

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

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

ANDREA ROSSI et al.,

Plaintiffs,

v.

THOMAS DARDEN, et al.,

Defendants.

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

Counter-Plaintiffs,

v.

ANDREA ROSSI and LEONARDO
CORPORATION,

Counter-Defendants,

And

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

Third-Party Defendants.

**PLAINTIFFS' REPLY IN SUPPORT OF THEIR
MOTION FOR PARTIAL SUMMARY JUDGMENT [DE 214, 237]**

In support of their Motion for Partial Summary Judgment ("Plaintiffs' Motion"), Plaintiffs state:

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Statement of Material Facts in Opposition to Defendants' Additional Facts

Plaintiffs state the facts below in opposition to Defendants' "Additional Facts." Each of these "additional facts" and supporting exhibits were cited to in Defendants' Motion for Summary Judgment and responded to in Plaintiffs' Response thereto. To avoid filing duplicative exhibits, Plaintiffs refer the Court to those exhibits already filed. As such, each citation listed below refers to either: Plaintiffs' Exhibits to their Motion for Partial Summary Judgment [DE 214] (e.g., "Ex. 4"); Plaintiffs' Supplemental Exhibits to their Response in Opposition to Defendants' Motion for Summary Judgment [DE 238] (e.g., "Supp. Ex. 44"), or to Defendants' Exhibits to their Motion for Summary Judgment [DE 207] (e.g., "Defs.' Ex. 2").

111. Disputed. The License Agreement, as amended by the parties, does not provide that at least 54 E-Cat reactors would be used for the Validation Test. *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). Based upon Dr. Rossi's conversations with Italian authorities, Dr. Rossi determined that the parties should test 18 reactors. *See* **Supp. Ex. 46** ¶ 6. Defendants consented to testing 18 reactors. 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.

112. 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. 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. 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. 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.

113. Disputed. Plaintiffs do not dispute that the 18 E-Cat reactors were tested during the Validation Test. However, 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.

114. Undisputed. To the extent that Industrial Heat paid AEG any money, Plaintiffs are not in a position to confirm or deny such information.

115. Disputed. 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.

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

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

118. Undisputed.

119. 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.

120. 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.

121. 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.

122. 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). 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).

123. 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*. 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. 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.

124. Undisputed.

125. Disputed. J.M. Products was a real customer with its own operations to use 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. 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. 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.

126. 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.

127. Disputed. 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. In addition, section 5 of the License Agreement clearly provides that: “Each of Leonardo and Rossi will use their commercially reasonably best efforts to cause Guaranteed Performance to be achieved, including making repairs, adjustments and alterations to the Plant as needed to achieve Guaranteed Performance.

128. Disputed. 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. 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).

129. 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 DE 238 ¶¶ 1-88.

Memorandum of Law

Defendants claim to be the victims of an elaborate scheme whereby they were supposedly duped into entering into a licensing agreement and making a partial payment of \$11.5 million to Plaintiffs. Defendants, who claim to be sophisticated investors with over \$2.2 billion in capital under their management (including several different technology companies that claim to be capable of violating the law of conservation of energy by producing far more energy than it consumes¹), *see* [DE 237 at 1,] ignore several key facts:

- Prior to entering into the License Agreement, Defendants recognized that (a) the underlying technology was unproven in the scientific community, (b) Dr. Andrea Rossi, personally, had many detractors in the field, (c) expert Fabio Penon had previously provided reports on the technology and (d) further validation of the technology was required. Defendant Darden even considered the possibility that the underlying technology and previous testing related thereto were part of a bigger fraud. *See* Darden Depo. Tr. at 15:2-8, 30:22-31:11; IH Depo. Tr. at 14:1-11, 28:13-30-6, appended hereto as Composite Ex. A.
- The parties included in the License Agreement certain parameters, including retaining an agreed-upon third party (expert retained for validation or “ERV”) to perform certain measurements, for purposes of validating the technology, which would then trigger payments to Plaintiffs if successful. *See* SOF ¶¶ 13, 20.
- After the License Agreement had been in place, Defendants agreed to the ERV, reviewed and had their own outside consultants review and approve the protocol for the Validation Test. Defendants then attended the Validation Test, received the report of the ERV, and made payment as agreed upon. Defendants, prior to making payment, knew exactly how the Validation Test was performed, what and where the variables were being measured and never made a single objection or complaint. *See* SOF ¶¶ 14-19; SOFO ¶¶ 19-20.
- After the Validation Test was completed, Defendants touted the results in communications with investors/potential investors. *See* Vaughn Depo. Tr. at 95:22-96:18, appended hereto as Ex. B.
- Defendants made numerous written admissions that the time for the performance of the Guaranteed Performance Test (“GPT”) required by the agreement had been extended. *See* SOFO ¶ 25.
- Prior to agreeing to ship the 1MW E-Cat Plant for purposes of the GPT, Defendants:
 - Now claim that they had been unable to replicate any positive test results, ever; *See* SOF ¶¶ 31-33, 48.

¹ Of course, Defendants, in making this claim, seem to forget that this technology involves compliance with the laws of nuclear physics – hence the name, Low Energy Nuclear Reactions (“LENR”).

