

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.

PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT
[DE 203, 207]

Plaintiffs, Andrea Rossi and Leonardo Corporation (collectively, "Plaintiffs"), pursuant to Federal Rule of Civil Procedure 56 and Local Rule 7.5, respond in opposition to Defendants' Motion for Summary Judgment [DE 203, 207] and state as follows:

Defendants *Seek* summary judgment as to all six counts of their Fourth Amended Answer, Additional Defenses, Counterclaims and Third-Party Claims ("AACT") and on all four pending counts set forth in the Plaintiffs' Complaint. Defendants misstate, obscure, and otherwise ignore both the relevant facts and applicable law. Even if Defendants could show entitlement to summary judgment as a matter of law on their affirmative claims (they cannot), Defendants make no attempt to even address Plaintiffs' fifteen (15) affirmative defenses (*See* DE 140). This failure is fatal to Defendants' motion with respect to their counterclaims. *See Durham Commer. Capital Corp. v. Select Portfolio Servicing, Inc.*, 2016 U.S. Dist. LEXIS 143229, *61 (M.D. Fla. Oct. 17, 2016) (Without any evidence or argument on that affirmative defense, the Court will not address its merits.) Plaintiffs will show that Defendants' Motion must be denied in its entirety.

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Statement of Material Facts in Opposition (“SOFO”)

1. Undisputed.

2. Disputed. Plaintiff Leonardo Corporation, a Florida corporation, executed and is party to the License Agreement by virtue of its merger with the New Hampshire incarnation of Leonardo Corporation. *See Supp. Ex. 43* (Rossi_00011827-44).

3. Disputed. Section 16.4 of the License Agreement requires IH and its assignee, IPH, by virtue of the Assignment and Assumption of License Agreement, to keep confidential the E-Cat IP as that term is defined in the License Agreement. *See Ex. 4* (License Agreement).

4. Undisputed.

5. Disputed. The License Agreement does not provide that at least 54 E-Cat reactors would be used for the Validation Test, and Dr. Rossi did not testify that at least 54 reactors were required to be tested. *See Ex. 4; Defs.’ Ex. 2* at 151:1-2. On or about April 24, 2013, the parties mutually agreed in writing to test 30 reactors for purposes of the Validation Test. *See Supp. Ex. 44* (IH-00098392-96). The First Amendment to the License Agreement provided for testing of 30 E-Cat reactors over a period of 24 hours. *See Ex. 5* (First Amendment, Ex. A). Defendant Darden represented to Dr. Rossi that the amount of power produced, rather than the number of reactors tested, mattered. *See Supp. Ex. 45* at 149:18-150:4. In fact, Defendants admitted that testing fewer units would make it more difficult for Plaintiffs to achieve the necessary results to entitle to Plaintiffs to receive payment under the License Agreement. *See Supp. Ex. 69* (IH-00133919). The ERV certified the Validation Test results pursuant to amended section 4 of the License Agreement. *See Ex. 12*. Defendants did not object to the ERV’s report. *See Ex. 3* at 152:21-154:25; *Ex. 14*, at 257:15-20; 340:4-12. On June 9, 2013, Defendants tendered the \$10 million payment as contemplated by section 3.2(b) of the License Agreement. *See, e.g., Countercl. ¶¶ 58, 94*.

6. Disputed. In April 2013, Dr. Rossi met with the Regional Agency for the Protection of the Environment of Ferrara to ensure that the Validation Test could take place without official interruption. *See Supp. Ex. 45* at 145:19-150:12. The Agency informed Dr. Rossi that he was required to obtain authorization prior to conducting the test, but that if neighboring residents would agree to the test the Agency would not interfere. *Id.* at 148:20-149:11. In an effort to minimize noise disturbance and ensure uninterrupted operation of the Validation Test, Dr. Rossi proposed to test 30 reactors. *See id.* at 145:19-150:12; *Supp. Ex. 44*. As noted in paragraph 5 *supra*, Defendants did not object to this arrangement. At no time did Dr. Rossi interpret, claim to have interpreted, or claim direct knowledge of Italian law; rather, Dr. Rossi communicated his understanding of what the Regional Agency told him. *See Supp. Ex. 46 ¶¶ 7-8*. Defendant IPH, the party bringing this claim, has no knowledge whatsoever about any

representations that Dr. Rossi purportedly made on April 23, 2013 with respect to conversations with Italian agencies or Italian law. *See Supp. Ex. 47* at 13:21-16:1. Defendant Vaughn testified that he had no evidence that Dr. Rossi did not meet with the Ferrara Health Office. *See Supp. Ex. 48* at 261:21-262:9.

7. Disputed. At no time did Dr. Rossi interpret, claim to have interpreted, or claim direct knowledge of Italian law; rather, Dr. Rossi communicated his understanding of what the Regional Agency told him. *See Supp. Ex. 46 ¶¶ 7-8*. Dr. Rossi made no reference to Italian law in document IH-00098392-96. *See Defs.’ Ex. 4*. Dr. Rossi proposed testing 30 reactors in an effort to minimize noise pollution to neighbors and ensure that the Validation Test would not be interrupted by Ferrara authorities. *See Supp. Ex. 45* at 145:19-150:12; *Defs.’ Ex. 4*.

8. Undisputed.

9. Disputed. Leonardo Corporation Florida is a party to the First Amendment by virtue of the merger of the New Hampshire and Florida incarnations of the company. *See Supp. Ex. 43*.

10. Disputed. Dr. Rossi is the beneficial owner of Leonardo Corporation Florida. *See Supp. Ex. 45* at 50:15-23.

11. Disputed. Leonardo Corporation of New Hampshire merged into Leonardo Corporation of Florida such that as a matter of law there is no assignment. *See Supp. Ex. 43*.

12. Undisputed.

13. Disputed. Plaintiffs Rossi and Leonardo Corporation executed the Assignment and Assumption of License Agreement entered into between IH and IPH based on IH’s representation that IPH was a wholly owned subsidiary of IH. *See Supp. Ex. 49* (IH-00015708). In addition, Defendants assured Plaintiffs that IPH, like IH, was owned under the Cherokee umbrella and that IPH was Cherokee Fund. *See Supp. Ex. 45* at 156:16-157:13.

14. Undisputed.

15. Disputed. At no time did Dr. Rossi interpret, claim to have interpreted, or claim direct knowledge of Italian law; rather, Dr. Rossi communicated his understanding of what the Regional Agency for the Protection of the Environment of Ferrara told him. *See Supp. Ex. 46 ¶¶ 7-8*. The Agency informed Dr. Rossi that: “in Italy we do not have authorizations for experiments. There is not something that is called an authorization for 36 hours. You are either authorized or you are not.” *Defs.’ Ex. 2* at 148:12-25. A restriction on the number of reactors was necessary to obtaining agreement from neighboring residents, as the number of reactors affected the noise generated during the Validation Tests. *See Supp. Ex. 46 ¶¶ 3-5*. Based upon the Ferrara Agency’s representation, Dr. Rossi determined that an

appropriate level would be the number of reactors actually tested. *See Supp. Ex. 46* ¶ 6. Defendants consented to testing 18 reactors and paid the \$10 million payment under the License Agreement. *See Countercl. ¶¶ 58, 94. See facts in ¶ 6, supra.*

16. Disputed. In April 2013, the Regional Agency for the Protection of the Environment of Ferrara informed Dr. Rossi that he was required to obtain authorization prior to conducting the test, but that if neighboring residents would agree to the test the Agency would not interfere. *See Supp. Ex. 45* at 148:20-149:11. A restriction on the number of reactors was necessary to obtaining agreement from neighboring residents, as the number of reactors affected the noise generated during the Validation Tests. *See Supp. Ex. 46* ¶¶ 4-6. Defendant IPH, the party bringing this claim, has no knowledge whatsoever about any representations that Dr. Rossi purportedly made on April 23, 2013 with respect to conversations with Italian agencies or Italian law. *See Supp. Ex. 47* at 13:21-16:1. Defendant Vaughn testified that he had no evidence that Dr. Rossi did not meet with the Ferrara Health Office. *See Supp. Ex. 48* at 261:21-262:9.

