UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

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

ANDREA ROSSI and LEONARDO CORPORATION,

Plaintiffs,

v.

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

Defendants.

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

Counter-Plaintiffs,

v.

ANDREA ROSSI and LEONARDO CORPORATION,

Counter-Defendants,
And

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

Third-Party Defendants.

PLAINTIFFS' REPLY IN SUPPORT OF *DAUBERT* MOTION TO STRIKE AND EXCLUDE DEFENDANTS' EXPERTS

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Plaintiffs, Andrea Rossi and Leonardo Corporation, by and through their undersigned counsel, hereby file their Reply to Defendants' Opposition to Plaintiffs' *Daubert* Motion to Strike and Exclude Defendants' Experts [ECF No. 235].

STATEMENT OF RELEVANT FACTS

1. On December 14, 2015, Plaintiff's counsel served upon Defendants' counsel a letter, which, *inter alia*, put Defendants on notice of potential litigation regarding the matters underlying this action. *See* Exhibit A. As of such date, and perhaps even prior to such date, Defendants were aware or should have been aware of any particular matters requiring an inspection of the E-Cat facility located in Doral, Florida ("Doral Facility").

2. On or about February 16th and 17th, 2016, Defendants and Mr. Joseph Murray visited and inspected the Doral Facility during the conclusion of the Guaranteed Performance Test. Exhibit B at 344-347. Then again in or around March 2016, Defendants again requested to visit the Doral Facility and were permitted to do so along with Mr. Joseph Murray at which time Mr. Murray took measurements, photographs and made other observations. *See, e.g.*, *id.* at 166:16-20.

3. Thereafter, on April 6, 2016, Plaintiffs filed their Complaint alleging, in pertinent part, that Defendants breached their obligation to compensate Plaintiffs for the successful completion of a Guaranteed Performance Test completed at the Doral Facility. *See* Compl.¶¶ 76-80.

4. Two hundred and ninety (290) days after the filing of the Complaint, on January 20, 2017, a mere ten days before the deadline for expert witness disclosures and reports, Defendants served their first request to inspect the Doral Facility. *See* ECF No. 235 at 4. Defendants subsequently amended the request to inspect on January 27, 2017, and, as such, Plaintiffs' response thereto was not due until February 27, 2017—approximately one (1) month after the expert disclosure deadline[1]. *See* id.

5. On February 16, 2017, sixteen (16) days after the expert disclosure deadline, and less than fifteen (15) hours before Murray's deposition, Defendants served the Supplemental

[1] Notably, the Defendants' amended request to inspect was served only three (3) days prior to the expert disclosure deadline. The initial (non-operative) request was served only ten (10) days prior to the expert disclosure deadline.

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Disclosure of Joseph A. Murray consisting of additional charts, photographs and videos, but completely lacked any of the underlying data used by Murray. *See* ECF No. 235 at 4.

6. Then, on March 20, 2017, approximately two (2) months after the expert disclosure deadline, approximately one (1) month after Smith's deposition and the discovery deadline, and only (1) day before the dispositive motion deadline, Defendants served Plaintiffs with the 30 page Supplemental Smith Report, which included six (6) new "conclusions". *See* ECF No. 235 at 5.

MEMORANDUM OF LAW

I. Murray is Subject to Fed. R. Civ. P. 26(a)(2)(B), and the Murray Disclosure Must be Stricken for Defendants Failure to Comply With the Same

Defendants erroneously argue that Murray is not subject to the disclosure requirements of Rule 26(a)(2)(B), Fed. R. Civ. P., because he was a former employee of Defendant IH. *See* ECF No. 235at 6. Defendants, in their response brief [ECF No. 235] further argue that as a former employee, Murray was only required to provide a written summary pursuant to Rule 26(a)(2)(C), Fed. R. Civ. P. Defendants' argument fails as a matter of law.