- Admitted they only wanted to test the technology and “didn’t care what [any customer] was using if for; and *See* Vaughn Depo Tr. at 195:21 – 196:11, attached hereto as Ex. C.
- Received, reviewed and commented on the protocol for the GPT, without ever informing Plaintiffs that it was their view that the 350-day test was not the contractual GPT. *See* SOF ¶¶ 44-46, 60; SOFO ¶ 25.
- Both prior to and after the commencement of the GPT, Defendants never once communicated to Plaintiffs in writing (prior to their receipt of \$50 million in funding) their claim that the time for the GPT had expired, or their belief that the protocol and/or equipment being tested was somehow improper. *See* SOF ¶¶ 45-46, 60; SOFO ¶ 25.
- Despite claiming their suspicions that the arrangement with JM Products was potentially fraudulent as early as February of 2015, Defendants continued to bring investors/potential investors to tour the facility and speak with Dr. Rossi about the technology and the test being performed. *See* SOF ¶¶ 53-54.
- In May of 2015, based in large part on the License Agreement with Plaintiffs, Defendants successfully sold approximately 4% of their company for \$50 million – equating to a \$2 billion valuation. *See* SOF ¶¶ 55-56.
- Only after Plaintiffs filed the present action in April of 2016, did Defendants first claim that Plaintiffs’ breached the License Agreement, that the Validation Test was improper, that they were fraudulently induced into shipping the 1MW E-Cat to Florida and that Plaintiffs were engaged in this elaborate scheme to defraud them. *See* SOF ¶¶ 18-19, 27.

In this very proceeding, Defendants have taken two diametrically opposed positions:

First, Defendants claim to have repeatedly told Dr. Rossi (orally, as no written notice exists), as early as October of 2013, that the time for performance of the GPT pursuant to the License had expired.

Second, Defendants claim to have been deceived by Plaintiffs (and the Third-Party Defendants) into shipping the 1MW Plant to Florida for purposes of performing the GPT. For if it was not for purposes of the GPT, and if it was merely to allow Plaintiffs to perform some non-contractual tests on the 1% chance that the technology could be validated (as claimed by Defendants), than none of the statements allegedly made by Plaintiffs would have induced Defendants’ reasonable reliance.

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

- I. **Plaintiffs are entitled to summary judgment as to Count I of the Complaint.**
 - a. **Plaintiffs timely completed the GPT as required by the terms of the License Agreement.**

Defendants, through explicit agreement, active encouragement and failure to make any statements to the contrary, induced Plaintiffs to spend over 16 hours a day for over 350 days in an extremely hot and uncomfortable working environment to perform the GPT. Plaintiffs had no contractual obligation to otherwise assist Defendants past May of 2014. *See* Pls.'Ex. ¶ 16.4. Defendants, despite claiming that the test being performed by Plaintiffs was not the GPT, successfully raised \$50 million in investment funds in the midst of Plaintiffs' performance. Only after receiving the funds did Defendants first claim that the GPT never occurred. *See, e.g.*, SOF ¶ 51.

i. The undisputed facts show that Defendants, not Plaintiffs, caused the GPT to be delayed.

When Defendants shipped the 1MW Plant to Florida in December 2014, Defendants intended to carry on with the GPT under the License Agreement. *See* SOF ¶ 43. It is undisputed that Defendant IH owned, controlled, and could have started testing the 1MW Plant at that or any time. *See id.* Yet 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* SOFO ¶ 24. It was not until June of 2014 that Defendants received clearance from their nuclear radiation compliance consultant. *See id.* When, in June 2014, Plaintiffs brought to Defendants' attention that Defendants had not – since 2013 – indicated where to install and operate the 1MW Plant, 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 id.* Significantly, Defendants fail to identify a single written request made to Plaintiffs demanding that the GPT begin, or that Plaintiffs' failure to timely assist in the commencement of the test amounted to a breach of the License Agreement or the expiration of the time for performance. As the delay in the test was caused by Defendants, they cannot now claim that Plaintiffs failed to timely perform as a result. *See, e.g., Amoco Oil Co. v. Gomez*, 125 F. Supp. 2d 492, 500-01 (S.D. Fla. 2000) (“Under Florida law, parties who prevent performance of a contract by their own acts cannot take advantage of their own wrong.”); *Gulf Am. Land Corp. v. Wain*, 166 So. 2d 763, 764 (Fla. 3d DCA 1964) (“When one of the contracting parties prevents or hinders the performance or the acts of the other contracting party required to be performed, or prevents the discharge of a contractual duty, then such actions are generally considered to be a breach of the contract, although not specified and delineated in the written instrument.”).

ii. Plaintiffs began the GPT as soon as Defendants allowed, and timely completed the GPT per the parties' agreement.

