

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

ANDREA ROSSI and LEONARDO  
CORPORATION,

Plaintiffs,

v.

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

Defendants.

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

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

Counter-Plaintiffs,

v.

ANDREA ROSSI and LEONARDO  
CORPORATION,

Counter-Defendants,

and

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

Third-Party Defendants.

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**DEFENDANTS' REPLY TO  
PLAINTIFFS' OPPOSITION TO  
DEFENDANTS' MOTION FOR  
SUMMARY JUDGMENT**

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Defendants Industrial Heat, LLC (“IH”), IPH International, B.V. (“IPH”), Thomas Darden, John T. Vaughn and Cherokee Investment Partners, LLC (collectively, “Defendants”) hereby file their Reply to the Opposition (“Opposition” or “Opp.”) of Plaintiffs Andrea Rossi (“Rossi”) and Leonardo Corporation (“Leonardo”) [D.E. 238] to Defendants’ Motion for Summary Judgment (“Motion” or “Mtn.”) [D.E. 203] and Statement of Material Facts (“SOMF”) [D.E. 207].

### **ARGUMENT**

#### **I. Defendants Need Not Disprove Plaintiffs’ Affirmative Defenses, Which Do Not Bar Summary Judgment Because Plaintiffs Have Offered No Proof On The Defenses**

Plaintiffs assert on the first page of the Opposition that “Defendants make no attempt to even address Plaintiffs’ fifteen (15) affirmative defenses,” which they claim “is fatal to Defendants’ motion with respect to their counterclaims.” Opp. at 1. They are wrong.

Defendants were under no obligation to disprove Plaintiffs’ affirmative defenses in their summary judgment motion. A party moving for summary judgment does not bear the burden of negating the existence of a genuine issue of fact as to issues on which a non-movant bears the burden of proof. *Celotex v. Catrett*, 477 U.S. 317, 323 (1986). Rather, Plaintiffs bore “the initial burden of showing that [an] affirmative defense is applicable” as they “bear[] the burden of proof on [the] affirmative defenses at trial.” *Office of Thrift Supervision v. Paul*, 985 F. Supp. 1465, 1470 (S. D. Fla. 1997) (citing *Blue Cross and Blue Shield v. Weitz*, 913 F.2d 1544, 1552 (11<sup>th</sup> Cir. 1990)). It is “only upon such a showing [that] the burden shift[s] regarding that affirmative defense.” *Id.* (citing *Weitz*, 913 F.2d at 1552 n.13)). See also *Int’l Schools Servs. v. AAUG Ins. Co.*, 2012 WL 5635590, at \*8 (S.D. Fla. Nov. 15, 2012) (same).

Indeed, Plaintiffs’ Opposition completely overlooks *this Court’s* repeated application of the appropriate burden-shifting standard for summary judgment with respect to affirmative defenses. See, e.g., *Schainberg v. Urological Consultants of S. Fla., P.A.*, No. 12-cv-21721, 2013 WL 12086461, \*2 (S.D. Fla. March 18, 2013) (“[W]hen moving for summary judgment on affirmative defenses, ‘the moving party is not required to support its motion with affidavits or other similar material *negating* the opponent’s claim in order to discharge this initial responsibility.’”) (Altonaga, J.) (citing *Celotex*, 477 U.S. at 323 and quoting *Fitzpatrick v. City of Atlanta*, 2 F.3d 1112, 1115-16 (11<sup>th</sup> Cir. 1993)); *Int’l Schools Servs., Inc. v. AAUG Ins. Co., Ltd.*, No. 10-cv-62115, 2012 WL 5635590, at \*7 (S.D. Fla. Nov. 5, 2012) (Altonaga, J.) (quoting

*Office of Thrift Supervision*, 985 F. Supp. at 1470). Further, because Plaintiffs failed to offer any evidence to show that any of their affirmative defenses are applicable, none of those defenses stands as an obstacle to the Court granting Defendants summary judgment. *Ecp Station I LLC v. Chandy*, No. 8:15-cv-2523-T-JSS, 2016 WL 3883028, at \*4 (M.D. Fla. June 29, 2016) (citing *United States v. Kafleur*, 158 Fed. Appx. 322, 327 (11<sup>th</sup> Cir. 2006)).

## **II. Defendants Correctly State the Elements of Breach of Contract Damages**

Plaintiffs argue that damages is an element of a breach-of-contract claim that requires proof and that a court may only award nominal damages in a breach-of-contract action where, after proving liability, “a party tried and failed to prove actual damages.” Opp. at 14-15. This argument is belied by the very definition of “nominal damages” and the well-settled case law.

Nominal damages is defined as “[a] trifling sum awarded when a legal injury is suffered but there is no substantial loss or injury to be compensated.” BLACK’S LAW DICTIONARY (10<sup>th</sup> ed. 2014). Consistent with this definition, the cases Defendants cited find that once liability for a breach of contract is established, the non-breaching party is entitled, at least, to nominal damages.<sup>1</sup> Plaintiffs’ attempt to distinguish these cases is unavailing. Not one requires that a party attempt and fail to prove actual damages before nominal damages are awarded. Indeed, Plaintiffs do not cite a single case for their proposition.