This Court has previously provided a detailed analysis as to the application of Rule 26(a)(2)(B) as opposed to Rule 26(a)(2)(C) in *In re Denture Cream Prods. Liab. Litig.*, No. 09-2051, 2012 U.S. Dist. LEXIS 152277, 2012 WL 5199597 (S.D. Fla. Oct. 22, 2012). There, in the context treating physicians, this Court explained that "[w]hen a treating physician testifies regarding opinions 'formed and based upon observations made during the course of treatment,' the treating physician need not produce a Rule 26(a)(2)(B) report." *Id.* (quoting *Jensen v. Carnival Corp.*, No. 10-24383, 2011 U.S. Dist. LEXIS 108727, at *3 (S.D. Fla. Sept. 25, 2011)). On the other hand, "treating physicians offering opinions beyond those arising from treatments are experts from whom full Rule 26(a)(2)(B) reports are required." *Id.* "A witness must submit a report regarding any opinions formed specifically in anticipation of litigation, or otherwise outside the normal course of a duty." *Id.* (quoting *Meredith v. Int'l Marine Underwriters*, No. GLR-10837, 2012 U.S. Dist. LEXIS 100972, 2012 WL 3025139 (D. Md. July 20, 2012)).

Murray's "expert" opinions were indisputably formed at the request of Defendant Industrial Heat, LLC's counsel and in anticipation of litigation. Notably, each of Murray's conclusions was formulated *after* the Guaranteed Performance Test underlying this litigation. Specifically, the Guaranteed Performance Test concluded on February 15, 2016. *See* Compl. ¶ 71.

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Immediately thereafter, Industrial Heat, LLC's counsel requested Murray to inspect the Doral Facility with the expectation that Murray's observations would be used in litigation. Murray testified:

> Q: Were you asked to come down to the plant on the 16th and 17th by counsel or as part of your job?
>
> A: I was asked to come down –
>
> Mr. Lomax: Objection.
>
> A: I was asked to come down by Industrial Heat under the guidance of counsel.
>
> […]
>
> Q: Was it your understanding that, that Industrial Heat was preparing litigation with Dr. Rossi?
>
> A: My understanding was that the Industrial Heat group anticipated that Dr. Rossi would sue them.

Exhibit B at 344-347; *see also id.* at 320-321.

Murray further testified that a report that he had prepared based upon his visit to the plant, which was not produced to Plaintiffs and which forms the basis of his "expert" opinions, was prepared in anticipation of litigation at the direction of counsel. *Id.* at 143-145.

Notably, the Murray Disclosure indicates that Murray is "former Vice President of Engineering for Industrial Heat, LLC…." Exhibit C at 2. It is not disputed that Murray is no longer employed by the Defendants. Murray testified as follows:

> Q: Have you been retained as an expert in this case?
>
> A: Well, that's hard to say. I am, I was asked to, to do this deposition and to support, and in my severance package it indicates that I have to support them at, at their request. So I would guess that that's probably yes, but I don't really understand the technical delineation of that. I am doing it. I'm billing them for my time.

Exhibit B at 204:16-24 (emphasis supplied).

In fact, Defendant IH is paying Murray an hourly rate of $175 with respect to this litigation, because Murray has been retained specifically to render expert services. *Id.* at 14:3-5. Murray further testified that the measurements and work he performed with respect to the Doral Facility were not "in the ordinary course" of his job functions. *Id.* at 344. Rather, Murray

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performed such tasks "specifically because [he] was requested to do it" at the direction of counsel after the Doral Facility closed. *Id.*

For the foregoing reasons, Murray does not qualify as an employee providing services in the ordinary course under Rule 26(a)(2)(C) and IH was required to provide a detailed report in order to comply with Rule 16(a)(2)(B). Plaintiffs have been prejudiced by Defendants' and/or Murray's failure to provide the same as Plaintiffs now lack the ability to depose Murray on such matters and/or determine whether any additional rebuttal experts are required. The exclusion of Murray as an expert witness is accordingly necessary. *See Morton's of Chicago/Miami, LLC v. 1200 Castle 100-A, Inc.*, No. 13-23366-CIV, 2014 U.S. Dist. LEXIS 193011, at *9 (S.D. Fla. Sept. 19, 2014); *see also* Rule 37(c)(1), Fed. R. Civ. P. ("[I]f a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at trial, unless the failure was substantially justified or is harmless.").