As noted *supra*, Plaintiffs had been trying to commence the GPT as early as 2013. *See* SOFO ¶ 23. In September 2014, Defendants admitted they would be shipping the 1MW Plant to Florida to begin the GPT, “a requirement of our contract with him.” *See* SOFO ¶ 25. In December 2015, Defendants shipped the 1MW Plant to Florida to begin testing, and it is undisputed that Defendants claimed they were willing to pay for performance at that time. *See* SOF ¶ 43. Once the 1MW Plant arrived in Florida, the parties agreed to the testing protocol. *See* SOF ¶ 44-46. The test ran from February 2015 to February 2016. *See* SOF ¶ 49. Plaintiffs apprised Defendants of the testing progress, and Defendants used those reports to induce investment. *See* SOF ¶ 50. Defendants brought investors to the Florida facility, despite their suspicions that there was dubious activity taking place, to induce further investment. *See* SOF ¶¶ 53-54. Defendants were successful in receiving a \$50 million in investment in May of 2015. *See* SOF ¶¶ 55-56. The ERV certified the GPT results in March 2016, delivered those results to Defendants, and Plaintiffs demanded payment under the License Agreement. *See* SOF ¶¶ 57-58. There is no written evidence that, prior to Defendants’ receipt of \$50 million in investment funds, Defendants ever told Plaintiffs that they believed Plaintiffs had violated the License Agreement or that the 350-day test taking place in Florida was not the GPT. *See* SOF ¶ 60².

These undisputed facts show that Plaintiffs meet the standard for an oral modification set forth in the case cited by Defendants - *Okeechobee Resorts, L.L.C. v. E Z Cash Pawn, Inc.*, 145 So. 3d 989, 993 (Fla. 4th DCA 2014). Facts show mutual asset: Defendants admitted to Plaintiffs and non-parties that the GPT would still occur after the time specified in the License Agreement. *See* SOF ¶ 43; SOFO ¶ 25; IH Depo Tr. at 202:24-203:21, appended hereto as Ex. D. Both parties (or at least Plaintiffs) performed consistent with the oral modification, as Plaintiffs completed the GPT. *See* SOF ¶¶ 44-46, 49, 51, 57-58. Defendants received and accepted a benefit that it was otherwise not entitled to under the original contract: Dr. Rossi continued to assist Defendants well past the time required by § 13.1 of the License Agreement, including speaking with investors to assist Defendants with their \$50 million funding. *See* SOF ¶¶ 50-56. The Court’s failure to enforce the terms of the agreement as modified above would clearly work a fraud on Plaintiffs. *See Sur. Bank v. Dunbar Armored, Inc.*, No. 14-81368-CIV-HURLEY, 2015 U.S. Dist. LEXIS 145461, at *18 (S.D. Fla. Oct. 27, 2015) (citing *Okeechobee Resorts*, 145 So. 3d at 993).

Nor should the Court give credence to Defendants’ dubious argument that Plaintiffs had already breached an agreement that Defendants intentionally continued to abide by until it was time to pay the

² Defendants proffer the testimony of Defendants Thomas Darden to dispute this fact. Plaintiffs will seek to introduce evidence showing this to be perjured testimony.

\$89 million. For the reasons stated in Plaintiffs' Partial Motion for Summary Judgment [DE 214] and Plaintiffs' Response in Opposition to Defendants' Motion for Summary Judgment [DE 238], Plaintiffs committed no prior breaches. Assuming *arguendo*, that Plaintiffs did commit a material prior breach (they did not), Defendants (a) failure to notify Plaintiffs and (b) continued acceptance of Plaintiffs' performance constitutes a waiver of such. See *Merrill Stevens Dry Dock Co. v. M/V Yeocomico II*, 329 F.3d 809, 816 (11th Cir. 2003) (quoting *Dunkin' Donuts of America, Inc. v. Minerva, Inc.*, 956 F.2d 1566, 1571 (11th Cir. 1992) ("A material breach [of a contract] does not automatically and ipso facto end a contract. It merely gives the injured party the right to end the agreement... If he elects instead to continue the contract, the obligations of both parties remain in force and the injured party may retain only a claim for damages for partial breach.")).

II. Plaintiffs are entitled to summary judgment on Defendants' Counterclaim Count

I.

a. Validation

It remains uncontroverted that: (a) Defendants and their agents/engineers reviewed and accepted the Validation Protocol prior to the Validation Test taking place (SOF ¶ 15); (b) Defendants attended the Validation Test (SOFO ¶ 19); (c) Defendants received and reviewed the Validation Test results (SOF ¶ 17; SOFO ¶ 5); (d) Defendants were satisfied with the Validation Test and Report and made payment of \$10 million pursuant to the License Agreement (SOF ¶ 26; SOFO ¶ 17); (e) Defendant Darden represented to Dr. Rossi that the amount of power produced, rather than the number of reactors tested, mattered (SOFO ¶ 5); (f) Defendants never objected to the Validation test, results, or payment related thereto until Plaintiffs brought this action (SOF ¶ 19); (g) neither Defendants nor their agents/engineers have any evidence whatsoever that any Validation data was manipulated or that nefarious activities took place (SOF ¶ 19).