17. Disputed. Dr. Rossi made no representations to Defendants regarding Italian law. *See Supp. Ex. 46* ¶¶ 7-8. Rather, Rossi determined the number of units to be tested based upon his discussions with the Regional Agency for the Protection of the Environment of Ferrara, as indicated *supra*. *See id.* ¶¶ 2-6.

18. Undisputed.

19. Disputed. Defendants and their associates were present at all material times during the Validation Test, and made no objections to the actual test and presented no objections afterward. *See Supp. Ex. 48* at 86:17-22; *Supp. Ex. 68* at 151:13-16. After the ERV produced a final reporting clearly showing the test parameters and results, Defendants tendered the \$10 million payment in accordance with the License Agreement. *See Countercl. ¶¶ 56, 58; See also Ex. 9* at 97:14-22.

20. Disputed. The mutually agreed to ERV, Fabio Penon, performed all measurements required by the mutually agreed to Validation Protocol. *See Ex. 3* at 115:4-25, 121:7- 11; *Exs. 11, 12*. After the ERV produced a final reporting clearly showing the test parameters and results, Defendants tendered the \$10 million payment in accordance with the License Agreement. *See Countercl. ¶¶ 56, 58; See also Ex. 9* at 97:14-22.

21. Disputed. 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; Ex. 9* at 97:19-22; *Ex. 3* at 142:12-16; *Ex. 13* at 142:6-16; *Ex. 17* at 102:24-103:22.

22. Disputed. Defendants' citation reads that it is AEG's "understanding that the validation

testing in Italy with Penon that resulted in the \$10 or \$15 million payment was in April/May of 2013.” *See Defs.’ Ex. 12* at 190:23-191:8. To the extent that Industrial Heat paid AEG any money, Plaintiffs are not in a position to confirm or deny such information.

23. Undisputed.

24. Disputed. Plaintiffs did not own or control the 1MW Plant after October 2012; rather, Defendant IH owned the Plant in 2013. *See* Countercl. ¶ 4; *Ex. 3* at 105:9-15; *Ex. 9* at 115:25-116:4; *Ex. 4* at § 3.2(a). Defendants admitted that they could have started the 1MW Plant for testing at any time. *See Supp. Ex. 50* at 116:5-17. Defendants prevented Plaintiffs from commencing the Guaranteed Performance Test in 2013 and 2014 by representing to Plaintiffs on numerous occasions that the parties needed authorization from a North Carolina Health Department but were unable to obtain such authorization. *See Supp. Ex. 45* at 192:25-197:11. In June 2014, Defendants sought and obtained a report from Stephen Browne, a nuclear radiation compliance consultant, on whether the E-Cat technology would be subject to North Carolina State or federal licensing requirements or safety regulations to operate. *See Supp. Ex. 51* (IH-00003735); *see also Supp. Ex. 52* at 211:18-213:10. In addition, in June 2014, when Plaintiffs brought to Defendants’ attention that Defendants had not – since 2013 – indicated where to install and operate the 1MW Plant since 2013, Defendant Darden responded that “ideally we would not make a decision about this new location for a while longer” and that the “decision [could] wait a while.” *See Supp. Ex. 53* (IH-00117296-97). Moreover, Defendants felt that Plaintiffs’ attention to the Lugano test was more important than tests with Defendants. *See Supp. Ex. 54* (IH-00020901-05); *Supp. Ex. 52* at 133:6-18).

25. Disputed. The parties agreed in writing and through performance that the time for the GPT would be extended. *See Ex. 7*. However, Plaintiffs completed the Guaranteed Performance Test within the time period set forth in Section 5 of the License Agreement as amended by the Second Amendment and subsequent agreements between the parties. *See Ex. 7; Ex. 22; Ex. 3* at 189:1-18, 214:21-215:1, 215:20-216:5. As of September 2014, Defendants represented to potential competitors at Texas Instruments that Dr. Rossi would be taking the 1MW Plant to Florida to “begin operating it continuously (this is a requirement of our contract with him).” *See Supp. Ex. 70* at IH-00107402. At no point in time prior to November 2015 did Defendants indicate that the time for performance had expired. *See Ex. 1* ¶ 26; *Ex. 3* at 202:17-203:4, 186:9-17, 202:17-203:4, 203:22-204:9; *Ex. 17* at 140:6- 15.

26. Disputed. 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; Defs.’ Ex. 15*. Dr. Rossi signed the Second Amendment on behalf of himself and Leonardo

Corporation. *See* **Supp. Ex. 45** at 180:6-22.

27. Disputed. AEG's corporate representative testified that he could not remember whether AEG executed the Second Amendment. *See* **Supp. Ex. 55** at 78:22-79:18. AEG also testified that that they understood that by not signing the Second Amendment, the amendment would not be binding upon them. *See* **Defs.' Ex. 12** at 79:2-18, 87:2-11; **Defs.' Ex. 16** (IH-00089736-43). AEG testified that it did not favor the Second Amendment because AEG believed that the terms thereof would have a negative impact on their fee arrangement with Defendants. *See* **Defs.' Ex. 12** at 79:6-18.

28. Disputed. Dr. Rossi signed the Second Amendment on behalf of himself and Leonardo Corporation. *See* **Supp. Ex. 45** at 180:6-22).

29. Disputed. *See* disputed facts in ¶ 28, *supra*.

30. Undisputed.

31. Disputed. Dr. Rossi understood that the Second Amendment was not valid with respect to AEG. *See* **Supp. Ex. 46** ¶ 9.

32. Disputed. Dr. Rossi has no information with respect to what IH wrongfully or rightfully believed, but maintains that IH never circulated any written notice to Plaintiffs that the Second Amendment was not in effect. *See* **Supp. Ex. 46** ¶ 10.

33. Undisputed.

34. Disputed. The Six Cylinder Unit differs from the 1MW Plant, and can be used to heat water as well as oil. *See* **Supp. Ex. 46** ¶ 11.

35. Undisputed.

36. Disputed. Plaintiffs and Defendants agreed to substitute the 1MW Plant for the Six Cylinder Unit for purposes of the GPT and shipped the same to Florida. *See* **Ex. 13** at 144:8-15; **Ex. 24**; **Ex. 1** ¶¶ 16-17; **Ex. 9** at 156:24-157:2; **Ex. 3** at 214:21-215:1; 215:20-216:5; **Ex. 1** ¶ 16.

37. Disputed. After the GPT concluded, Dr. Rossi re-purposed the piping that comprised the heat exchanger that dissipated heat generated by operation of the 1MW Plant. *See* **Defs.' Ex. 17** at 271:1-272:2.

38. Disputed. Plaintiffs raised \$50 million in investment capital based upon the E-Cat technology; as such, it is not undisputed that Defendants ever sub-licensed the E-Cat IP for profit. *See* **Exs. 3, 34, 35**.

39. Disputed. Plaintiffs raised \$50 million in investment capital based upon the E-Cat technology; as such, it is not undisputed that Defendants ever created a product or service that could be sold based on the E-Cat IP. *See* **Exs. 3, 34, 35**.

40. Disputed. Defendants have reported, on numerous occasions, their ability to replicate. *See, e.g., Supp. Ex. 67* (IH-00000861) (COP 4.0); **Ex. 3** at 163:23-164:25; **Ex. 19**. The term “replicate” does not appear, in any variation of the term, in the License Agreement or amendments thereto. *See Ex. 4; Ex. 5; Ex. 7; Ex. 13* at 149:9-12. IH testified that Defendants did not explicitly include a replication requirement in the License Agreement. *See Ex. 13* at 149:25-150:6. Defendant IPH, the only entity with contractual rights to the E-Cat IP, has no knowledge or evidence about its own claims regarding its purported inability to replicate. *See Ex. 17* at 25:25-26:17, 41:11-42:7.

41. Disputed. Plaintiffs carefully crafted public communications to only disclose information that had previously been made public by virtue of patent filings, eliminating any need to enter into confidentiality agreements. *See Defs.’ Ex. 24* at Resp. No. 18.