II. Defendants' Lack of Dilligence Caused Smith's Untimely & Prejudicial Supplemental Disclosure

"[T]he purpose of a discovery deadline is to give the opposing party 'reasonable opportunity to prepare for cross examination and perhaps arrange for expert testimony from other witnesses.'" *Morton's of Chicago/Miami, LLC v. 1200 Castle 100-A, Inc.*, No. 13-23366-CIV, 2014 U.S. Dist. LEXIS 193011, at *9 (S.D. Fla. Sept. 19, 2014). The Defendants' argue, in pertinent part, that Smith's Supplemental Expert Report (Smith Report and Supplemental Report are attached hereto as Exhibits D & E respectively), was untimely "because Smith was not able to inspect the Doral Warehouse – which Plaintiffs continue to lease and occupy – until after the report deadline." *See* ECF No. 235 at 7. However, any delay caused in inspecting the property is the fault of Defendants' lack of diligence and/or purposeful delay, and Defendants cannot and should not benefit from such improper gamesmanship.

Notably, Defendants' Response acknowledges the timeline of events set forth above. Specially, Defendants acknowledge that on April 5, 2016, the Plaintiffs filed their Complaint in this matter. *See* ECF No. 235 at 2. Two hundred and Ninety (290) days later, and only ten (10) days prior to the expert disclosure deadline, on January 20, 2016 Defendants first requested an inspection of the Doral Facility to take place on February 20, 2016, more than 20 days after the deadline to serve expert reports. *See id.* at 4. Thereafter, Defendants served an amended request

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for inspection on January 27, 2017 -- only three (3) days prior to the expert disclosure deadline. *See id.* Accordingly, Plaintiffs were not required to serve a response thereto until February 27, 2017. *See id.* at 4. Even ignoring the subsequent amended request, the Plaintiffs response would not have been due until nearly three (3) weeks after the expert disclosure deadline. Defendants' offer no reasonable explanation (or any explanation at all, for that matter) as to why they waited until the last minute to request an inspection, notwithstanding the fact that Defendants were aware of all relevant issues well before the Complaint was even filed and had inspected the facility on at least two prior occasions.

Defendants now rely on their own lack of diligence as justification for Smith's untimely disclosure.[2] Such gamesmanship is improper and prejudices the Plaintiffs, who now lack any opportunity to depose Smith regarding the Supplemental Disclosure and/or to obtain any necessary rebuttal experts. Exclusion of the Supplemental Disclosure, and any testimony pertaining to the same, is necessary. *See Morton's of Chicago/Miami, LLC v. 1200 Castle 100-A, Inc.*, No. 13-23366-CIV, 2014 U.S. Dist. LEXIS 193011, at *9 (S.D. Fla. Sept. 19, 2014); *see also* Rule 37(c)(1), Fed. R. Civ. P. ("[I]f a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at trial, unless the failure was substantially justified or is harmless.").

III. Murray's Testimony/Opinions Fail to Satisfy the Daubert Standard

Murray's testimony and opinions fail to meet the *Daubert* standard. Notwithstanding Plaintiffs' inability to fully investigate Murray's qualifications due Defendants failure to produce any resume, curriculum vitae or even personnel file, it is apparent that Murray has no relevant experience in nuclear reactions. *See* Exhibit B at 293:9-20. Rather, Defendants rely solely upon Murray's purported experience in "heat transfer, fluid mechanics, turbulence, and

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[2] Defendants have a history of failing to exercise diligence in this matter, and failing to provide justification therefore. This Court has recognized Defendants' lack of diligence throughout these proceedings in its Order dated January 17, 2017 [ECF No. 121], wherein the Court stated:

> Defendants do not provide any reason for why they waited more than three months after the Scheduling Order to propound the referenced discovery, or why they have waited until now to alert the Court to the non-production of documents by the described parties. The measures to obtain discovery information from Plaintiffs and Third-Party Defendants described in the Motion do not sufficiently demonstrate Defendants' diligence when Defendants did not propound discovery until months after the Scheduling Order and do not provide reasons for this delay.

ECF No. 121 at 2.