Defendants' claim of fraud³ is unsupported by any evidence, and is simply a last ditch, after-the-fact effort to avoid having to make payment. Defendants were aware that Plaintiffs' proposal to test fewer than 30 E-Cat units was based on Dr. Rossi's conversations with the Regional Agency for the Protection of the Environment of Ferrara, as well as his conversations with neighbors of the facility where the test actually took place. See, e.g., SOFO ¶¶ 6-7, 15-16. Defendants point to no evidence to suggest that (a) Dr. Rossi knew what, in fact, Italian law was on the subject, or (b) he intentionally misstated that Italian law. In fact, Defendant IPH, the party bringing this claim, has no knowledge

³ This is a new argument identified in pre-trial filings for the first time. Defendants' AACT Count I is for breach of contract, not for fraud.

whatsoever about any representations that Dr. Rossi purportedly made with respect to conversations with Italian agencies or Italian law. *See* SOFO ¶ 16. Defendant Vaughn testified that he had no evidence that Dr. Rossi did not meet with the Ferrara Health Office. *See id.* Nor do Defendants present any evidence as to any relevant Italian law. Defendants cannot prove any element of a claim for fraudulent representation, the elements of which are: “(1) a false statement concerning a material fact; (2) the representor's knowledge that the representation is false; (3) an intention that the representation induce another to act on it; and (4) consequent injury by the party acting in reliance on the representation.” *Butler v. Yusem*, 44 So.3d 102, 105 (2010).

b. Replication.

Defendants claimed on numerous occasions that they had replicated the results that Plaintiffs achieved using the E-Cat IP, *see* SOF ¶ 32; SOFO ¶ 40, only to allege otherwise once they had been sued for the \$89 million.⁴ Notably, Defendants could not point to a single document in which they notified Plaintiffs of their alleged inability to replicate the technology, whether as a result of their incompetence, faulty equipment, inferior materials, or outright lies. *See* SOF ¶¶ 31, 33. The best Defendants could muster was an email provided after they received their \$50 million investment, wherein Darden states, “(w)e remain uncertain about our ability to replicate the technology...” *See* Def. SOFO ¶ 31.

Regardless, Defendants knowingly and intentionally omitted any such requirement in the License Agreement. *See* SOF ¶¶ 28-29. 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. 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)). The parties did agree to validate the technology by virtue of two separate tests: the Validation Test and the GPT Test. If Defendants intended Plaintiffs to have further obligations, they could have insisted they be placed in the License Agreement. They did not.

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.

⁴ Defendants provide self-serving testimony that their positive results were “preliminary” and were “later retracted.” *See* Def. SOFO ¶ 32. Of course, Defendants offer no written evidence of such retractions, whether they be contemporaneous or after the present lawsuit was filed.

c. **IH assigned its rights under the License Agreement and lacks standing to bring certain claims.**

Under the License Agreement, IH paid Plaintiffs \$1.5 million for the 1MW Plant. *See* Countercl. ¶ 4; SOF ¶ 12. Thereafter, and pursuant to the Agreement, Plaintiffs delivered the 1MW Plant to Ferrara, Italy for Validation. *See* Countercl. ¶¶ 50, 56. IH then assigned to IPH all rights under the License Agreement, retaining only ownership of the 1MW Plant. *See* SOF ¶¶ 5, 9, 11-12. As a matter of law and pursuant to section 3.2(a) of the License Agreement, IH would only be eligible for a refund of the \$1.5 million purchase price if Validation was not achieved. Yet as noted, *infra*, Validation was achieved and IH was thus not eligible for a refund of the Plant’s purchase price. *See* SOF ¶ 17.

III. **Plaintiffs are entitled to Summary Judgment on Defendants’ Counterclaim Count II.**

a. **Breach of Confidentiality.**

As a preliminary matter, Defendant IPH (the only party to bring Count II) claims that Plaintiffs breached section 16.4 of the License Agreement without having any proof that Plaintiffs did in fact do so. *See* SOF ¶¶ 64-66.⁵ IPH’s 30(b)(6) witness, in response to virtually every substantive question, claimed he ‘had the same information that [IH] has to support the allegation.’ When asked what information IH had, the witness responded that he did not know, and made no effort to find out. Rather than offer compelling evidence in support, Defendant IPH simply proceeds to rehash its unpersuasive arguments.

Assuming, *arguendo*, that such disclosures constituted a material breach – they would not – Defendants chose not to terminate the License Agreement, but to continue Plaintiffs’ performance thereunder, thereby waiving the purported breach. *See Merrill Stevens*, 329 F.3d at 816 (quoting *Dunkin’*, 956 F.2d at 1571 (“A material breach [of a contract] does not automatically and ipso facto end a contract. It merely gives the injured party the right to end the agreement...If he elects instead to continue the contract, the obligations of both parties remain in force and the injured party may retain only a claim for damages for partial breach.”)).

Defendants likewise ignore that section 16.4 of the License Agreement explicitly permits Plaintiffs to disclose the terms of the agreement without Defendants’ prior consent when “required by law or legal process. “ Never the less, Plaintiffs filed their Complaint and exhibits thereto, pursuant to Federal Rule of Civil Procedure 10(c) only after Defendants breached the License Agreement by, *inter alia*, failing to pay the \$89 million due and owing under the Agreement.

⁵ Plaintiffs SOF ¶ 65 should cite to page 236:15-18. The quote, and Defendants’ testimony, remains the same.