42. Disputed. Plaintiffs have incurred and continue to incur the costs of the present litigation to collect payment from companies that do not have the resources to pay. *See Supp. Ex. 71* (Supplement to Defendant Industrial Heat, LLC’s Amended Responses and Objections to Plaintiff Andrea Rossi’s First Set of Interrogatories, No. 16).

43. Disputed. Defendant IPH testified that it did not know what specific confidential information Plaintiffs disclosed, and further indicated that he did not know of any proof or facts that IPH has in support of this claim. *See Ex. 17* at 62:24-63:23. Defendant IPH testified that IPH 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 Ex. 17* at 48:24-49:19.

44. Disputed. 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 Ex. 17* at 62:24-63:23. Defendant IPH testified that IPH 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 Ex. 17* at 48:24-49:19.

45. Disputed. Plaintiffs were permitted by law to file with the Court documents necessary to support their claims, without advance approval from any party. *See Ex. 4*.

46. Disputed. The License Agreement itself grants to Defendants the purported “assignment” that Defendants sought in their February 2016 letter, thereby rendering the letter and its request redundant and unnecessary. *See Ex. 4* § 1 (the License Agreement 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.” In addition, as early as October 2013, Defendants had no intention of

making the \$89 million payment to Plaintiffs. *See, e.g., Ex. 9* at 117-121. IPH and IH readily admit that they did not pay the \$89 million sought by Plaintiffs. *See* Countercl. ¶¶ 74, 80; *Ex. 17* at 108:23-25.

47. Disputed. As early as October 2013, Defendants had no intention of making the \$89 million payment to Plaintiffs. *See, e.g., Ex. 9* at 117-121. IPH and IH readily admit that they did not pay the \$89 million sought by Plaintiffs. *See* Countercl. ¶¶ 74, 80; *Ex. 17* at 108:23-25. In fact, Defendants represented to Plaintiffs that Defendants had the funds to pay the \$89 million under the License Agreement when, in fact, they never had such funds. *See Supp. Ex. 52* at 259:9-11. Finally, IPH's corporate representative was unable to offer any proof or evidence that there had been a failure to assign any patents, and did not know when such a failure occurred. *See Ex. 17* at 63:24-64:18, 73:7-16; *Ex. 9* at 240:18-241:3

48. Disputed. Leonardo did not file any patent application relating to the Licensed Patents without informing IPH. *See Ex. 1* ¶ 26. Moreover, IPH's corporate representative was unable to offer any proof or evidence that Plaintiffs filed patent applications without informing IPH, and did not know which or how many applications were purportedly so filed. *See Ex. 17* at 66:20-68:2, 73:17-74:5. Defendant Darden testified that he was not aware of such patents. *See Ex. 9* at 138:5-17.

49. Disputed. Leonardo did not abandon any patent application or Licensed Patent without the prior written consent of IPH. *See Ex. 1* ¶ 25. Moreover, IPH's corporate representative was unable to offer any proof or evidence that Plaintiffs abandoned patent applications without informing IPH, and did not know which or how many applications were purportedly so abandoned. *See Ex. 17* at 66:20-68:2, 73:17-74:5.

50. Disputed. IPH testified that it was not aware of the damages associated with any purported breach of the License Agreement with respect to Leonardo's patent activities. *See Ex. 17* at 70:25-71:5. Defendant Darden testified that neither IH nor IPH had computed damages related to any purported violation of any such provision of the License Agreement. *See Ex. 9* at 7-24.

51. Disputed. Plaintiffs are not engaged in designing and developing E-Cat Products as defined under the License Agreement within the Territory defined in the License Agreement. *See Ex. 4*. Plaintiffs have not engaged in prohibited competition in violation of the License Agreement. *See Ex. 1* ¶ 26.

52. Disputed. Plaintiffs are not engaged in prohibited design and development activities within the Territory defined in the License Agreement. *See Ex. 4*. Plaintiffs have not engaged in prohibited competition in violation of the License Agreement. *See Ex. 1* ¶ 26.

53. Undisputed.

54. Undisputed.

55. Disputed. Non-Party AEG produced the document contained in **Defs.’ Ex. 33**. Plaintiffs produced amended tax returns for the year 2013 as bates-range Rossi_00011736-51.

56. Disputed. Dr. Rossi reported to Defendants that Plaintiffs and Defendants had a potential customer who could use steam produced from the E-Cat. *See Supp. Ex. 45* at 191:17-192:24).

57. Disputed. Dr. Rossi did not represent to Defendants that J.M. Products was an affiliate of Johnson Matthey. *See Supp. Ex. 46* ¶ 13. Dr. Rossi represented to Plaintiffs that J.M. Products was a newly formed company that Henry Johnson – Dr. Rossi’s attorney – would serve as the company’s CEO and that Dr. Rossi would run the operations for the first year of business. *See Supp. Ex. 56* (IH-00011867, IH-00012026). Henry Johnson never intended J.M. to stand for Johnson Matthey, and Dr. Rossi never told Henry Johnson that J.M. Products would be related in any way to Johnson Matthey. *See Supp. Ex. 57* at 124:5-25, 171:13-19).

58. Disputed. *See* disputed facts in ¶ 57, *supra*.

59. Disputed. Dr. Rossi represented to Defendants that J.M. Products would use steam heat produced by the 1MW Plant to treat platinum sponge to create catalyzers for sale. *See Supp. Ex. 58* (IH-00012026); **Supp. Ex. 45** at 185:23-186:20. IPH has no proof to contradict this representation. *See Ex. 17* at 149:19-150:8. In fact, J.M. Products did use steam generated by the 1MW Plant to create platinum-sponge and/or grapheme based catalyzers for sale to Leonardo. *See Supp. Ex. 59* at 214:23-215:3, 220:16-19, 225:5-10. Regardless, Defendants did not care what J.M. Products was using steam for or what the company was producing. *See Supp. Ex. 48* at 196:8-196:11. Finally, Defendants’ cited testimony and documents do not stand for the proposition for which Defendants cite them; Defendants misstate the cited testimony. *See Defs.’ Ex. 17* at 79:1-80:14, 139:6-140:3, 174:1-15, 242:21-243:2.

60. Disputed. Dr. Rossi represented to Defendants that J.M. Products was a newly formed company that Henry Johnson – Dr. Rossi’s attorney – would serve as the company’s CEO and that Dr. Rossi would run the operations for the first year of business. *See Supp. Ex. 56*. As such, Plaintiffs clarified to Defendants in drafts of the Term Sheet that there should be no reference to Johnson Matthey, and any such references were deleted. *See Supp. Ex. 60* (Rossi_00001328). Furthermore, there is no evidence showing that Dr. Rossi drafted the term sheet. *See Supp. Ex. 61* (IH-00007120).

61. Disputed. Defendants could have, but did not, make any attempts to “investigate” or “contact” Johnson Matthey to confirm any purported arrangement with them or any related entity. *See, e.g., Supp. Ex. 48* at 200:5-201:2. Defendants never called Johnson Matthey to speak with them about any agreements or arrangements. *See id.* at 195:25-196:11. Defendants never requested a letter from

Johnson Matthey or any other written confirmation that would validate Dr. Rossi's alleged representations. *See id.* at 201:3-6. Defendants did no due diligence into whether the customer had a facility in Florida. *See Supp. Ex. 52* at 232:10-18. Defendants did not ask to see the customer's facility where the 1MW Plant would operate. *See Supp. Ex. 48* at 195:25-196:11. Defendants did not care what the customer would be doing. *See id.* at 196:8-196:11. The extent of Defendants' due diligence with respect to the customer was to check Secretary of State filings to determine where J.M. Products was formed and to ask Dr. Rossi and Henry Johnson to sign an OFAC compliance document. *See Supp. Ex. 52* at 229:3-10. The Compliance with OFAC statement was signed by Henry Johnson on behalf of J.M. Products, Inc. *See Supp. Ex. 62* (OFAC Statement). None of the documents to which Defendants cite support their purported "undisputed fact" that Dr. Rossi ever rebuffed any of Defendants' attempts to contact the actual customer – J.M. Products – or Johnson Matthey. *See Defs.' Ex. 40*.

