Ex. 13 at 242:21-243:2; Ex. 28 at 4th Am. AACT Ex. 16. In reliance on these representations, IH entered into a Term Sheet with Leonardo and JMP, which required moving the 1MW Plant to Florida.[7]

123. JMP was not in any way affiliated with Johnson Matthey; it was owned by a U.S. trust for which Johnson acted as trustee.[8] Rossi and Leonardo entirely controlled and funded JMP and James Bass.[9] JMP had no manufacturing process, made no products, and had no customers other than Leonardo itself.[10]

124. Rossi rented the premises at 7861 N.W. 46th Street, Doral, FL 33166 (the "Doral Facility") on behalf of Leonardo. *See* Ex. 15 at 200:9-17; Ex. 33 at 24:25-25:9, 72:7-20, 83:6-17;

---

[5] *See* Ex. 15 at 183:9-184:5, 199:9-16; Ex. 3 at 164:19-23; Ex. 5 at 215:3-10, 229:17-21, 232:15-23; Ex. 6 at 180:8-22, 181:7-17, 194:17-20, 198:16-20, 267:18-268:4, 268:23-269:4; **Composite Ex. 28** (4th Am. AACT Ex. 16; Rossi Dep. Exs. 13 & 14; [IH-00011175-00011176]).

[6] *See* Ex. 3 at 172:6-173:12, 185:18-186:2, 186:9-18; Ex. 5 at 213:25-214:9, 215:3-10, 218:13-19; 229:21-230:5, 231:22-232:23; Ex. 6 at 180:13-181:25, 194:9-16; **Ex. 29** ([IH-00090895-00090896]); *see also* **Composite Ex. 31** ([IH-00011864]; [IH-00011871-00011872]; [IH-00011867-00011870]); **Composite Ex. 32** (Johnson Dep. Exs. 50, 51, & 52); Ex. 3 at 179:16-180:12; Ex. 5 at 229:21-230:5; **Ex. 39** ([IH-00011231]).

[7] *See* Ex. 10; Ex. 3 at 156:24-162:5, 164:19-167:14, 169:21-24, 180:15-181:3, 191:21-23; Ex. 5 at 191:21-24, 213:25-214:19, 215:20-216:12, 217:12-221:3, 231:24-232:20; Ex. 6 at 182:5-183:8, 184:7-15, 185:3-10, 197: 8-16, 198:7-201:2, 267:18-268:7, 272:5-12, 276:19-277:9.

[8] *See* Ex. 15 at 202:8-203:11; J.M. Products Dep. (excerpts of which are attached hereto as **Composite Ex. 33**) 111:11-112:7, 204:21-205:19; Johnson Dep. (excerpts of which are attached hereto as **Composite Ex. 30**) at 14:21-15:12, 171:13-173:3, 240:7-20, 243:20-244:1.

[9] *See* Ex. 13 at 207:24-209:13, 227:11-15; Ex. 33 at 17:6-16, 18:4-20, 22:16-23:4, 24:13-25:9; Ex. 30 at 56:13-15, 116:9-18, 117:23-118:1, 142:6-16, 144:16-146:14, 153:14-155:25, 158:5-11, 160:1-162:7, 229:8-18, 241:23-25; Bass Dep. (excerpts of which are attached hereto as **Composite Ex. 34**) 96:13-20, 97:5-17, 98:1-3; **Composite Ex. 35** (Johnson Dep. Exs. 16, 27, 29, 30, & 31).

[10] *See* Ex. 33 at 31:3-25, 32:14-17, 77:16-23, 233:14-16, 237:12-15, 248:23-249:3; Ex. 30 at 19:13-21:17, 22:24-23:8, 50:16-23, 53:7-11, 198:9-11, 224:20-226:10; Ex. 34 at 71:1-15, 133:23-135:12, 136:12-19; Stokes Dep. (excerpts of which are attached hereto as **Composite Ex. 36**) 92:6-21, 93:21-94:6, 165:1-21, 191:16-22, 199:18-200:5.