Florida law is clear that “even where actual damages and issues of proximate cause have not been proven, once a plaintiff has established a breach of contract, he is entitled to an award of nominal damages because the law presumes some damages when a legal right has been violated.” *Jeld-Wen, Inc.*, 2007 WL 5960207, at \*13. “[N]ominal damages...are recoverable upon a finding of breach of contract ***even though no proof of further damages is made out.***” *Id.* (emphasis added) (quoting *Zim v. W. Pub. Co.*, 573 F.2d 1318, 1326 (5<sup>th</sup> Cir. 1978) (citing *Hutchison v. Tompkins*, 259 So.2d 129, 132 (Fla. 1972))). Accordingly, courts have consistently found in favor of a non-breaching party where liability for breach of contract has been established but actual damages either have not yet been proven or cannot be proven. *See, e.g., id.* at \*13; *Miami Heart Inst., Inc. v. Heery Architects & Engineers, Inc.*, 88-1714-CIV-DAVIS, 1991 WL 163030, at \*2 (S.D. Fla. Aug. 22, 1991); *Alhassid v. Bank of Am., N.A.*, 14-CIV-20484,

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<sup>1</sup> *See MSM Golf, L.L.C. v. Newgent*, 853 So. 2d 1086, 1087 (Fla. 5<sup>th</sup> DCA 2003); *Destiny Const. Co. v. Martin K. Eby Const.*, 662 So. 2d 388, 390 (Fla. 5<sup>th</sup> DCA 1995); *Beverage Canners, Inc. v. Cott Corp.*, 372 So. 2d 954, 956 (Fla. 3<sup>d</sup> DCA 1979); *Jeld-Wen, Inc. v. Nebula Glass Intern., Inc.*, 05-60860-CIV, 2007 WL 5960207, at \*13 (S.D. Fla. May 15, 2007).



2015 WL 11216721, at \*4 (S.D. Fla. Sept. 14, 2015), *reconsideration denied in part*, 14-20484-CIV, 2015 WL 11110557 (S.D. Fla. Nov. 4, 2015); *E-Z Pack Mfg., LLC v. RDK Truck Sales & Serv., Inc.*, 8:10-CV-1870-T-27AEP, 2011 WL 4343790, at \*4 (M.D. Fla. Aug. 10, 2011), *report and recommendation adopted*, 8:10-CV-1870-T-27AEP, 2011 WL 3841631 (M.D. Fla. Aug. 30, 2011); *Onontario of Florida, Inc. v. R. P. Trucking Co., Inc.*, 399 So. 2d 1117, 1118 (Fla. 4th DCA 1981). Plaintiffs' contrary arguments are without merit.

### **III. IH and IPH are Entitled to Summary Judgment on Count I of the Complaint and Count I of the 4th Amended AACT**

#### **A. Plaintiffs Lack Standing to Pursue Count I of the Complaint**

Plaintiffs do not dispute that Rossi lacks standing to bring Count I of the Complaint. As to Leonardo (Florida), they claim IH and IPH are estopped from challenging its standing because they countersued Leonardo (Florida), but they do not cite a single case in support because estoppel has no application here. *See U.S. v. All Funds in Account of Prop. Futures*, 820 F. Supp.2d 1305, 1335-36 (S.D. Fla. 2010). Leonardo (Florida) represented in the Complaint that Leonardo (New Hampshire) was no more. But that is not accurate because Leonardo (New Hampshire) still exists, and it is the contracting party to the License Agreement.

#### **B. Plaintiffs Undeniably Deceived IH As To The Validation Test**

Plaintiffs say they did not deceive IH into entering the First Amendment because Rossi did not misrepresent whether Italian law required limitations on the Validation Test. This position is indefensible, and is based on Plaintiffs ignoring or misrepresenting the undisputed evidence. In Exhibit 3 to Defendants' SOMF, an April 23, 2013 e-mail, Rossi clearly states:

This morning I had a meeting with the Health Office of the Province of Ferrara, ***which has to authorize the 24 hours test...*** We found an acceptable solution. ***He explained to me that the Italian law 'DPR (Decreto del Preseidente della Repubblica) #551-Dec. 21 1999 requests an authorization for any plant that makes more than 35 kWh/h and this authorization takes at least 6 months...*** Therefore if we can consume up to ***35 kWh/h*** without authorization, this implies that in our LENR case I can produce up to ***210 kWh/h***, which is a consistent amount of energy... ***In this case we do not need any authorization...***

SOMF Ex. 3 (emphasis added). Plaintiffs ignore this damning document. Instead, they disingenuously claim that Exhibit 4 to Defendants' SOMF "contains no statement with respect to Italian law". But Exhibit 4 is an email from the next day (April 24, 2013) in which Darden states "we will agree to do a test of only those reactors constituting the allowable percentage of the plant (eg ***35kw/210kw*** instead of 165kw/1mw). We would like to get details about how this will

work: how many reactors, how will you decide which ones, etc.” *Id.* Ex. 4 at IH-00098392.