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thermodynamics." ECF No. 235 at 9. However, Murray's first and second opinions pertain solely to the comparisons of data relating to the supply of electricity to the Doral Facility and the Plant. Exhibit C at 1-2. Heat transfer, fluid mechanics, turbulence, and thermodynamics have no applicability to such analysis. Moreover, Murray's analysis with respect to such data is nothing more than the comparison of one set of data to another set of data. Exhibit B at 267:10-17. Defendants attempt to make the analysis seem more complicated than it is by referring to the comparison of one data set to another as a "probability density" analysis, ECF No. 235 at 11, but the simple and non-technical nature of the comparison remains the same. In fact, the comparison does not address probability or density but rather compares a demonstrative graph each of the data sets to one another. *See* Exhibit C. Moreover, Defendants have refused to produce an un-redacted copy of the alleged report and/or underlying data used to create such demonstrative graphs. Similarly, Defendants have failed to produce any of Murray's test data or test plan for any of the tests/simulations that he allegedly performed. Murray's undisclosed report presumptively includes Murray's "methodology", or lack thereof, but without such report Plaintiffs remain unable to investigate the same. To that effect, Murray testified:

Q: Where is your test plan, sir, for the test you ran?

A: It's in our, in our archival, and it was provided to our attorneys under attorney-client privilege.

Q: It has not been provided to me –

A: I don't, I don't know.

Q: -- so, I can't evaluate your test either, but.

[…]

Q: Can I properly evaluate your test, sir, without knowing the test plan?

A: I don't believe you can.

Q: Okay. Can I properly assess your test, your testing without being provided the test data?

A: I don't believe you could.

Exhibit B at 337-338.

Defendants argue that Murray's methodology is sound based upon Murray's use of certain computer programs and modeling systems such as OpenFOAM, Python and NumPy. *See* ECF No. 235 at 10-11, 15. Murray, however, testified regarding those programs as follows:

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Q: Okay. What are the limitations on that, if any? I mean –

A. On modeling and simulation?

Q. Yeah.

A. Oh, there are significant limitations. It really depends on the fidelity and how you describe it, the boundary conditions, but it really depends. We use it as guidance for understanding kind of the range of potential outcomes. So we use it as a tool to guide the development of a test plan and procedure.

Exhibit B at 86:10-19. Incredibly, Murray admits those programs have "significant limitations" and are generally used as a tool to develop the types of test plans and procedures that Defendants failed to disclose to Plaintiffs. *Id.*

Defendants erroneously argue that Murray's data comparisons and simulations are reliable and will assist the trier of fact by attacking the report of the Expert Responsible for Validation "ERV". ECF No. 235 at 11-12. However, such an attack is precisely what the parties contracted to avoid by engaging the ERV as a neutral arbiter of the test results. Given the nature of the invention, and the fact that no generally accepted protocol exists to analyze the same, the parties agreed that an independent expert would perform the evaluation to avoid this particular situation: a battle of the experts opining on technology that they do not understand. Any other interpretation of the License Agreement renders the ERV's function meaningless. Notwithstanding the parties' agreement to Fabio Penon as the ERV, the Defendants now seek to undermine the selection of the neutral arbitrator.

Additionally, regarding Murray's heat simulations and water flow analysis, Defendants assert that such documents were produced during discovery. ECF No. 235 at 14. Defendants reference Exhibits 2 and 9 of their Response. Notably, such Exhibits reflect documents untimely produced after the close of business, two (2) weeks after the expert disclosure deadline, mere hours before the Murray deposition, and with no time for Plaintiffs' counsel to analyze the same. Even if such documents had been timely produced, the documents that Defendants produced reflect nothing more than conclusions without any methodology, underlying data or otherwise. *See* ECF No. 235 at Ex. 9. In response to the other issues raised by Defendants, Plaintiffs otherwise rely upon the argument set forth in Plaintiff's *Daubert* Motion [ECF No. 215]. Accordingly, Murray's testimony must be excluded.

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IV. Smith's Conclusions/Opinions Fail to Satisfy the Daubert Standard

Smith's opinions similarly fail to satisfy the *Daubert* standard. Defendants broadly state the qualifications and reliability of Smith's opinions and argue, without explanation, that such qualifications and reliability are sufficient as to all of Smith's conclusions. ECF No. 235 at 16-20. Defendants make no effort to apply the qualification and reliability prongs of *Daubert* to each of Smith's conclusions; presumably because Defendants are unable to do so. Moreover, the Defendants' generalizations of Smith's qualifications and reliability are insufficient.