Defendants now admit - and the undisputed facts prove - that Defendants permitted and encouraged Plaintiffs to make certain disclosures to Professor Cook and the Swedish Scientists, but modify their argument to state that the License Agreement itself prohibits such disclosures even with Defendants' permission, absent a signed writing. *See* DE 237 at 16. The undisputed evidence is clear that Defendants, through multiple written emails, induced Plaintiffs to work with Professor Cook and the Swedish Scientists, and to disclose certain information to these individuals. *See* SOF ¶¶ 68-69.⁶ Under Florida law, emails constitute signed writings. *See United States Distribs., Inc. v. Block*, No. 09-21635-CIV, 2009 U.S. Dist. LEXIS 95391, at *14 (S.D. Fla. Oct. 13, 2009) (citing § 668.004, Fla. Stat. and § 668.003(4), Fla. Stat. ("Electronic signature' means any letters, characters or symbols manifested by electronic or similar means, executed or adopted by a party with an intent to authenticate a writing. A writing is electronically signed if an electronic signature is logically associated with such writing.")). As such, Defendants' "writing" argument fails. In addition, Defendants may not knowingly and intentionally induce a breach of contract, and then seek to recover thereon. Defendants have apparently abandoned their remaining breach of confidentiality theories, which is especially appropriate given that Defendants testified that they did not know what specific confidential information Plaintiffs purportedly disclosed, could not point to any other instances of purported violations, and further indicated that they did not know of any proof or facts that IPH has in support of this claim. *See* SOF ¶ 70.

Defendants have failed yet again to prove any damages, holding on tightly to their incredulous claim that they need not do so when bringing a breach of contract claim. *See* DE 237 at 16. Since Defendants filed their Motion for Summary Judgment, none of the cases to which Defendants cite have changed in Defendants' favor. As Plaintiffs explained in their Response to Defendants' Motion for Summary Judgment, Florida law requires that Defendants plead and prove damages, even if such damages are nominal. *See* DE 238 at 14-15; *see also Vital Pharms., Inc. v. Balboa Capital Corp.*, 2016 U.S. Dist. LEXIS 113942, *14 (S.D. Fla. Aug. 25, 2016) ("To establish a cause of action for breach of contract, the [complainant] must plead and prove ... damages to the [complainant]."). Perhaps Defendants have taken this novel position because they have sworn that the E-Cat IP has no value and are unable to identify any damages. *See* SOF ¶¶ 72-73, 77. As a matter of law, Plaintiffs are entitled to summary judgment on this count.

b. Failure to Assign Licensed Patents.

⁶ Defendants claim that Plaintiffs' citations to Defendants' e-mails and testimony is taken out of context.

Plaintiffs are entitled to summary judgment on this count for at least two reasons. First, as a matter of law, the License Agreement itself was an exclusive license “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))). Given that the License Agreement itself provided for precisely what Defendants’ February 2016 letter purported to demand, Defendants cannot seriously maintain that Plaintiffs have materially breached the License Agreement.

Second, Defendants have admittedly failed to prove an essential element of their breach of contract claim: damages. As noted *supra*, Florida law requires that Defendants plead and prove damages, even if such damages are nominal. See DE 238 at 14-15; see also *Vital Pharms.*, 2016 U.S. Dist. LEXIS 113942 at *14.

c. **Failure to Inform/Consult on Patent Applications.**

Defendants set the standard for “flimsy evidence” and gamesmanship by swearing at deposition that they had no idea when, which, or how many patent applications Plaintiffs purportedly filed or abandoned, but two weeks later providing an unverified and unsubstantiated “lists” of patents about which Defendants prejudicially deprived Plaintiffs of questioning. See, e.g., SOF ¶ 82; SOFO ¶ 47. Yet these lists are not admissible at trial and should not be reviewed as evidence for purposes of summary judgment. See Fed. R. Civ. P. 56(c)(2); *Reassure Am. Life Ins. Co. v. Warner*, No. 08-22664-CIV, 2010 U.S. Dist. LEXIS 134312, at *4 (S.D. Fla. Nov. 17, 2010). Defendants have produced no evidence sufficient to support a finding that the lists are what Defendants claim they are. See Fed. R. Evid. 901(a). Defendants have presented no testimony with respect to these lists. Defendants have provided no statement from the USPTO or any other body authenticating the contents of the lists and/or showing that the listed patents were filed or abandoned⁷. Defendants have not submitted the actual applications to the Court. Defendants simply assert these “lists” are evidence – albeit inadmissible and unverified – of Plaintiffs’ purported breach.

Finally, faced with undisputed evidence showing that Defendants had not determined or computed damages related to this claim, Defendants cling to their baseless argument that they are not required to provide an essential element of their breach of contract claim: damages. See, e.g., SOF ¶ 83. As noted *supra*, Florida law requires that Defendants plead and prove damages. See DE 238 at 14-

⁷ Plaintiffs submit that they did file provisional patents with the USPTO, they sent copies of such to IH, and most of these provisional patents expired as of their own terms (12 months after being filed). An expiration of a provisional patent does not constitute abandonment.