Darden was directly referring to Rossi’s statement from the prior day that Italian law requires authorization for plants that consume more than 35 kWh/h, but he can run a test that stays under that threshold but still produces 210 kWh/h. *Id.* Rossi responded “VERY GOOD: WE WILL OPERATE 30 REACTORS, NO PREFERENCE ABOUT WHICH.” *Id.*

At his deposition, Rossi told a completely different story. Rossi testified that the Ferrara health office told him:

in Italy we do not have authorizations for experiments. There is not something that is called an authorization for 36 hours. *Your are either authorized or you are not... And so they said it is unthinkable that we can authorize you and take the reliability.* The law does not foresee this. *But if you find some kind of an agreement with your outdoor - - without your neighbor, we don’t come...* So I have gone to my neighbors and say please, I have to make this and this and this and said they all right. You don’t make too much noise, and we can accept it because we want to sleep.

See SOMF Ex. 2 at 147:5-150:13. Plaintiffs make no attempt to reconcile this testimony with the April 2013 e-mails because they are irreconcilable: Rossi simply lied when he told IH that fewer reactors needed to be used in the Validation Test to comply with Italian law.<sup>2</sup> And Plaintiffs’ contention that Rossi’s deception to reduce the reactors used in the Test was insignificant because “Defendants readily admit that testing fewer units would make it more difficult for Plaintiffs to achieve the necessary test results” is completely false. The e-mail relied on for this proposition is from October 2013, at least five months after the Validation Test, and relates to the testing of a 6 cylinder versus 1 cylinder unit – not the testing of 54 reactors versus 18 reactors.

### **C. The Penon Report Shows That Validation Was Not Achieved**

Plaintiffs claim that IH and IPH cannot dispute the report of “ERV” Penon that the Validation Test was successful because the “License Agreement provides for no appeal mechanism with respect to the findings of the ERV.” Opp. at 17. To begin, nothing in the License Agreement states that the parties must accept Penon’s report, even if the product of fraud or corruption. In any event, Plaintiffs ignore that the Penon report actually *shows on its face* that Validation was not achieved under the License Agreement, whether the First Amendment was

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<sup>2</sup> Defendants have translated the Italian Law Rossi cites in his April 23, 2013 e-mail. The law does not state what Rossi claims. A true and correct copy of D.P.R. del 21 dicembre 1999, n. 551, along with an English translation thereof, is attached hereto as Exhibit 1.

valid or not. The report expressly states that only 18 E-Cat reactors were tested.<sup>3</sup> SOMF Ex. 11 at PENON0000076. The report expressly states that the testing period was less than 24 hours. *Id.* The report expressly states the measurements taken during the test, none of which was of the “flow of the heated fluid” coming out of the 1 MW Plant. *See id.* at PENON0000078-79.

Plaintiffs ignore the fact that only 18 E-Cat reactors were tested, and they do not dispute that the test only ran for 23.5 hours instead of 24. Opp. ¶¶ 18-19. These undisputed violations alone are sufficient to support summary judgment in IH and IPH’s favor.<sup>4</sup> Finally, Plaintiffs have utterly failed to prove how the payment of \$10,000,000, which was procured by Rossi’s fraud, operated as a waiver or is subject to the “voluntary payment doctrine.” *See* Fl. Stat. § 725.04; *Taylor, Bean & Whitaker Mortg. v. GMAC Mortg.*, 2007 WL 1114045, at \*6 (M.D. Fla. Apr. 12, 2007); *see also* License Agreement (SOMF Ex. 1) § 16.9 (“[n]o delay in exercising any right, power or privilege hereunder shall operate as a waiver”).

#### **D. Plaintiffs did not Achieve Guaranteed Performance**

Plaintiffs argue that summary judgment on Count I of the Complaint and Counterclaims should be denied because they achieved “Guaranteed Performance” under the License Agreement. This argument fails because the undisputed facts show that (i) Plaintiffs did not commence the guaranteed performance test within the time period required by the License Agreement, and (ii) even if the Proposed Second Amendment was sufficient to extend the time for commencing the guaranteed performance test, the wrong equipment was tested.

There is no dispute that Rossi and Leonardo did not complete any “guaranteed performance” test within the time period set by the License Agreement. Instead, Plaintiffs argue that the Proposed Second Amendment extended the time for commencing the guaranteed performance test. Opp. at 19. The Proposed Second Amendment, however, was not effective because it was not signed and executed by all parties, and even Rossi admitted it was not effective. *See* SOMF ¶¶ 26-31. Plaintiffs make no attempt to refute this fatal defect.

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<sup>3</sup> The report states “[t]o comply with the Italian law the trial was conducted by activating only 18 E-Cat units.” SOMF Ex. 11 at PENON0000076. Penon admitted in his deposition that this alleged Italian law requirement was provided to him by Rossi. SOMF Ex. 11 at 149:25-151:12.

<sup>4</sup> Plaintiffs argue the License Agreement does not require a measurement of the heated fluid out of the E-Cat reactors. But it clearly does. License Agreement (SOMF Ex. 1), §4 (“the ERV *will measure the flow of the heated fluid ...*”).

Even if the Proposed Second Amendment was effective, it required that the “guaranteed performance” test be conducted using the “Six Cylinder Unit,” not the 1 MW Plant. Plaintiffs do not dispute that what they used for their alleged “guaranteed performance” test was the 1 MW Plant, not the Six Cylinder Unit. Opp. ¶ 36. Instead, they argue that the testing of the 1MW Plant was proper based on oral modification or waiver. However, Plaintiffs fall far short of even creating an issue of fact as to oral modification or waiver in light of the License Agreement’s anti-waiver provision, which clearly states that the “Agreement may be amended ..., and the terms hereof may be waived, ***only by a written instrument signed by the Parties or, in the case of a waiver, by the Party waiving compliance.***” License Agreement (SOMF Ex. 1) § 16.9 (emphasis added).