62. Disputed. On or about July 2014, Dr. Rossi and Henry Johnson met with Defendants Darden and Vaughn in North Carolina to discuss the proposal to relocate the 1MW Plant to Florida and how J.M. Products would utilize the Plant. *See Defs.' Ex. 37* at 230:18-231:6. At no time prior to that meeting did Dr. Rossi represent to Defendants that there would be a meeting with any Johnson Matthey representative. *See Supp. Ex. 46* ¶ 14. During the July meeting, Dr. Rossi informed Defendant Darden that J.M. Products' only "association or affiliation with Johnson Matthey" was that J.M. Products would "obtain materials from Johnson Matthey and process those materials." *See Defs.' Ex. 37* at 237:13-22. In fact, J.M. Products did use steam generated by the 1MW Plant to create platinum-sponge and/or grapheme based catalyzers for sale to Leonardo. *See Supp. Ex. 59* at 214:23-215:3, 220:16-19, 225:5-10. Subsequent to that meeting, Defendants sent Barry West to help set up the Doral facility. *See Supp. Ex. 63* at 87:5-8.

63. Disputed. At all times subsequent to the July 2014 meeting, Dr. Rossi represented to Defendants that J.M. Products was a new company and that Defendants would be working with J.M. Products. *See Defs.' Ex. 41*. The extent of Dr. Rossi's representations regarding Johnson Matthey was that J.M. Products would use Johnson Matthey as a supplier. *See Defs.' Ex. 41*. Dr. Rossi's references to anonymity refer exclusively to J.M. Products, and not Johnson Matthey. *See Supp. Ex. 46* ¶ 15.

64. Disputed. Dr. Rossi represented to Defendants that J.M. Products was a newly formed company that Henry Johnson – Dr. Rossi's attorney – would serve as the company's CEO and that Dr. Rossi would run the operations for the first year of business. *See Supp. Ex. 56*. As such, Plaintiffs clarified to Defendants in drafts of the Term Sheet that there should be no reference to Johnson Matthey, and any such references were deleted. *See Supp. Ex. 60*. Furthermore, there is no evidence showing that

Dr. Rossi drafted the term sheet. *See* **Supp. Ex. 61**.

65. Disputed. J.M. Products was intended to be established in the United Kingdom, but due to high costs associated with incorporation the situs was changed. *See* **Defs.’ Ex. 37** at 240:16-20.

66. Disputed. At all relevant times prior to execution of the Term Sheet, Defendants knew that J.M. Products would be a newly formed company not yet operating business. *See* **Supp. Ex. 56**; *See also* **Supp. Ex. 46** ¶ 12. At all relevant times, Defendants knew that the Doral Facility was not yet up and running. *See* **Defs.’ Ex. 36** at 34:9-20.

67. Disputed. Dr. Rossi made clear to Defendants that J.M. Products was a newly formed company. *See* **Supp. Ex. 56**. Dr. Rossi made clear to Defendants that J.M. Products would use Johnson Matthey as a supplier. *See* **Defs.’ Ex. 41**.

68. Disputed. Dr. Rossi made clear to Defendants that J.M. Products was a newly formed company. *See* **Supp. Ex. 56**. Dr. Rossi made clear to Defendants that J.M. Products would use Johnson Matthey as a supplier. *See* **Defs.’ Ex. 41**. In fact, J.M. Products purchased product from Johnson Matthey. *See* **Supp. Ex. 64** at 108:1-16.

69. Disputed. Plaintiffs never intended to induce Defendants into signing a Term Sheet and made no false representations with respect to J.M. Products. *See* **Supp. Ex. 46** ¶ 46. In addition, Defendants mutually benefitted from the use of a customer in that they actually brought investors to the Doral Facility in order to solicit and obtain over \$50 million in investment funds. *See* **Ex. 3** at 170:9-14, 204:25-205:5; 206:6-207:6; **Ex. 34**. Finally, Defendants testified that with respect to a customer, they simply wanted to “accommodate” Dr. Rossi. *See* **Supp. Ex. 48** at 184:7-15. Defendants’ “goal” was to determine whether the 1MW Plant produced a “real serious significant energy output.” *See id.* at 184:7-15. Defendants did not care what the customer would be doing. *See id.* at 196:8-196:11.

70. Disputed. Defendants entered into the Term Sheet because they simply wanted to “accommodate” Dr. Rossi. *See id.* at 184:7-15. Defendants’ “goal” was to determine whether the 1MW Plant produced a “real serious significant energy output.” *See id.* at 184:7-15. Defendants did not care what the customer would be doing. *See id.* at 196:8-196:11. In addition, they intended to, and did, solicit and obtain \$50 million in investment funds. *See* **Ex. 3** at 170:9-14, 204:25-205:5; 206:6-207:6; **Ex. 34**.

71. Disputed. *See* Disputed Facts in ¶ 70, *supra*.

72. Undisputed.

73. Disputed. J.M. Products was a real customer who used steam produced by the 1MW Plant to treat platinum sponge to create catalyzers for sale. *See* **Supp. Exs. 58, 45** at 185:23-186:20. IPH has no proof to contradict this representation. *See* **Ex. 17** at 149:19-150:8. In fact, J.M. Products did use steam

generated by the 1MW Plant to create platinum-sponge and/or grapheme based catalyzers for sale to Leonardo. *See Supp. Ex. 59* at 214:23-215:3, 220:16-19, 225:5-10. Regardless, Defendants did not care what J.M. Products was using steam for or what the company was producing. *See Supp. Ex. 48* at 196:8-196:11.

a. At all times, Dr. Rossi distinguished J.M. Products from Rossi and Leonardo: (a) to respect corporate formalities; and (b) because the entities and individuals were separate and distinct. *See Supp. Ex. 46* ¶ 17.

b. James Bass actually served as Director of Engineering and independent contractor for J.M. Products. *See Defs.’ Ex. 48* at 57:2-15.

c. J.M. Products used steam produced by the 1MW Plant to treat platinum sponge to create catalyzers for sale. *See Supp. Exs. 58, 45* at 185:23-186:20. IPH has no proof to contradict this representation. *See Ex. 17* at 149:19-150:8. In addition, J.M. Products had its own operations that consisted of using steam heat to create catalyzers. *See Supp. Ex. 59* at 214:23-215:3, 220:16-19, 225:5-10.

d. J.M. Products was in fact satisfied with the power that it was receiving from the 1MW Plant. *See Defs.’ Ex. 47* at Leonardo Corp. Dep. Ex. 20.

e. Dr. Rossi made clear to Defendants that J.M. Products was a newly formed company. *See Supp. Ex. 56*. Dr. Rossi made clear to Defendants that J.M. Products would use Johnson Matthey as a supplier. *See Defs.’ Ex. 41*.

74. Plaintiffs reserve the right to dispute these purported “facts” to the extent that Defendants prospectively assert the “facts” against Plaintiffs.

75. *See* ¶ 74, *supra*.

76. As indicated above, Plaintiffs engaged in no wrongful activity. *See* ¶¶ 1-75, *supra*. The 1MW Plant operated as indicated in the reports that the ERV, Fabio Penon, circulated to Plaintiffs and Defendants. *See Ex. 32; Ex. 36*.

77. J.M. Products did use steam generated by the 1MW Plant to create platinum-sponge and/or graphene based catalyzers for sale to Leonardo. *See Supp. Ex. 59* at 214:23-215:3, 220:16-19, 225:5-10; *Supp. Ex. 58; Supp. Ex. 45* at 185:23-186:20. IPH has no proof to contradict this representation. *See Ex. 17* at 149:19-150:8.