15; *see also Vital Pharms.*, 2016 U.S. Dist. LEXIS 113942 at *14. Defendants' failure to do so entitles Plaintiffs to summary judgment. To the extent that Defendants claim that they made any payments that Leonardo was required to make, their claim is barred by the doctrine of voluntary payment; Defendants readily admit to knowing the underlying facts and proceeding to make payments. *See Deere Constr., LLC v. Cemex Constr. Materials Fla., LLC*, 198 F. Supp. 3d 1332, 1342 (S.D. Fla. 2016).

d. Breach of the Covenant Not to Compete.

Defendants' dubious argument that Plaintiffs are prohibited from working in any other territory in the world on Plaintiffs' life's work is directly contrary to Florida law, and ignores the fact that the license only applied to defined territories.

Under Florida law, covenants not to compete must be reasonable in time, area, and line of business. *MDS (Canada), Inc. v. Rad Source Techs., Inc.*, 822 F. Supp. 2d 1263, 1313 (S.D. Fla. 2011) (citing § 542.335(1), Fla. Stat.). Where a covenant not to compete has "omitted any limitation whatsoever as to time or area," Courts will read a reasonable time or area into the contract rather than assuming that the limit does not exist. *See Kofoed Pub. Relations Assocs., Inc. v. Mullins*, 257 So. 2d 603, 605 (Fla. 4th DCA 1972) (citing *Flammer v. Patton*, 245 So. 2d 854, 855 (Fla. 1971)). Given that non-compete provisions are "in derogation of the common law rule precluding agreements in restraint of trade, any such agreement must be construed strictly against the purported restraint." *Dunkin v. Barkus & Kronstadt, D.O.'s P.A.*, 533 So. 2d 877, 878 (Fla. 3d DCA 1988).

Plaintiffs have not engaged in prohibited competition in violation of the License Agreement. *See* SOF ¶ 87. Defendants have suffered no damages related to this purported claim. *See* SOF ¶¶ 85-86. For the foregoing reasons, Defendants claim fails as a matter of law, and Plaintiffs are entitled to summary judgment with respect thereto.

e. Failure to Pay Taxes.

First, this is not an affirmative claim. *See* Countercl. ¶ 132. Next, Defendants have neither alleged nor suffered any damages whatsoever. *See* SOF ¶¶ 89-91; DE 237 at 26. Nor could Defendants suffer any damages since, 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). As noted *supra*, Florida law requires that Defendants plead and prove damages, even if such damages are nominal. *See* DE 238 at 14-15; *see also Vital Pharms.*, 2016 U.S. Dist. LEXIS 113942 at *14.

Finally, merely attaching copies of Plaintiffs' tax returns proves nothing. Defendants provide no testimony, expert or otherwise, contradicting the propriety of the tax returns, or explaining that they are somehow false. Simply, there is no evidentiary basis to support this (non) claim.

IV. Plaintiffs are entitled to summary judgment as to Defendants' FDUTPA Counterclaim.

a. Plaintiffs sold no goods or services, and received no monies from Defendants related to this claim; IH Lacks Standing

Defendants' action does not fail because Defendants are not consumers. Defendants' action fails because Plaintiffs' alleged actions do not fall under the statute. *See* § 501.203(8), Fla. Stat. (Plaintiffs did not advertise, solicit, provide, offer, or distribute any tangible or intangible good, service, or property to Defendants or any other consumer). Instead, Defendants argue that "Plaintiffs' conduct clearly involved trade or commerce since they were charging IH and IPH for expenses associated with operating the 1MW Plant in Florida and they were allegedly providing a product (steam) to J.M. Products in Florida pursuant to a Term Sheet that would require payment for that product to IH." (DE 237 at 20). In support of their alleged expenses associated with operating the 1MW Plant, Defendants point to one exhibit – Ex.54 – which evidences no such expenses. Instead, Ex. 54 identifies payments made to Third-Party Defendant Unites States Quantum Leap, LLC. Even if they could point to some evidence in this regard, such would still not amount to a payment to Plaintiffs within the scope of Fla. Stat. § 501.203(8). Defendants lack proof, and summary judgement is appropriate.

Further, IH lacks standing, not because its claims are tied to the express contract with Plaintiffs, but rather because all of the acts alleged took place after IH made its assignment of its contractual rights to IPH. *See* SOF ¶¶ 9, 11. Contractual privity is not at issue. At issue is which party, if any, had suffered any harm.

b. Defendants Cannot Show Causation.

Defendants cite to *Toback v. GNC Holdings, Inc.*, 2013 U.S. Dist. LEXIS 131135, *8, 2013 WL 5206103 (S.D. Fla. Sept. 13, 2013) in support of their claim that the element of causation is met when the alleged misrepresentations would have deceived an objectively reasonable person. In support of this standard, Defendants point to the self-serving testimony of Defendants Vaughn and Darden. For purposes of this motion, even assuming that Plaintiffs made the alleged misrepresentations as claimed by Vaughn and Darden (as there is no written proof of any such statements), no objectively reasonable person would have been deceived in light of the contradictory testimony given by both Darden and Vaughn, and written communications from Darden:

- Defendants had repeatedly told Dr. Rossi that the time of the GPT had expired. *See* SOF ¶ 25.
- Defendants’ ultimate goal was “to accommodate [Dr. Rossi] and to determine the state of the art, whether or not it really works.” *See* SOF ¶ 99.
- IH’s corporate representative (Vaughn) testified that Defendants “could care less about a customer.” *See* SOF ¶ 99.
- The License Agreement did not require that a customer be involved in any way with any test under the Agreement. *See* SOF ¶ 96.
- Moreover, Defendants did no due diligence into the customer other than meet with its CEO, whom Defendants knew to be Dr. Rossi’s real estate attorney. *See* SOF ¶ 99.
- Defendants were admittedly only concerned with testing the E-Cat IP, and did not care about any purported customer. *See* SOF ¶ 99.
- In March of 2015, months after the alleged misrepresentations, Darden admitted that he did not know the nature of the customer and that such was not even related to the “core issue.” *See* SOF ¶ 101.

In addition, given Defendants’ position that Dr. Rossi was difficult to communicate with, that he was volatile, that he would not cooperate with Defendants, and that he was completely unreasonable and untrustworthy from the very beginning, Defendants cannot now claim that they justifiably relied on such representations. *See* IH Depo. Tr. at 150:24-151:11, 151:12-15, 203:11-19; Vaughn Depo. Tr. at 105:1-6, 125:6-14, 246:21-25; Darden Depo. Tr. at 127:19-22, appended hereto as Composite Ex. E; *Hall v. Burger King Corp.*, 912 F. Supp. 1509, 1524 (S.D. Fla. 1995) (“Where a hostile and antagonistic relationship exists between the parties, reliance on any alleged misrepresentations is unreasonable as a matter of law.”) Florida law is clear that a party “is not entitled to rely blindly on the opposing party’s representations where . . . the relationship between the parties has been plagued with distrust.” *Id.* (citing *Pieter Bakker Management, Inc. v. First Fed. Sav. & Loan Ass’n*, 541 So. 2d 1334, 1335 (Fla. 3d DCA 1989).

Defendants seem to believe that by repeating their claim that Plaintiffs manipulated data over and over, that somehow, such will constitute evidence of the allegation. Defendants ignore their own testimony, their employees’ testimony, and their purported expert’s testimony that there was no evidence of any manipulated data. *See* SOF ¶¶ 102-103. With respect to the data received from Florida Power and Light (“FPL”), Defendants’ purported expert, Murray testified that the FPL data could have been erroneous, and that it was equally as likely as Penon’s data being erroneous. *See* Murray Depo. Tr. at 280:12-15, 281:22-282:5, 282:22-283:6, appended hereto as Ex. F. Defendants also ignore that

they agreed to the GPT Protocol, and received quarterly reports from ERV Penon, but never objected to them.

c. Defendants suffered no actual damages.

In an attempt to work around the requirement that they prove actual damages, Defendants cite to *Morgan v. Pub. Storage*, No. 1:14-CV-21559-UU, 2015 WL 11233111, at *1 (S.D. Fla. Aug. 17, 2015). This case cannot save this FDUPTA claim, as *Morgan* involved a factually specific case in which the Defendant represented that certain fees it collected would be transferred to a third party. Instead of transferring those monies, the Defendant retained those fees. The key to the *Morgan* holding being that the Defendant actually kept the money/received some profit. This fact is conspicuously absent in the present case, as neither Dr. Rossi nor Leonardo made any profit or kept any monies stemming from the alleged FDUTPA scheme. As such, the FDUTPA claim must fail.

V. Plaintiffs are entitled to summary judgment on their Affirmative Defenses.

Defendants bear the burden of proving facts to establish the elements of their affirmative defenses. *See, e.g., Marshall v. BATFE*, No. 10-21424-CIV, 2011 U.S. Dist. LEXIS 29345, at *3 (S.D. Fla. Jan. 31, 2011). They have failed to do so, and summary judgment is appropriate.

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

Defendants abandon their assignment argument and now claim that the Section 16.4 of the License Agreement precludes a transfer of the rights by virtue of "operation of law." This argument, too must fail, as Leonardo New Hampshire was merged into Leonardo Florida. Tellingly, Defendants point to no case law in support of their new argument, nor do they address the case law cited by Plaintiffs. To support their claim that Plaintiff Rossi lacks standing, Defendants cite to *Dinuro Invs., LLC v. Camacho*, 141 So.3d 731, 741-42 (Fla. Dist. Ct. App. 2014). The *Dinuro* court held that a limited liability company ("LLC") member who was a party to an operating agreement along with the LLC and other members could not enforce the other members' obligations under the agreement that flowed to the LLC and not directly to the member, but instead should have brought the claim derivatively. Such facts are inapposite to the present case, as Dr. Rossi could not bring a derivative action in the present case.