“[W]hen a contract plainly provides that any modification must be in writing, all claims—however labeled—founded upon an alleged oral modification should generally be disposed of as a matter of law.” *Okeechobee Resorts, L.L.C. v. E Z Cash Pawn, Inc.*, 145 So. 3d 989, 993 (Fla. Dist. Ct. App. 2014). A party thus bears a heavy burden in attempting to enforce an alleged oral modification of a contract requiring modifications only in writing:

[A] party pursuing such a claim [must] allege and prove more—indeed much more—than just a ‘mutual agreement,’ or just ‘detrimental reliance,’ or just ‘subsequent conduct,’ or just generalized ‘inequitable conduct.’ Rather, a plaintiff must again allege—and eventually prove—that the oral amendment was ‘accepted and acted upon by the parties in such a manner as would work a fraud on either party to refuse to enforce it.’ *Cahill*, 90 So.2d at 918 [*Professional Insurance Corp. v. Cahill*, 90 So.2d 916, 918 (Fla. 1956)]. This requires that a plaintiff plead (and again eventually prove): (a) that the parties agreed upon and accepted the oral modification (i.e., mutual assent); and (b) that both parties (or at least the party seeking to enforce the amendment) performed consistent with the terms of the alleged oral modification (not merely consistent with their obligations under the original contract); and (c) that due to plaintiff’s performance under the contract as amended the defendant received and accepted a benefit that it otherwise was not entitled to under the original contract (i.e., independent consideration). Absent such a showing, the parties will be held to the bargain as negotiated and memorialized in their written agreement.

*Id.* at 995. Plaintiffs make no such showing. Similarly, the courts of the Southern District have found that waiver is “defeated as a matter of law” by an anti-waiver provision contained in a contract. *See MaxMara Retail, Ltd. v. Bal Harbour Shops, LLP*, No. 1:12-CV-21423-UU, 2013 WL 12092079, at \*3 (S.D. Fla. Feb. 22, 2013); *Guarantee Ins. Co. v. Brand Mgmt. Serv., Inc.*, No. 12-61670-CIV, 2013 WL 6768641, at \*8 (S.D. Fla. Dec. 20, 2013).

Citing *Dioguardi v. Giroski, LLC*, No. 12-23354-CIV, 2013 WL 12092475, at \*2 (S.D. Fla. Mar. 20, 2013), Plaintiffs incorrectly argue that the parties' subsequent course of dealing waived the License Agreement's anti-waiver protection. *Dioguardi* addressed whether a subsequent course of dealings contrary to a contract's condition that modifications be in writing might waive that condition. Here, of course, the evidence demonstrates that the parties respected the License Agreement's written modifications condition, as so clearly reflected by the fact that they twice prepared written modifications to the Agreement (the First Amendment and the Proposed Second Amendment). Moreover, the *Dioguardi* court held that any argument of waiver was "defeated as a matter of law by the anti-waiver provisions of the contract itself" and that there was "no evidence to show a written modification of the contract or an oral modification with additional consideration provided." *Id.* at \*3. *Dioguardi* is thus in accord with Florida cases making clear that "subsequent course of dealing" is simply not enough to modify an agreement that requires modifications to be in writing. See *Okeechobee Resorts, L.L.C.*, 145 So.3d at 995; *Energy Smart Indus., LLC v. Morning Views Hotels-Beverly Hills, LLC*, 660 F. App'x. 859, 863-64 (11th Cir. 2016).

Furthermore, Plaintiffs' assertion that IH or IPH should be faulted for not telling Plaintiffs that they were too late in attempting to conduct a Guaranteed Performance test is both factually incorrect and irrelevant. Thomas Darden told Rossi back in late 2013 or in 2014 that the time for commencing the Guaranteed Performance test had passed. Darden Dep. (excerpts attached hereto as Ex. 2) at 123:23-125:13. Moreover, the License Agreement is clear as to the timing requirement, and the Proposed Second Amendment is clear as to testing a Six Cylinder Unit. Neither IH nor IPH had an obligation to read the clear language of the License Agreement or the Proposed Second Amendment to Plaintiffs.

#### **IV. The License Agreement Precludes Plaintiffs' Unjust Enrichment Claim**

Plaintiffs offer no authority to counter the well-settled case law that "[a] party cannot pursue a quasi-contract claim for unjust enrichment if an express contract exists concerning the same subject matter as the party's claim for unjust enrichment." See *Diamond "S" Dev. Corp. v. Mercantile Bank*, 989 So.2d 696, 697 (Fla. Dist. Ct. App. 2008) (citing *Ocean Commc'ns, Inc. v. Bubeck*, 956 So.2d 1222, 1225 (Fla. Dist. Ct. App. 2007)). Here, the License Agreement is just such "an express contract ... concerning the same subject matter" as Plaintiffs' unjust enrichment claim – namely, the E-Cat IP. If IH and IPH did not comply with that Agreement

(they did), then Plaintiffs' remedy is a breach-of-contract claim, *David v. Am. Suzuki Motor Corp.*, 629 F. Supp. 2d 1309, 1324 (S.D. Fla. 2009); if IH and IPH complied with the Agreement, they control the E-Cat IP per the license and transfer under the Agreement. Plaintiffs cannot "enrich" them by providing what they already control under contract.