78. In exchange and consideration for J.M. Products’ sale to Leonardo Corporation of the catalysts that J.M. Products produced using the 1MW Plant steam, Leonardo Corporation paid J.M. Products’ expenses and employee/contractor income. *See Defs.’ Ex. 17* at 208:3-209:21. Dr. Rossi

controlled J.M. Products' technical and product development activities, as well as the company's day-to-day activities. *See Defs.' Ex. 36* at 17:11-16, 22:23-23:1. At all relevant times, Defendants knew that Dr. Rossi would direct the operations of the J.M. Products. *See Defs.' Ex. 36* at 34:15-20.

a. Dr. Rossi hired Mr. Bass on behalf of J.M. Products and on an independent contractor basis, and gave him the title "Director of Engineering." *See Defs.' Ex. 17* at 209:17-18; *Defs.' Ex. 36* at 26:11-13. Defendant IPH has no knowledge about whether Mr. Bass was J.M. Products' Director of Engineering. *See Supp. Ex. 47* at 161:7-162:8. Defendant Vaughn testified that he had no reason to believe that Mr. Bass was not J.M. Products' Director of Engineering. *See Supp. Ex. 52* at 294:20-295:2).

b. *See ¶ 74, supra.*

c. Undisputed.

79. Dr. Rossi made clear to Defendants that J.M. Products was a newly formed company. *See Supp. Ex. 56*. Dr. Rossi made clear to Defendants that J.M. Products would use Johnson Matthey as a supplier. *See Defs.' Ex. 41*. J.M. Products was intended to be established in the United Kingdom, but due to high costs associated with incorporation the situs was changed. *See Defs.' Ex. 37* at 240:16-20.

80. When necessary, Mr. Fabiani transmitted to Fabio Penon data that was stored on equipment used to measure the 1MW Plant output. *See Supp. Ex. 65* at 105:6-106:4. None of the data could be manipulated without the equipment recording such manipulation. *See id.* at 105:6-106:4, 171:2-10. The only data that Dr. Rossi transmitted to Fabio Penon was a logbook containing performance data. *See Supp. Ex. 59* at 37:16-38:5. At all times, Dr. Rossi rigorously logged information relevant to the logbook, including "water flow, the water temperature, the steam temperature, the bars, etcetera." *See id.* at 132:16-19.

81. *See ¶ 74, supra.*

82. *See ¶ 74, supra.*

83. The testimony to which Defendants cite does not support the proposition that Plaintiffs were required to provide such data to Penon or that they did not provide such data to Penon. Dr. Rossi transmitted to Fabio Penon a logbook containing performance data. *See Supp. Ex. 59* at 37:16-38:5. At all times, Dr. Rossi rigorously logged information relevant to the logbook, including "water flow, the water temperature, the steam temperature, the bars, etcetera." *See id.* at 132:16-19. Dr. Rossi never withheld purported "discrepancies between measurements taken from Leonardo's portion of the Doral Facility and measurements taken from JMP's portion of the Doral Facility." *See Supp. Ex. 46 ¶ 20.*

84. The 1MW Plant was sent to Florida in a container whose construction was not yet

complete. *See Supp. Ex. 45* at 248:6-10). When the container arrived in Florida, Plaintiffs completed the construction. *See id.* Plaintiffs made no substantial changes to the container or 1MW Plant, including any changes that would make evaluating the 1MW Plant's performance more difficult. *See id.* at 249:17-250:16; **Supp. Ex. 46** ¶ 19. Plaintiffs did not remove any steam trap. *See Supp. Ex. 45* at 248:11-19.

85. Plaintiffs did not have the authority to grant Defendants access to the J.M. Products side of the Doral Facility. *See Supp. Ex. 46* ¶ 18.

86. *See* ¶ 74, *supra*.

87. *See* ¶ 74, *supra*.

88. None of Dr. Rossi's claims about the 1MW Plant were false. *See Supp. Ex. 46* ¶ 21. Murray is not a qualified to assess Dr. Rossi's claims about the 1MW Plant. *See Supp. Ex. 66* (Expert Report of Dr. K. Wong).

89. Plaintiffs never orchestrated any fraudulent scheme to induce Defendants into any action whatsoever, and Defendants had full knowledge regarding J.M. Products, its new facility, and its officer (Henry Johnson). *See Supp. Ex. 46* ¶ 22; *See also* facts outlined in paragraphs 1-88 *supra*.

90. – 104. *See* ¶ 74, *supra*.

105. Undisputed.

106. Leonardo Corporation New Hampshire merged with Leonardo Corporation of Florida. *See Supp. Ex. 43*.

107. Undisputed.

Memorandum of Law

I. Breach of Contract Elements.

Defendants, at the outset, misstate the elements for a breach of contract claim, failing to identify that damages is, in fact, an element that requires proof. The first case cited by Defendants, makes this clear:

To establish a cause of action for breach of contract, the plaintiff must plead and prove the following: (1) the existence of the contract; (2) the plaintiff's performance or excuse for nonperformance; (3) the defendant's breach; and (4) resulting damages to the plaintiff.

Vital Pharms., Inc. v. Balboa Capital Corp., 2016 U.S. Dist. LEXIS 113942, *14, 2016 WL 4479370 (S.D. Fla. Aug. 25, 2016). In attempt to justify their failure to make any attempt at proving any damages, Defendants further misstate Florida law, claiming that “proof of actual damages is not necessary.” Defs.’ Mot. at 3. Nowhere in the three cases cited by Defendants does a court support such a proposition. Instead, the case law generally provides that in instances where a party tried and failed to prove actual damages after proving liability for breach of contract, a court may award nominal damages.

In *MSM Golf, L.L.C. v. Newgent*, 853 So. 2d 1086, 1087 (Fla. 5th DCA 2003), the Court remanded the case for a new trial on all liability and damage issues, stating that, once the jury found that the contracts at issue had been breached, the plaintiff was entitled to at least nominal damages. . Proof of nominal damages does not equate to removing ‘damages’ as a necessary element of a breach of contract claim.

In *Destiny Const. Co. v. Martin K. Eby Const.*, 662 So. 2d 388, 390 (Fla. 5th DCA 1995), a sub-contractor sued a general contractor for damages for failure to make payments on a construction contract.. The contractor therein submitted evidence as to the amounts due under the contract, the costs incurred by the sub-contractor, and the profits due to sub-contractor. The sub-contractor presented competing affidavits of a construction consultant and claims specialist, and a certified public accountant, providing a competing damage amount. The *Destiny* Court reversed the trial court’s order striking the sub-contractor’s complaint as a sham pleading. In the present case, Defendants seek to be absolved of making any attempt at proving any damages whatsoever.

In *Beverage Canners, Inc. v. Cott Corp.*, 372 So.2d 954, 956 (Fla. 3d DCA 1979), the issue raised by this appeal was whether the trial court, as the trier of both law and fact, properly awarded nominal damages to appellant/plaintiff subsequent to rendering a decision against the appellee/defendant on the issue of liability in a breach of contract action. . The *Beverage Canners* Court affirmed that the plaintiff’s

proof of loss of profits was too speculative and conjectural, and therefore only nominal damages were appropriate. In the present case, Defendants failure to produce any evidence in support of even nominal damages is fatal to a number of their claims.

Finally, in *Jeld-Wen, Inc. v. Nebula Glass Intern., Inc.*, No. 05-60860-CIV, 2007 WL 5960207, at *13 (S.D. Fla. May 15, 2007) the Court held:

[Plaintiff] has not yet established that its damages were the proximate result of [Defendant]'s breach of contract and this issue remains for trial. Nevertheless, [Plaintiff] has established the invasion of its legal right by [Defendant]'s admission that it breached the contract, and therefore is entitled to summary judgment on the issue of liability.

In the present case, Plaintiffs have made no such admission of breach of contract, and Defendant, with respect to most of their claims for breach of contract, make no attempt at showing, much less proving, any damages.

II. Industrial Heat and IPH are Not Entitled to Summary Judgment As to Count I of the Complaint (Breach of the License Agreement) or Count I of the AACT (Breach of License Agreement).

Defendants claim undisputed material facts exist to support summary judgment in their favor. Specifically, Defendants argue: (a) Plaintiffs lack standing, (b) Rossi intentionally deceived IH into modifying the protocol for the contractual Validation Test, (c) Plaintiffs failed to abide by the terms of the Validation Test protocol, (d) Plaintiffs failed to achieve Guaranteed Performance, (e) Plaintiffs failed to follow the Guaranteed Performance Test protocol, (f) Plaintiffs' prior breaches entitle IH and IPH to summary judgment. Defendants' arguments are flawed.