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

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

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

i. Estoppel. To succeed on a claim for equitable estoppel, Defendants must prove: "(1) a representation of fact by one party contrary to a later asserted position; (2) good faith reliance by another party upon the representation; and (3) a detrimental change in position by the later party due to the reliance." *MSC Mediterranean Shipping Co. SA, Geneva v. Metal Worldwide, Inc.*, 884 F. Supp. 2d 1269, 1274 (S.D. Fla. 2012). Defendants make no attempt to identify any evidence in support of these elements, and instead regurgitate their "merger and integration" argument. *See* DE 237 at p. 27. This is not sufficient to support their defense of estoppel, and summary judgment is appropriate.

ii. Waiver. To succeed on a claim for waiver, Defendants must prove: "(1) the existence at the time of the waiver of a right, privilege, advantage, or benefit which may be waived; (2) the actual or constructive knowledge of the right; and (3) the intention to relinquish the right." *Dantzler, Inc. v. PNC Bank, Nat. Ass'n*, 946 F. Supp. 2d 1344, 1367–68 (S.D. Fla. 2013). Defendants again fail to present evidence as to any of these elements or any facts that would purport to support a waiver, and refer to their "merger and integration" argument. Plaintiffs are entitled to judgment as a matter of law as to this defense.

iii. Laches. To succeed on a claim for laches, Defendants must prove: "(1) a delay in asserting a right or a claim; (2) that the delay was not excusable; and (3) that there was undue prejudice to the party against whom the claim is asserted. *AmBrit, Inc. v. Kraft, Inc.*, 812 F.2d 1531, 1545 (11th Cir. 1986); *see also I.C.E. Mktg. Corp. v. Gapardis Health & Beauty, Inc.*, No. 00-02280-CIV, 2014 WL 10093869 at *8 (S.D. Fla. Nov. 13, 2014), *report and recommendation adopted in part*, No. 00-CV-02280, 2015 WL 4243528 (S.D. Fla. July 13, 2015). Defendants fail to provide any evidence of delay, much less inexcusable delay, or any evidence as to how they were somehow prejudiced as a result of such delay. Plaintiffs do not argue that the License Agreement is invalid. Defendants argue that it had expired, and that Plaintiffs' performance thereafter, resulting in great benefit to Defendants, should be disregarded. If Defendants' argument is deemed correct, then Defendants have been unjustly enriched by Plaintiffs' performance post-expiration. The defense of laches must fail, as there is no evidence to support it.

c. Defendants' Affirmative Defense No. 3: Unclean Hands.

For reasons more fully set forth in Section IV, Defendants' Affirmative Defense of Unclean Hands.

d. Defendants' Affirmative Defense No. 4: Antecedent Breach.

For reasons more fully set forth in Section III(a-c), Defendants' Affirmative Defense of antecedent breach must fail.

e. Defendants' Affirmative Defense No. 5: Unlawful Actions (FDUTPA)

For reasons more fully set forth in Section IV, Defendants' Affirmative Defense of unlawful actions must fail.

f. Defendants' Affirmative Defense No. 7: Proximate Cause.

This defense does not admit, justify or avoid Plaintiffs' claims, and is instead a mere denial of the element of causation. Denial of causation is not an affirmative defense. Even if it were an affirmative defense, Defendants have produced no evidence in support of how either Plaintiffs' or the Third-Party Defendants' actions have resulted in Plaintiffs being unjustly enriched.

g. Defendants' Affirmative Defense No. 8: Merger and Integration Clause.

In Florida, "the existence of a merger or integration clause, which purports to make oral agreements not incorporated into the written contract unenforceable, does not affect the oral representations which are alleged to have fraudulently induced a person to enter into the agreement." *TEC Serv., LLC v. Crabb*, No. 11-62040-CIV, 2013 WL 11326552, at *6 (S.D. Fla. Jan. 23, 2013) (citations omitted). The Florida Supreme Court is clear that "[t]o hold that by the terms of the contract which is alleged to have been procured by fraud, the [party] could bind the [other party] in such manner that lessee would be bound by the fraud of the [party] would be against the fundamental principles of law, equity, good morals, public policy and fair dealing." *Oceanic Villas, Inc. v. Godson*, 4 So. 2d 689, 690 (1941). The Court went on "recognize the rule to be that fraud in the procurement of a contract is ground for rescission and cancellation of any contract unless for consideration or expediency the parties agree that the contract may not be cancelled or rescinded for such cause, and that by such special provisions of a contract it may be made incontestable on account of fraud, or for any other reason." *Id.*

Oceanic Villas is undisturbed by, and not in conflict with the lower court's decision in *Billington v. Ginn-LA Pine Island, Ltd.*, 192 So.3d 77, 83 (Fla. 5th DCA 2016). *Billington* involved a non-reliance clause through which the buyer explicitly agreed that it was not relying on any statement not specifically expressed in the contract or related documents. *Id.* The *Billington* court found that provision "as clear and conspicuous as [it was] comprehensive," clearly meeting the *Oceanic Villas* standard. *Id.* at 84. The Court noted that in "virtually all of the cases that have addressed the distinction between [a merger and non-reliance clause, the latter being the clause in question in the case] ... [t]hese cases have concluded that non-reliance clauses negate claims for fraud, but integration or merger clauses do not. *Id.* Accordingly, as a matter of law Defendants' affirmative defense must fail.

Dated: April 11, 2017.

Respectfully submitted,

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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 11, 2017, on all counsel or parties of record on the attached Service List.

/s/ John W. Annesser

John W. Annesser, Esq.

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