Knowing the deficiency in their claim, Plaintiffs argue that the "benefit" they conferred on IH and IPH is the \$50 million investment made by a third-party investor, Woodford Funds, rather than the value of the E-Cat IP.<sup>5</sup> This argument is legally untenable. An unjust enrichment claim requires that "the benefit [] be conferred directly from the plaintiff to the defendant." *City of Miami v. Bank of Am. Corp.*, 800 F.3d 1262, 1287 (11th Cir. 2015), *cert. granted sub nom. Bank of Am. Corp. v. City of Miami, Fla.*, 136 S. Ct. 2544 (2016). "A benefit that a defendant gains that does not come directly from the plaintiff does not give rise to a claim for unjust enrichment." *Century Sr. Services v. Consumer Health Ben. Ass'n, Inc.*, 770 F. Supp. 2d 1261, 1267 (S.D. Fla. 2011). An investment by a third-party in IH and its entire LENR portfolio cannot be a benefit directly conferred by Plaintiffs. *See e.g. Virgilio v. Ryland Group, Inc.*, 680 F.3d 1329, 1337 (11th Cir. 2012) (marketing fee of 1.5% of the home purchase price developer paid to marketer was not a benefit conferred directly from plaintiff homebuyers). Moreover, since the investment occurred well prior to Plaintiffs completing their alleged "Guaranteed Performance" test, it obviously was not predicated on the outcome of that test.

**V. Plaintiffs Fail to Identify a Genuine Issue of Material Fact as To Their Misappropriation Claim in Count IV of the Complaint**

Plaintiffs identify no disputed facts relating to Count IV of their Complaint and therefore, summary judgment for Defendants is warranted on their misappropriation claim.

Plaintiffs claim they took steps to protect any trade secret contained in the E-Cat IP because the *first* paragraph of License Agreement § 16.4 required Plaintiffs and IH to keep the terms of the Agreement confidential. But the terms of the Agreement are not the E-Cat IP. The *second* paragraph of License Agreement § 16.4 governs confidentiality of the E-Cat IP, and it applies only to Plaintiffs (and AEG), not to IH or IPH. In fact, License Agreement §1 expressly allows IH and IPH to provide (via sublicense) the E-Cat IP to anyone they choose at their sole

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<sup>5</sup> Plaintiffs suggest just the fact that they worked on the "Guaranteed Performance" test was a benefit to IH and IPH, but that work conferred no benefit on IH or IPH. Plaintiffs did not pay IH or IPH for the work (instead, IH and IPH were paying for Plaintiffs' expenses), and all it "bought" IH and IPH was a frivolous claim against them for \$89 million.



discretion. The License Agreement is the only measure Plaintiffs identify to protect their alleged trade secret, and it is expressly does not provide Plaintiffs any such protection.

Because Plaintiffs do not identify reasonable efforts they undertook to protect the secrecy of their supposed trade secret, their trade secret claim fails. *See Amer. Red Cross v. Palm Beach Blood Bank, Inc.*, 143 F.3d 1407, 1401 (11<sup>th</sup> Cir. 1998) (citing Fla. Stat. § 688.002(4)). It also fails because Plaintiffs can point to no evidence of improper disclosure of the E-Cat IP by Defendants (which treated it as confidential information *of IH and IPH*), and the validity of the License Agreement means the E-Cat IP was not acquired by improper means.

**VI. Plaintiffs Fail to Identify a Genuine Issue of Material Fact as To Their Fraud in the Inducement Claim in Count VI of the Complaint**

Plaintiffs argue that they can plead fraud in the inducement as well as breach of contract in the same case. Opp. at 24. Defendants do not dispute that. But, in such a case the plaintiff must prove damages arising from the alleged fraud that are separate from the damages for breach of the relevant contract. *Williams v. Peak Resorts*, 676 So. 2d 513, 517 (Fla. Dist. Ct. App. 1996). Plaintiffs have failed to demonstrate separate damages.

Just as importantly, Plaintiffs ignore Defendants' argument that they "have neither identified separate damages for fraud *nor* alleged pre-contract fraudulent conduct that is unrelated to their breach of contract claim." Mtn. at 16. Instead, their "claims of fraud relate exclusively to the alleged breach of the License Agreement." *Id.* Stated differently, Plaintiffs only claim fraud because they believe IH and IPH did not perform under the License Agreement, but their remedy for that is a breach-of-contract claim, not fraudulent inducement.

Plaintiffs go on to argue that a fraud in the inducement claim is not bound by the parol evidence rule (Opp. at 25), and that they can therefore submit evidence extrinsic to the License Agreement to show that they entered into it on the promise that Cherokee entities would guarantee the contractual obligations of IH and IPH.