A. Plaintiffs' have standing.

Defendants' claim that Leonardo Corporation, a New Hampshire corporation ("Leonardo – N.H.") is the only proper Plaintiff. Of course, in their AACT, Defendants have not sued Leonardo N.H., but instead have sued Leonardo Florida (simply, "Leonardo"). Defendants themselves seem to agree that Leonardo is the proper party to the preset suit, and are estopped from arguing otherwise. *See* Plaintiffs' Motion for Partial Summary Judgment [DE 214] at 35.

Defendants ignore the fact that Leonardo NH merged with Leonardo and that Plaintiff Leonardo "suffered harm" as a result of Defendants' actions. *See* SOFO ¶¶ 2, 106.

B. There is no evidence of any deception or intent to deceive.

(i) The Validation Test Protocol was reviewed and approved by Defendants and their consultants.

Defendants executed the First Amendment on April 29, 2013, after it was reviewed and approved by Defendants and their consultants. *See* SOF ¶ 7. The First Amendment contained an Exhibit A, which

was the “E-Cat Validation Protocol.” *See id.*; SOFO ¶ 5. The protocol provided that:

Description: Two separate units (“Unit A” and “Unit B”), each composed of a different set of 30 individual E-Cat reactors, will be tested for a period of 24 hours, per the schedule below. Subsequently, a Hot Cat unit will be tested for a period of 15 hours, as described below. For purposes concerning validation achievement, only the performance of Unit A will be considered. Unit B and the Hot Cat are being tested solely for purposes of further research and development.

(ii) Defendants mischaracterize Rossi’s testimony.

Defendants claim that Rossi made interpretations of Italian law. This is false. Rossi merely reiterated what he was told by an official from the Health Office of the Province of Ferrara – “he explained to me that the Italian Law . . .” *See* Defs.’ Mot. at 4.

Defendants claim that Rossi “agreed that Italian law would allow the Validation Test to be done using 30 reactors.” *See* Defs.’ SOMF ¶ 7. This is false. Defendants’ Ex. 4, an email from Rossi to Darden, contains no statement with respect to Italian law.

Defendants claim that Rossi “claimed that Italian law was even more restrictive, and only would permit using 18 E-Cat reactors for the test,” despite that 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* Defs.’ SOMF ¶¶ 15, 16. This is false. Rossi, instead, explained that the officer from the Ferrara Health Office, “told me in Italy we do not have authorizations for experiments. There is not something called an authorization for 36 hours. You are either authorized or you are not. Now we understand your problem. You have to make a test that for a customer . . . Either we make a procedure to authorize you and it will take in Italy to get an authorization for that can take between six months if you are very lucky and two years if you are normal.” *See* SOFO ¶ 15.

Significantly, Defendants have no evidence to contradict what Rossi claims he was told by the Ferrara Health Office. *See* SOFO ¶ 6. Defendants, instead, make the leap of attributing what Rossi claims he was told as being untruthful, and then further conclude that even if Rossi were told such things, Rossi’s intentions were to deceive. The only evidence presented by Defendants in this regard is the self-serving affidavit of Defendant Thomas Darden (“Darden”). Significantly, Defendants do not point to any testimony or affidavit from an appropriate person who testifies that Italian law does not require some type of authorization to use the equipment or perform the test contemplated by the original Validation Test Protocol. Absent such evidence, Defendants cannot even prove that the statements purportedly made by

Rossi to Darden were false. Defendants' conclusions lack evidentiary foundation, and therefore must be disregarded.

Finally, Defendants readily admit that testing fewer units would make it more difficult for Plaintiffs to achieve the necessary test results to entitle them to receive payment. See SOFO ¶ 5. The testing of fewer E-Cat units was not to Plaintiffs' advantage, and Defendants' claim that Rossi "intended to deceive" Defendants is unsupported.

C. The Agreed-Upon ERV, not Plaintiffs, were responsible for following the Test Protocol.

Defendants now claim, for the first time, that because the Validation Test ran for 30 minutes less than a full 24 hours, the results are somehow invalid, and Plaintiffs are in breach of the License Agreement. This is absurd. Defendants then attempt to read into the License Agreement the requirement that there be a measurement of the heated fluid out of the E-Cat reactors. No such requirement exists in the License Agreement. Instead, Section 4 of the License Agreement merely requires the ERV to measure the flow of the heated fluid, mentioning nothing about where in the process such test should take place. The ERV did perform a measurement of the flow of the heated fluid, pursuant to a testing protocol agreed to by Defendants. See SOFO ¶¶ 5, 19, 20.

Further, Defendants' argument is based on false premise: that Plaintiffs were responsible for ensuring the Validation Test Protocol was followed. It is undisputed that the parties agreed that Fabio Penon would be the expert responsible for validation ("ERV") pursuant to the License Agreement. 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; SOFO ¶ 5. The License Agreement provides for no appeal mechanism with respect to the findings of the ERV. Defendants participated in the drafting and approval of the Validation Test protocol, agreed to the selection of Fabio Penon as the ERV, and were present during the Validation Test. See *id.*; see also SOF ¶ 15; SOFO ¶¶ 19, 20. Despite their full participation and knowledge regarding the Validation Test and its performance, Defendants made payment of the \$10,000,000 pursuant to Section 3.2(b) and 4 of the License Agreement. See SOF ¶ 26, SOFO ¶ 20. At no time prior to the present lawsuit (filed 3 years after the Validation Test) did Defendants ever complain to either Plaintiffs or Rossi that the Validation Test Protocol was not followed, or that Validation had not been achieved. See SOF ¶ 27. Defendants' actions constitute a waiver of their known rights, and their payment to Plaintiffs is subject to the voluntary payment doctrine.

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). Here, all three elements are present.

D. Plaintiffs achieved Guaranteed Performance.

Defendants argue that Guaranteed Performance, a condition precedent to Plaintiffs’ right to payment of \$89 million, was not achieved for one of two mutually exclusive reasons: either (1) it was not timely performed, or (2) if it was timely performed, then the wrong equipment was tested. Defendants’ arguments fail because the evidence shows that Defendants agreed that the time for performance of the GPT had been extended and that the 1MW E-Cat would be the equipment tested. Even if it were to be found that Defendants did not explicitly agree, the facts show that Defendants induced Plaintiffs to continue to perform a year-long test as if they had explicitly agreed. Despite having ample opportunity to do so, Defendants provided Plaintiffs with no notice of termination of the License Agreement, nor did Defendants provide so much as a single communication identifying any issues with Plaintiffs’ performance under the License Agreement until mere months prior to the completion of the GPT. *See* SOF ¶ 60; SOFO ¶ 25. All the while, Defendants were using the License Agreement and Plaintiffs’ performance thereunder to raise in excess of \$50 million.

(i) The Initial Agreement.

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)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. *See* SOF ¶ 34.

It is undisputed that the parties agreed that Fabio Penon would serve as the ERV. *See* SOF ¶ 14. It

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.”

is undisputed that 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.

(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 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 by failing to timely begin the GPT. *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 ¶¶ 44, 45, 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.

Whether as a result of the License Agreement as originally drafted, or as a result of subsequent modification (should the Second Amendment be deemed enforceable), 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 was 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.

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, while the GPT was ongoing. *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.

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.

E. The ERV, not Plaintiffs, were responsible for making measurements pursuant to the GPT.

As set forth in Section II.C., *supra*, Plaintiffs were not responsible for taking any measurements – such was the job of the agreed-upon ERV. To the extent Defendants contend that the ERV failed in his duties, Defendants may take that matter up with the ERV. Perhaps more significantly, Defendants participated in the review and approval of the protocol for the GPT. *See* SOF §§ 44-46. The protocol, reviewed and approved by Defendants, did contain a procedure for the measurement of the flow of the heated fluid. Defendants, now complain that they disagree with the place in the process the measurement was taken. The time for making this known was prior to the test taking place, not well after the test has been completed. Defendants have knowingly and intentionally waived any such arguments.

F. Defendants have failed to prove any prior breach, nor did they terminate the License Agreement as a result of any such prior breach.