Ex. 30 at 40:25-41:6, 110:12-111:18, 123:10-17; **Composite Ex. 37** (Johnson Dep. Ex. 15; J.M. Products Dep. Ex. 3).

125. Plaintiffs represented JMP (a) as an entity separate from Rossi and Leonardo, *see* **Composite Ex. 38** (Leonardo Corp. Dep. Ex. 20; Johnson Dep. Exs. 17 & 23; AEG Dep. Ex. 28; Bass Dep. Ex. 20; [Rossi_00004860]); (b) as having its own operations and using the 1 MW Plant's steam to manufacture and process its own products,[11] *see* Ex. 5 at 285:6-23; Ex. 38 at Leonardo Corp. Dep. Ex. 20; *See* Ex. 3 at 228:7-24, 291:8-12; and (c) as satisfied with the power it was purportedly receiving from the 1 MW Plant,[12] *see* Ex. 38 at Leonardo Corp. Dep. Ex. 20; Ex. 3 at 295:25-296:12; Ex. 33 at 56:4-15, 61:9-18; **Composite Ex. 40** (Johnson Dep. Exs. 18, 32, 34, 35, 36, 37, 38, & 39; Rossi Dep. Ex. 21).

126. Rossi and Third-Party Defendant Fulvio Fabiani ("Fabiani"), acting on behalf of Third-Party Defendant United States Quantum Leap, LLC ("USQL"), provided measurement data to Penon, who in turn provided that information to IH and IPH. Fabiani also provided his own separate measurement data to IH and IPH.[13] The power absorption data that Fabiani and Penon provided IH and IPH[14] reflected that during certain time periods, the 1 MW Plant was used more power than Florida Power and Light ("FPL") was providing to the entire warehouse facility where the 1 MW Plant was located. Ex. 43 at Fabiani Dep. Ex. 3 & Penon Dep. Ex. 21;

---

[11] It was also represented that James Bass was J.M. Products' Director of Engineering, to give the company a veil of legitimacy. *See* Ex. 3 at 227:21-228:6; Ex. 5 at 289:2-7, 291:23-292:1; Ex. 33 at 44:5-9; Ex. 34 at 158:7-159:17; **Ex. 41** (Bass Dep. Ex. 28).

[12] The monthly letters to IH prepared on J.M. Products letterhead and signed by Johnson, which reported levels of power allegedly received from the 1 MW Plant, were drafted and the information contained therein provided by Rossi. *See* Ex. 15 at 271:11-272:2, 276:6-23; Ex. 30 at 121:2-12, 167:15-169:8, 170:9-171:3, 173:6-174:3, 179:23-179:25; Ex. 38 at Johnson Dep. Ex. 17; Ex. 40 at Johnson Dep. Exs. 34, 35, 36, 37, & 38; **Composite Ex. 42** (Johnson Dep. Exs. 18 & 33).

[13] *See* Ex. 17 at 101:12-102:3, 105:6-21, 107:4-10, 115:17-116:6, 117:20-118:8, 137:6-13, 169:19-171:20, 190:2-191:3; Ex. 13 at 16:15-17:1, 29:6-16, 37:16-38:5, 156:12-19, 178:25-180:10; Ex. 6 at 256:7-22; **Composite Ex. 43** (Fabiani Dep. Ex. 3; Penon Dep. Exs. 16, 19, 21, & 26); Fabiani Dep. (excerpts of which are attached hereto as **Composite Ex. 44**) 38:3-18, 39:11- 40:12, 44:14-48:9, 87:16-88:23, 99:5-8, 100:8-22, 142:5-10.