The crux of Plaintiffs' reliance argument thus amounts to a claim that Defendants separately agreed that the Cherokee entities would *guarantee* the License Agreement, despite not being parties to it or even mentioned in it. This is a bald attempt to amend the License Agreement, which plainly contains no such guarantee provision but does contain an integration clause stating that it supersedes any prior oral or written promises. In this regard, Plaintiffs decline to distinguish *Eclipse Medical, Inc. v. Am. Hydro-Surgical Instruments, Inc.*, 262 F.

Supp. 2d 1334 (S.D. Fla. 1999), in which the court explained that:

First and foremost, this District has clearly held that *reliance on fraudulent representations is unreasonable as a matter of law where the alleged misrepresentations contradict the express terms of the ensuing written agreement. Barnes v. Burger King Corp.*, 932 F. Supp. 1420, 1428 (S.D. Fla. 1996); *see also Acquisition Corp. of Am. V. FDIC*, 760 F. Supp. 1558, 1561 n.6 (S.D. Fla. 1991).

Id. at 1342 (emphasis added).<sup>6</sup> A Cherokee guarantee would contradict the License Agreement, which does not include Cherokee entities as parties to the Agreement, so the fraudulent inducement exception to the parol evidence rule does not apply here.

## **VII. IPH is Entitled to Summary Judgment as to Count II of the Counterclaims**

In defense of summary judgment on Count II of the Counterclaims, Plaintiffs, in large part, rely solely on the corporate representative of IPH's supposed lack of knowledge, and ignore the substantial evidence IPH presented in the Motion. Plaintiffs' position is the Court should ignore IPH's evidence as a sanction to IPH, but that argument has already been rejected *twice* – once by Magistrate Judge O'Sullivan, and once by this Court on appeal [D.E. 218, 246]. Further, Plaintiffs mischaracterize the IPH witness' testimony. Often, where Plaintiffs claim the witness testified that he “had no evidence in support of this claim,” he actually testified that he had no evidence “other than what Industrial Heat has.” *See e.g.*, IPH Dep. (excerpts of which are attached hereto as Ex. 3) at 25:5-15, 41:11-22, 48:24-49:9, 49:20-50:6, 52:3-10, 52:21-53:3, 53:14-21, 54:7-18; 61:25-62:9, 62:24-63:5, 63:24-64:8, 66:20-67:3, 67:14-24, 72:5-12, 72:24-

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<sup>6</sup> Cases on this point are legion. *See Behrman v. Allstate Life Ins. Co.*, 388 F. Supp. 2d 1346, 1352 (S.D. Fla. 2005) (finding in breach of contract/fraud in the inducement action that “[e]vidence of a prior or contemporaneous oral agreement is inadmissible to vary or contradict the unambiguous language of a valid contract”) (quotation omitted); *Rayle Tech, Inc. v. DEKALB Swine Breeders, Inc.*, 897 F. Supp. 1472, 1477 (S.D. Ga. 1995) (“Plaintiffs cannot overcome the written instrument here, and, particularly, the integration clause, by invoking the fraud-in-the-inducement exception to the parol evidence rule. The exception for a party who has been induced by a fraudulent misrepresentation to enter the contract, must not be stretched or inflated in a way that would severely undermine the policy of the parol evidence rule, which is grounded in the inherent reliability of a writing as opposed to the memories of contracting parties. We need not belabor the point. We have here the case of a party with the capacity and opportunity to read a written contract, who has executed it, not under any emergency, and whose signature was not obtained by trick or artifice; such a party, if the parol evidence rule is to retain vitality cannot later claim fraud in the inducement.”) (internal quotations omitted); *Bakrac, Inc. v. Franchise Sys., Inc.*, No. 02-23434-CIV, 2003 WL 25730510, at \*7 (S.D. Fla. Nov. 3, 2003) (“[T]he fraud exception does not apply to parol evidence of a prior representation to vary or contradict the clear and unambiguous terms of a written contract.”).



73:2, 73:7-25. As reflected below, there is ample evidence to support summary judgment in favor of IPH on Count II of the Counterclaims.

**A. Plaintiffs Disclosed the License Agreement**

Plaintiffs' response demonstrates they have no defense to this breach. They do not deny that they disclosed terms of the License Agreement. They claim their full public disclosure of the Agreement (as an exhibit to their Complaint) is excused because they believe IH and IPH had already breached the Agreement. They are wrong on that for all the reasons stated herein and in the Motion, and in any event the relevant confidentiality provision expressly continued even "after th[e] Agreement terminates." License Agreement § 16.4, first paragraph.

As to their disclosures of E-Cat IP to others, IPH did not move for summary judgment on that ground (though IPH notes that Plaintiffs' arguments on those disclosures are premised on the wrong confidentiality provision, *see* License Agreement (SOMF Ex. 1) § 16.4, second paragraph).

**B. Plaintiffs Failed to Assign Licensed Patents**

License Agreement § 10 provides: "Upon the request of the Company, Leonardo and Rossi shall assign to the Company the Licensed Patents with respect to the Territory." License Agreement (SOMF Ex. 1) § 10. The undisputed evidence is that IPH counsel sent a letter to Plaintiffs' counsel on February 17, 2016, requesting assignment of the Licensed Patents to IPH. SOMF ¶ 46. Plaintiffs refused. *Id.* at ¶ 47. This is a breach of Section 10's clear terms. Plaintiffs cannot avoid this breach simply because they believe Section 10 is unnecessary; the parties included Section 10 in the License Agreement, so Plaintiffs had to abide by it. Also, aside from damages on this breach, IPH is entitled to specific performance since the Licensed Patents constitute at least a unique asset, whatever their value. *See DePrince v. Starboard Cruise Servs.*, 163 So.3d 586, 597 (Fla. 3<sup>rd</sup> DCA 2015).