For the reasons more fully set forth Section VI *supra*, Defendants claims for prior breach all must fail.

III. Defendants are not entitled to Summary Judgment as to Complaint Count III (Unjust Enrichment)

Defendants argue on the one hand that Plaintiffs' ability to perform the Guaranteed Performance Test pursuant to Section 3.2(c) and Section 5 of the License Agreement expired as of its own terms in October of 2013. *See* Defs.' Mot. § I.D. On the other hand, Defendants argue that because of the existence of an express agreement, Plaintiffs cannot prevail on their count for Unjust Enrichment. Defendants cannot have it both ways. Further, Defendants ignore the fact that, based in large part on their claim to own the license to Plaintiffs' technology, Defendants were able to raise in excess of \$50 million in May of 2015.

Defendants correctly cite the elements for a claim of unjust enrichment: (1) Plaintiffs conferred a benefit on Defendants; (2) Defendants voluntarily accepted and retained the benefit conferred; and (3) the circumstances are such that it would be inequitable for Defendants to retain the benefit without paying the value thereof to Plaintiffs. *See* Defs.' Mot. at 11. Plaintiffs can prove each of these elements.

First, Plaintiffs conferred a direct benefit upon the Defendants. Assuming Defendants arguments with respect to the License Agreement are correct, and Plaintiffs were unable to even attempt to achieve Guaranteed Performance as of October of 2013, Defendants received the direct benefit of Plaintiffs' continued performance, as under the License Agreement. Section 13.1 of the License Agreement provides that Rossi had a continuing obligation to assist Defendants for twelve months after Validation, which occurred in May of 2013. Yet, Rossi continued to assist Defendants well past May of 2014, spending months working with Defendants in North Carolina and over one year performing the 350-day test in Florida. As a result of Plaintiffs' continued assistance, Defendants were able to sell four percent of their company for \$50 million. *See* SOF ¶ 55; SOFO ¶¶ 38, 39.

Second, Defendants voluntarily accepted and retained the benefit conferred. It is undisputed that Defendants accepted the benefits conferred by Plaintiffs. They continued to work with Plaintiffs as if Guaranteed Performance under the License Agreement, and the accompanying success payment of \$89 million, were still achievable – never informing Plaintiff otherwise. *See* SOF ¶¶ 50, 53-56, 60; SOFO ¶ 25. All the while, Defendants used this benefit to solicit and obtain the \$50 million investment, which they have retained. *See* SOF ¶ 55, SOFO ¶¶ 38, 39.

Third, it would be inequitable for Defendants to retain the benefit without paying the value thereof to Plaintiffs. Defendants' self-serving testimony in this regard contradicts their actual conduct, and strains the boundary of credibility. While Defendants contend that they were never able to replicate Plaintiffs' test results, that they were skeptical of the underlying technology and considered the possibility that it

might be a fraud, were concerned that Dr. Rossi's real estate attorney was the President of JM Products, and from the outset of the test in Florida thought it might be fraudulent, continued to bring investors/potential investors to tour the facility in Florida and meet with Dr. Rossi. *See* SOF ¶ 50. It would be inequitable to allow Defendants to retain the \$50 million benefit, without paying the value thereof to Plaintiff.

IV. Defendants are not entitled to Summary Judgment as to Complaint Count IV (Misappropriation)

In Count IV of the Complaint, Plaintiffs allege a Misappropriation of Trade Secrets against Defendants Darden, Vaughn, Cherokee, IH, and IPH. In determining whether summary judgment is proper for a misappropriation claim, the Court must resolve three questions: (1) whether there are disputes of fact as to whether the Plaintiffs took reasonable efforts to protect the secrecy of the documents at issue; (2) whether there are disputes of fact concerning any economic value of the alleged trade secrets to Plaintiffs; and (3) whether there are disputes of fact as to whether Defendants used improper means to obtain the trade secrets. *AlphaMed Pharms. Corp. v. Arriva Pharms., Inc.*, Case No. 03-20078-CIV, 2005 U.S. Dist. LEXIS 45923 (S.D. Fla. Aug. 23, 2005). Questions of material fact remain, and Defendants' motion must be denied.

First, there are disputed facts as to whether Plaintiffs took reasonable efforts to protect the secrecy of the trade secrets at issue. Defendants argue that, because "Plaintiffs licensed the E-Cat IP to Industrial Heat and later, through an assignment to IPH – and because each entity was allowed to grant sublicenses to the E-Cat IP to anyone it selected ... there is no question of material fact as to whether Plaintiffs protected the E-Cat IP from disclosure...." *See* Defs.' Mot. § III. Defendants' argument is meritless based upon the express non-disclosure language included within the License Agreement. Specifically, the License Agreement states that "[w]hile 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 consent of each other Party hereto...." (License Agreement at 14.) (Emphasis supplied).

With respect to the economic value of the trade secrets, disputed facts similarly remain. Such fact is implicit in the amounts already paid by Defendants to Plaintiff for the same, and the \$89 million outstanding balance that remains.

Finally, disputed facts exist as to whether Defendants used improper means to obtain the trade secrets, further detailed in Section V of this Motion below. Specifically, disputed facts exist as to whether Defendants misrepresented to Plaintiffs that they had the funds to pay the total agreed upon amount for

the E-Cat IP; that IH (and subsequently IPH) were funded by Cherokee; and that Defendants intended to pay the full amount, notwithstanding that they in fact lacked such intent. *See* SOF ¶ 13; SOFO ¶ 47. Such disputed facts preclude the entry of Summary Judgment.

V. Defendants are not entitled to Summary Judgment as to Complaint Count VI (Fraud and Deceit)

Count VI of the Complaint alleges fraud and deceit against IH, IPH, Cherokee, Darden and Vaughn. Defendants argue that summary judgment is proper as to Plaintiffs' Fraud claim because (1) Plaintiffs purportedly fail to adduce evidence of separate damages for Fraud and (2) because Plaintiffs' Fraud claim cannot be proven pursuant to the parol evidence rule. *See* Defs.' Mot. § IV. With respect to both arguments, Defendants ignore that Plaintiffs' claim is in the nature of fraud in the inducement (Compl. ¶ 113), and the arguments fail as a matter of law.

Defendants first rely upon *Williams v. Peak Resorts Int'l Inc.*, 676 So. 2d 513 (Fla. 5th DCA 1996) to argue that a party may not recover damages arising from fraud unless the party establishes that the damages are separate or distinguishable from the damages arising from the breach of contract. *See* Defs.' Mot. § IV.A (emphasis added). Defendants' argument is not applicable at the summary judgment stage, but rather is directed toward the post-judgment recovery of damages.

As a preliminary matter, Defendants incorrectly cite *Williams* as a Florida Supreme Court opinion. However, the opinion is from Florida's Fifth District Court of Appeal. More importantly, Defendants noticeably fail to advise the Court of *Williams*' holding that "[t]he actions of fraudulent inducement into a contract and breach of that contract are not mutually exclusive and, therefore, may be brought in the same suit." *Williams*, 676 So. 2d at 516-17. The Southern District of Florida concurs, holding that "[u]nder Florida law, 'one can sue for breach of contract and fraudulent inducement to enter the very same contract, and obtain two recoveries.'" *Guar. Ins. Co. v. Brand Mgmt. Servs.*, No. 12-61670-CIV, 2014 U.S. Dist. LEXIS 187782, at *33 (S.D. Fla. Sept. 15, 2014) (citing *Williams*, 676 So. 2d at 513)). This is particularly so where the fraudulent inducement pertains to the inducing party's financial security. *See Golding v. Imperial Sterling*, No. 99-8906-CIV, 2001 U.S. Dist. LEXIS 25226 (S.D. Fla. June 28, 2001).

For example, In *Golding*, the plaintiff alleged that "the defendants made material representations regarding [their] financial security, apparently prior to entering into the contract, in an attempt to induce [plaintiff] to enter into the contract. *Id.* at *15. Plaintiffs in the matter *sub judice* make the same allegation. *See* SOF § 13; SOFO § 47. In *Golding*, the Southern District held that because the conduct arose prior to and distinct from the breach of contract itself, dismissal of the fraud claim was not proper. *Id.* at *16. The same result is proper here.