First, Defendants argue, generally, that because Smith thinks "that the 1 MW Plant is a boiler," he is qualified to opine on the E-Cat's "operation and the purported measurements of its performance." ECF No. 235 at 16. Notably though, Smith testified that he did not even know the nature of the reaction underlying the operation of the E-cat plant. Specifically, Smith testified:

Q. Do you know what the nature of the reaction underlying the E-Cat is?

A. I do not.

Exhibit F at 129:17-19. Specifically, Smith lacks any personal knowledge as to whether the E-Cat's reaction is nuclear, *id.* at 129-30, has no background and/or experience in nuclear reactions to assist in making such a determination, *id.* at 132, and has otherwise never tested and/or analyzed an E-Cat, *see, e.g., id* at 65:17-20. It remains unclear how Smith makes the analytical leap that the E-Cat is nothing more than simple boiler upon which he can opine.

Surprisingly, in Defendants' Reply on Motion to Exclude the Opinions and Testimony of Dr. K. Wong [ECF No. 248], Defendants argue, in relevant part, that "[s]ince Dr. Wong admits to knowing absolutely nothing about how the E-Cat Plant operates, his opinion does not reflect any application of his engineering training or experience to assess what would be a 'suitable' means of evaluating the E-Cat Plant." ECF No. 248 at 1-2; *see also id.* at 3 ("Once again, because Dr. Wong admitted to knowing absolutely nothing about how the E-Cat operated…, this opinion does not involve application of his specialized engineering knowledge."). By Defendants' own argument, Murray and Smith should be excluded as each suffers the same flaw. *See, e.g.*, Exhibit B at 293:9-23; Exhibit F at 27:20-21; 37:4-6; 128: 23-24; 130:9-20.

With respect to methodology, Defendants argue that Smith "relies upon his understanding of the basic laws of thermodynamics, as explained by Kenneth Wark" to reach a conclusion on heat dissipation; and that "because the 1 MW Plant is a boiler," Smith can rely on the American

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Society of Mechanical Engineers' Performance of Test Codes to identify proper parameters for measuring steam flow. ECF No. 235 at 17. What Defendants do not argue, however, is how reliance upon one's *ipse dixit* "understanding" is a sufficiently reliable methodology pursuant to *Daubert* or, as set forth above, how Smith is able to categorize the E-Cat as a simple boiler with no experience or knowledge as to how the E-Cat operates. To support their argument that "a district court may determine the reliability prong under *Daubert* based primarily upon an expert's experience and general knowledge in the field", Defendants rely solely upon language cherry picked from the 11th Circuit Court's opinion in *Kilpatric v. Breg, Inc.*, 613 F.3d 1329, 1366 (11th Cir. 2010). Notably, the 11th Circuit court's opinion in *Kilpatric* stands for the exact opposite proposition. The relevant portion of *Kilpatric* is set forth below:

> To be sure, there are instances in which a district court may determine the reliability prong under Daubert based primarily upon an expert's experience and general knowledge in the field, e.g., *United States v. Brown*, 415 F.3d 1257 (11th Cir. 2005); **but at all times the district court must still determine the reliability of the opinion, not merely the qualifications of the expert who offers it.** See *Kumho Tire*, 526 U.S. at 149 ("We conclude that Daubert's general principles apply to the expert matters described in Rule 702. The Rule, in respect to all such matters, establishes a standard of evidentiary reliability."); see also Rider v. Sandoz Pharmaceuticals Corp., 295 F.3d 1194, 1197 (11th Cir. 2002) (noting that the Supreme Court in Kumho "made it clear that testimony based solely on the experience of an expert would not be admissible.").
>
> [The expert] testified that he formed his opinions after reviewing medical literature and applying the differential diagnosis method. Thus, it was entirely proper -- indeed necessary -- for the district court to focus on the reliability of these sources and methods. **To hold otherwise would encourage trial courts to simply rubber stamp the opinions of expert witnesses once they are determined to be an expert.** See Allison v. McGhan Medical Corp., 184 F.3d 1300, 1316-17 (11th Cir. 1999) ("Under the regime of Daubert . . . a district judge asked to admit scientific evidence must determine whether the evidence is genuinely scientific, as distinct from being unscientific speculation offered by a genuine scientist.").

Kilpatric at 1336. (Emphasis supplied).