**C. Plaintiffs Failed to Inform and Consult on Patent Applications**

Plaintiffs' response on this breach is to rest on Rossi's self-serving and conclusory declaration that states Plaintiffs did not breach the consultation and abandonment provisions in the License Agreement. But his affidavit does not address any specific patent application IPH identified as ones on which IH and IPH were not consulted, either as to the filing or the abandonment. Also, his claim that Leonardo did not abandon any "Licensed Patent without prior written consent" cannot be credited since he did not attach even a single such written consent

(because one does not exist). Such conclusory assertions in a party declaration are insufficient to defeat summary judgment. *See Levine v. Hernandez*, 2017 U.S. Dist. Lexis 29000, at \*11-12 (S.D. Fla. Feb. 28, 2017); *Liebherr-Mining Equip. Colmar v. Castec, Inc.*, 2013 WL 85179, at \*7 (S.D. Fla. Jan. 7, 2013); Fed. R. Civ. P. 56(d)(4) & (e)(3).

Plaintiffs also wholly ignore an additional breach – that Leonardo charged IH and IPH for “fees and expenses associated with its [patent] activities,” which Leonardo was suppose to bear. License Agreement (SOMF Ex. 1) § 7.1(c); Mtn. at 19 & n.7. They do so because they know that Leonardo did improperly charge IH and IPH for these fees and expenses.

#### **D. Plaintiffs Openly Competed with IH and IPH**

Plaintiffs do not deny that they have openly acknowledged being engaged in designing and developing “E-Cat Products” with companies or customers other than IH or IPH. But they claim (without support) that any such activities are outside the geographic “Territory” defined in License Agreement § 2. Even assuming this were true, the non-compete provision in License Agreement § 13.3 does not contain a geographical limitation to the “Territory,” so it cannot be read to be so limited. *See Ferox v. Conseal Int’l*, 175 F.Supp.3d 1363, 1371 (S.D. Fla. 2016). Indeed, limiting Section 13.3 to the Territory would be illogical. It would permit Plaintiffs to disclose the E-Cat IP to others as long as they were outside the Territory (in violation of Section 16.4), be inconsistent with Plaintiffs “transfer[ring] ... all E-Cat IP” to IH (per Section 3.2(b)), and allow Plaintiffs to work with another company to design and develop “E-Cat Products” outside the Territory that the company could then distribute within the Territory.

#### **E. Plaintiffs Failed to Pay Taxes**

Plaintiffs do not dispute that at least Leonardo did not report as income or pay taxes on revenue it received under the License Agreement. Nor can they dispute this: IPH caused Leonardo to be paid \$10 million in 2013, but Leonardo reported only a fraction of this income (and later even reduced that amount in an amended tax return). Mtn. at 20-21. (Their only defense is a lack of damage to IPH, but as explained in detail above, this does not excuse their breach or prevent summary judgment.)

#### **F. Plaintiffs Failed to Enable Replication**

Plaintiffs’ defense to this breach is simple: The License Agreement does not reference “replicate,” so the Agreement could not be breached because IH and IPH could not replicate Plaintiffs’ claimed results. But this is too simplistic. The Agreement required Plaintiffs to

transfer to IH “all E-Cat IP,” which they represented was everything “necessary or useful” for IH to develop and manufacture “all the products deriving from the E-Cat IP,” and further for Rossi to “provide ongoing training and support” to “enable [IH] to utilize the E-Cat IP.” License Agreement (SOMF Ex. 1) §§ 3.2(b), 12(b), 13.1. IH and IPH’s inability to replicate Plaintiffs’ claimed fantastical results, or even anything remotely approaching those results, thus demonstrates either that the E-Cat IP does not work and Plaintiffs’ results are fabricated (which they will not admit) or that Plaintiffs breached the Agreement sections requiring them to provide IH and IPH with all of the E-Cat IP needed to replicate those results and the training and support to so replicate.

### **VIII. IH and IPH are Entitled to Summary Judgment on their FDUTPA Claim**

#### **A. FDUTPA is not Limited to Consumers and Consumer Transactions**

Plaintiffs’ first argument – that IH and IPH’s FDUTPA claim fails because they are not consumers and there was no consumer transaction – is contrary to the law in this district. At least since the 2001 amendments to FDUTPA, the courts of the Southern District have held that a non-consumer can sue under FDUTPA.<sup>7</sup> See *Kelly v. Palmer, Reifler & Assocs., P.A.*, 681 F. Supp.2d 1356, 1373-74 (S.D. Fla. 2009); *Niles Audio Corp. v. OEM Sys. Co.*, 174 F. Supp.2d 1315, 1320 (S.D. Fla. 2001). Moreover, the Florida courts have made clear that FDUTPA “is not limited to purely consumer transactions” and that “[i]t is now intended by its plain text to apply to any act or practice occurring ‘in the conduct of any trade or commerce’ [e.s.] even as between purely commercial interests.” *Beacon Prop. Mgmt., Inc. v. PNR, Inc.*, 890 So. 2d 274, 278 (Fla. 4th DCA 2004) (citing Fla. Stat. §501.204); see also *Crowley Liner Services, Inc. v. Transtainer Corp.*, 06-21995, 2007 WL 433352, at \*4 (S.D. Fla. Feb. 6, 2007) (“the Court finds no support for the plaintiff’s claim that the FDUTPA does not apply to sophisticated commercial transaction.”). Accordingly, Plaintiffs’ first argument is insufficient to defeat summary judgment.