Accordingly, Plaintiffs may pursue its fraud in the inducement claim and its breach of contract claim simultaneously, and summary judgment is not proper. To the extent Plaintiff is awarded damages pursuant to both causes of action, and to the extent such damages are duplicative, Plaintiff may elect its remedy at any time prior to the entry of judgment. *See Barbe v. Villeneuve*, 505 So. 2d 1331 (Fla. 1987). It is unnecessary to do so at this time.

Defendants next argue that Plaintiffs' fraud claims cannot be proven as a result of the parol evidence rule. *See* Defs.' Mot. at 16. Plaintiffs' allegation, however, is in the nature of fraud in the inducement. Compl. ¶ 113. The parol evidence rule does not bar extrinsic factual allegations supporting such a claim. *Media v. Kravitz Law Group, P.A.*, No. 8:09-CV-2078-T-17-AEP, 2010 U.S. Dist. LEXIS 70655 (M.D. Fla. Jul. 14, 2010); *see also Baggett v. Electricians Local 915 Credit Union*, 620 So. 2d 784 (Fla. 2d DCA 1993) ("While final agreements may not be contradicted by parol or extrinsic evidence, an exception is made in actions alleging negligent misrepresentations or, otherwise, fraud in the inducement. In such cases, the parol evidence rule does not preclude admission of extrinsic evidence.") (citing *Lou Bachrodt Chevrolet, Inc. v. Savage*, 570 So. 2d 306 (Fla. 4th DCA 1990); *Nobles v. Citizens Mortgage Corp.*, 479 So. 2d 822 (Fla. 2d DCA 1985); *Florida Pottery Stores of Panama City v. American National Bank*, 578 So. 2d 801 (Fla. 1st DCA 1991); *Tinker v. De Maria Porsche Audi, Inc.*, 459 So. 2d 487 (Fla. 3d DCA 1984)). Accordingly, as a matter of law, and summary judgment must be denied.

VI. Defendants are not entitled to Summary Judgment as to Count II of the Counterclaim (Breach of the License Agreement)

Defendants argue that they are entitled to Summary Judgment as to Count II of their Counterclaim, "for various breaches of the License Agreement." *See* Defs.' Mot. at § V. Specifically, Defendants assert that summary judgment should be entered with respect to Plaintiffs' purported failure to "(i) comply with the confidentiality provision, (ii) assign licensed patents, (iii) inform and consult on patents, (iv) comply with the covenant not to compete, (v) pay taxes, and (vi) enable replication of the E-Cat technology." *See* Defs.' Mot. § V. Defendants' motion must be denied. Significantly, Defendant IPH, the only Defendant that is a party to this claim, put forth a Rule 30(b)(6) witness who testified that he had no knowledge of any evidence or facts in support of any of the claims in Count II of the AACT, and failed to do make any attempt to fulfill his 30(b)(6) obligations. Magistrate Judge O'Sullivan found that the testimony of said

30(b)(6) witnesses “was insufficient.”² *See* [DE 218]. Pursuant to *QBE Ins. Corp. v. Jorda Enters.*, 277 F.R.D. 676 (S.D. Fla. 2012), the natural consequence of this testimony is that Defendants may not introduce any evidence or testimony in support of these claim, particularly where IPH had ample time to prepare its witness, and where the discovery period is now closed. Any evidence that Defendants now claim to support these claims should be excluded.

A. 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. Despite the foregoing, Defendants argue that “[i]t is undisputed that Rossi and Leonardo breached the confidentiality provision.” *See* Defs.’ Mot. § V.A.

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.

² Magistrate Judge O’Sullivan ordered that IPH’s Rule 30(b)(6) witness be re-deposed, as opposed to prohibiting IPH from presenting evidence on the issues for which they were unprepared to testify. Plaintiffs shall appeal this ruling, as they have been prejudiced by IPH’s failure to properly prepare.

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.

B. 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; SOFO ¶ 46; SOFO ¶ 47. 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; SOFO ¶ 47. 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.

C. 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; SOFO ¶ 47. 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.

D. 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 Agreement³ 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.

E. 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 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.*

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

³ The territories include North America, Central America and the Caribbean, South America, China, Russia, Saudi Arabia, and the Arabian Emirates. *See* License Agreement § 2.

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. *See* SOF ¶¶ 28-33; SOFO ¶ 40.

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; SOFO ¶ 40.

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.

Based on the foregoing, Defendants are not entitled to Summary Judgment as to Count II of the Counterclaim.

VII. Defendants are not entitled to Summary Judgment as to Count IV of the Counterclaim (FDUTPA)

Count IV of Defendants’ Counterclaim alleges that Plaintiffs and Third-Party Defendants violated the Florida Deceptive and Unfair Trade Practices Act (“FDUTPA”). A FDUTPA claim has three elements: “(1) a deceptive act or unfair practice; (2) causation; and (3) actual damages.” *N. Am. Clearing, Inc. v. Brokerage Computer Sys.*, No. 6:07-cv-1503-Orl-19KRS, 2009 U.S. Dist. LEXIS 82961 (M.D. Fla. Sept. 10, 2009). Defendants must demonstrate that no genuine issues of material fact exist as to any of the foregoing elements in order to be entitled to summary judgment. Moreover, only a “consumer” may recover actual damages for unfair trade practices. *PortionPac Chem. Corp. v. Sanitech Sys.*, 217 F. Supp. 2d 1238 (M.D. Fla. 2002). “Therefore, an action can be maintained under the statute only if the alleged unfair and deceptive act or practice complaint of involves a consumer transaction. *Id.* (holding that,

because the plaintiff was not a consumer involved in a consumer transaction with defendants, it had no standing to bring claims under FDUPTA; and granting summary judgment in favor of defendants).

First, 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 to any consumer; nor do Defendants even claim that Plaintiffs have done so. *See Fla. Stat. § 501.203(8); Countercl. ¶ 145.*

Second, “[w]hether particular conduct constitutes such an unfair or deceptive trade practice is a question of fact.” *Nature’s Prods. v. Natrol, Inc.*, 990 F. Supp. 2d 1307 (S.D. Fla. 2013) (holding that genuine disputes of material fact remained as to movant’s FDUTPA claim). There are numerous issues of fact with respect to the underlying evidence. For instance, Defendants’ purported evidence as to what they were told about J.M. Products is in dispute. *See SOFO ¶ 57.* What Defendants knew or should have known prior to entering into the Term Sheet, allowing Plaintiffs to complete the 350-day test, sending and paying for their employees/contractors, is likewise in dispute.

Finally, even if the Court determines that the complained of acts were unfair or deceptive, “the jury must determine to what extent the conduct caused [Defendants’] actual—and not consequential—damages. *Nature’s Prods. v. Natrol, Inc.*, 990 F. Supp. 2d 1307 (S.D. Fla. 2013). 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.” *Nat’l Union Fire Ins. Co. v. Tyco Integrated Sec., LLC*, 2015 U.S. Dist. LEXIS 82646, at *99 (S.D. Fla. June 24, 2015).

Neither IH nor IPH has presented any evidence that they paid Plaintiffs any sums as a result of the alleged deceptive acts, much less any sums 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; SOF ¶¶ 61, 108.* Instead, IH and IPH claim that they incurred mere 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*, 262 F. Supp. 2d 1334 (S.D. Fla. 1999) *aff’d sub nom. Eclipse Med., Inc. v. Am. Hydro-Surgical*, 235 F.3d 1344 (11th Cir. 2000).

The undisputed evidence shows that Defendants are not entitled to summary judgment as to this Count; Plaintiffs, however, are so entitled.

Conclusion

WHEREFORE, Plaintiffs, Andrea Rossi and Leonardo Corporation, respectfully request that the Court deny Defendants' Motion for Summary Judgment in its entirety, and such other and further relief as this Court deems and proper.

Dated: April 4, 2017.

Respectfully submitted,

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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 April 4, 2017, on all counsel or parties of record on the attached Service List.

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