Additionally, Smith's "process of elimination" methodology regarding heat dissipation is unreliable as Smith failed to consider all possible alternatives. *Chapman v. P&G Distrib., LLC*, 766 F.3d 1296 (11th Cir. 2014) (holding that an expert's failure to enumerate a comprehensive list

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of alternatives determines the admissibility of the proposed testimony). In fact, Smith's evaluation ignores the testimony of fact witnesses and refuses to consider reasonable alternative explanations including, but not limited to, the existence of a heat exchanger. Smith testified as follows:

Q: Your – your report was predicated upon the assumption that there was no heat exchanger, correct?

A: Correct.

Q: Okay. So if there was a heat exchanger, there would be different variables that you had not accounted for in this report, correct?

A: I – I can't answer that. Know nothing about it and – and a heat exchanger, even if it's installed, may not work. There may have been a heat exchanger there; it may not have functioned.

Q: But you don't know one way or another. If there was a functioning heat exchanger there, sir, would that change the findings in your report?

A: It may, it may not. It probably will not.

Q: Why is that?

A: Because, again, I don't believe it was there, based on my understandings of thermodynamics and what I have – what pictures I have seen of the facility, I have no reason to believe that it was there.

Q: Well, I'm asking you to assume, sir, that it was.

A: I'm not taking that assumption. Sorry.

Exhibit F at 184-185.

For the foregoing reasons including, but not limited to, Smith's lack of relevant qualifications, his wholly unsupported and unscientific "*ipse dixit"* speculative conclusions, and his unexplainable refusal to consider reasonable alternatives (even those testified to by fact witnesses in this case), in addition to the arguments set forth in Plaintiff's *Daubert* Motion [ECF No. 215, Smith's testimony is inadmissible and is properly excluded.

CONCLUSION

Plaintiff's *Daubert* motion should be granted, and the testimony and reports of Murray and Smith should be excluded.

PERLMAN, BAJANDAS, YEVOLI & ALBRIGHT, P.L.
200 South Andrews Avenue, Suite 600, Fort Lauderdale, Florida 33301 • (954) 566-7117
283 Catalonia Avenue, Suite 200, Coral Gables, Florida 33134 • (305) 377-0086

Dated: April 10, 2017.

Respectfully submitted,

/s/ John W. Annesser, Esquire

John W. Annesser, Esq. (FBN 98233)
jannesser@pbyalaw.com
Brian W. Chaiken, Esq. (FBN 118060)
bchaiken@pbyalaw.com
D. Porpoise Evans, Esq. (FBN 576883)
pevans@pbyalaw.com
PERLMAN, BAJANDAS, YEVOLI & ALBRIGHT, P.L.
283 Catalonia Avenue, Suite 200
Coral Gables, FL 33134
Telephone: 305.377.0086
Facsimile: 305.377.0781
Attorneys for Plaintiffs, Andrea Rossi and Leonardo Corporation

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 10, 2017 on all counsel or parties of record on the attached Service List.

/s/John W. Annesser, Esquire

John W. Annesser, Esquire

SERVICE LIST

Christopher R.J. Pace, Esq. (FBN 721166
cpace@jonesday.com
Christopher M. Lomax, Esq. (FBN 56220)
clomax@jonesday.com
Christina T. Mastrucci, Esq. (FBN 113013)
cmastrucci@jonesday.com
Erika S. Handelson, Esq. (FBN 91133)
ehandelson@jonesday.com
JONES DAY
600 Brickell Avenue, Suite 3300
Miami, FL 33131

- and -

Bernard P. Bell, Esq. (*PHV*)
bellb@millerfriel.com
MILLER FRIEL, PLLC
1200 New Hampshire Avenue, N.W.
Suite 800
Washington, DC 20036
Attorneys for Defendants, Darden, Vaughn, Industrial Heat, LLC, IPH Int'l B.V., and Cherokee Investment Partners, LLC

Service via: CM/ECF

Francisco J. León de la Barra, Esq. (FBN 105327)
fleon@acg-law.com
Fernando S. Arán, Esq. (FBN 349712)
faran@acg-law.com
ARÁN CORREA & GUARCH, P.A.
255 University Drive
Coral Gables, Florida 33134
Attorneys for Third-Party Defendants, JMP, Johnson, and Bass

Service via: CM/ECF

Rodolfo Nuñez, Esq. (FBN 016950)
rnunez@acg-law.com
RODOLFO NUÑEZ, P.A.
255 University Drive
Coral Gables, Florida 33143
Attorney for Third-Party Defendants, Fabiani and USQL

Service via: CM/ECF