#### **B. Plaintiffs Have Failed to Create a Genuine Issue of Material Fact with Respect to their Deceptive and Unfair Acts**

Next, Plaintiffs argue that summary judgment is improper because “whether particular conduct constitutes an unfair or deceptive trade practice is a question of fact.” Opp. at 32. Out of

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<sup>7</sup> Even if FDUTPA was limited to “consumers,” IH and IPH fit squarely within the broad statutory definition of “consumer,” which includes a corporation as well as “any commercial entity, however denominated.” Fla. Stat. § 501.203(7).

approximately six pages of facts relating to the FDUTPA claim listed in Defendants' SOMF [D.E. 207], however, Plaintiffs point to only one specific paragraph they dispute – SOMF ¶57, stating that Rossi represented that J.M. Products was affiliated with Johnson Matthey, plc (“Johnson Matthey”). They also state that other facts are disputed (such as what Defendants knew before entering the Term Sheet and what Defendants paid for employees or contractors), but they *offer no evidence* to demonstrate either alleged dispute. Summary judgment cannot be avoided by conclusory statements unadorned by actual evidence. *See Feldman v. Cutting*, 09-14133-CIV, 2009 WL 4021364, at \*6 (S.D. Fla. Nov. 19, 2009).

Plaintiffs argument ignores the scope of Plaintiffs and Third-Party Defendants' fraudulent scheme, which included, among other things, (i) creating the false illusion that J.M. Products was a real company using the steam produced from the 1MW Plant for a manufacturing process and (ii) manipulating the operation and measurement of the 1MW Plant. *See, e.g.* SOMF ¶¶ 73, 80-85. These acts alone support FDUTPA liability, but Plaintiffs' do not even address them in their Opposition. Therefore, Plaintiffs have failed to create a genuine issue of material fact precluding summary judgment. *Scottsdale Ins. Co. v. Cutz, LLC*, 543 F. Supp. 2d 1310, 1313 (S.D. Fla. 2007) (“Once the moving party has discharged its burden, the nonmoving party must designate specific facts showing that there is a genuine issue of material fact”).

### **C. IH and IPH Have Presented Undisputed Evidence of Actual Damages**

Finally, Plaintiffs claim that “[n]either IH nor IPH has presented any evidence that they paid Plaintiffs any sums as a result of the allegedly deceptive acts, much less any sums that could constitute actual damages.” Opp. at 32. This argument fails for two reasons: It misconstrues the meaning of actual damages, and does not even address, much less dispute, the evidence of damages IH and IPH have presented.

FDUTPA does not define “actual damages”, but “actual damages” are generally defined as “[a]n amount awarded to a complainant to compensate for a proven injury or loss; damages that repay actual losses.” BLACK’S LAW DICTIONARY (10th ed. 2014). Plaintiffs contend that the measure of actual damages is the difference in the market value of a product or service as delivered versus as it should have been delivered. Opp. at 32. “This measure of damages is helpful where there is an actual product or service being provided, and the defendant’s deceptive act alters the product’s or service’s value,” however, “FDUTPA damages are not [] limited to

this measure of damages.” *Morgan v. Pub. Storage*, No. 1:14-CV-21559-UU, 2015 WL 11233111, at \*1 (S.D. Fla. Aug. 17, 2015).

Here, IH and IPH have suffered actual losses in reliance on Plaintiffs and Third-Party Defendants’ deceptive and manipulative scheme, including incurring their own expenses, and reimbursing Plaintiffs and Third-Party Defendants for their expenses, which IH and IPH would not have done had they known the truth. This includes expenses in connection with transporting and setting up the 1 MW Plant in Florida due to Plaintiffs, Johnson and J.M. Products manipulating IH and IPH into relocating the 1 MW Plant to Florida. Mtn. at 27-28; SOMF ¶ 89. It also includes expenses in connection with operating the 1 MW Plant in Florida due to Plaintiffs and Third Party Defendants’ deceptions as to J.M. Products and the operation (and measurement) of the 1 MW Plant in Florida. *Id.* And it includes expenses arising out of this litigation, which IH and IPH would not have incurred had Plaintiffs and Third Party Defendants not deceived them into allowing the 1 MW Plant to be relocated to, and operated in, Florida to conduct a sham “Guaranteed Performance” test. Plaintiffs do not dispute that IH and IPH have incurred these expenses. Thus, summary judgment is warranted.

### **CONCLUSION**

Defendants respectfully request that this Court grant summary judgment in favor of Defendants on all remaining claims in the Complaint and 4th Amended AACT.

Dated: April 11, 2017

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on April 11, 2017, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system which will send a notice of electronic filing to all counsel or parties of record.

/s/ Erika S. Handelson  
Erika S. Handelson