[14] Fabiani and Penon's measurement data regarding the 1 MW Plant's power absorption were nearly identical. *See* Ex. 43 at Fabiani Dep. Ex. 3 & Penon Dep. Ex. 21; Ex. 44 at 99:5-8, 100:8-22; Murray Dep. (excerpts of which are attached hereto as **Composite Ex. 45**) 118:16-119:5, 147:2-13, 251:18-252:7; **Composite Ex. 46** (Murray Dep. Exs. 8 & 11).

Ex. 44 at 99:5-8, 100:8-22; Ex. 45 at 254:13-260:14, 279:14-283:6, 367:8-368:7; Ex. 46; **Composite Ex. 47** (Murray Dep. Exs. 12 & 13).

127. When the 1 MW Plant was sent to and then reassembled in Florida, Plaintiffs redesigned its configuration in a manner that made evaluating its performance more difficult. For example, the 1 MW Plant was designed to produce steam, yet Rossi removed the steam trap and condensate line placed on the pipe intended to carry the steam out of the 1 MW Plant.[15] Dameron Dep. (excerpts of which are attached hereto as **Composite Ex. 48**) 181:8-21, 184:23-185:15, 192:12-197:14, 198:24-201:13, 203:15-22; West Dep. (excerpts of which are attached hereto as **Composite Ex. 49**) at 88:3-16, 89:16-19, 91:3-25, 110:20-24, 139:5-11.

128. Plaintiffs refused to grant IH access to the Doral Facility in July 2015 and December 2015. Ex. 5 at 247:13-16, 258:7-9; Ex. 6 at 62:19-20, 239:23-25, 240:7-241:12; Ex. 45 at 66:14-18, 130:3-14; **Ex. 51** (4th Am. AACT Ex. 19); Ex. 30 at 182:11-183:6, 184:23-185:19, 187:1-14, 228:11-229:6; **Composite Ex. 52** (Johnson Dep. Exs. 40 & 41). Once IH gained access to the Plant in February 2016, it was promptly able to determine that Rossi's claims about the Plant were false. *See* Ex. 45 at 145:5-8; **Ex. 53** (4th Am. AACT Ex. 5).

129. The scheme orchestrated by Plaintiffs and Third-Party Defendants caused IH and IPH to pay for (1) the Plant's transportation to Florida; (2) the procurement and delivery of equipment for the Plant's reassembly in Florida; (3) the procurement and transportation of personnel to assemble the Plant in Florida; (4) repairs and maintenance of the 1 MW Plant; (5) new equipment for the Doral Facility; and (6) personnel to work at the Doral Facility, including Barry West, T. Barker Dameron, Murray, and Fabiani.[16]

---

[15] Rossi also walled off a portion of the Doral Facility for the ostensible purpose of creating a space within which J.M. Products would "operate" and then prohibited IH personnel from entering that side of the Doral Facility or learning about J.M. Products' supposed operations. *See* Ex. 6 at 238:7-239:8; Ex. 33 at 38:3-6; Ex. 45 at 216:9-11, 314:10-13; Ex. 49 at 81:6-11, 82:14-17, 100:22-101:7, 157:23-158:2, 159:4-15, 178:16-19, 180:11-23, 181:7-9, 206:12-21, 210:23-212:3, 226:3-12; **Composite Ex. 50** (Bass Dep. Exs. 25, 26, & 27).

[16] *See* Ex. 3 at 249:14-20, 305:21-306:5; Ex. 17 at 119:10-15; Ex. 13 at 134:24-135:4, 137:16-138:18, 141:16-142:17, 143:14-144:16, 145:11-148:24, 295:11-18; Ex. 5 at 241:19-242:8, 292:7-20; Ex. 6 at 247:1-6; Ex. 27; Ex. 45 at 82:21-83:8; **Ex. 54** ([IH-00131928]).

Dated: April 4, 2017.

Respectfully submitted,

/s/ Christopher R. J. Pace

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

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

Attorneys for Defendants/Counter-Plaintiffs

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on April 4, 2017, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system which will send a notice of electronic filing to all counsel or parties of record.

/s/ Erika S. Handelson
Erika S. Handelson