

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.

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 BASS

Third-Party Defendants.

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

**DEFENDANTS' REPLY TO
PLAINTIFFS' RESPONSE IN
OPPOSITION TO DEFENDANTS'
CONSOLIDATED MOTION IN
LIMINE**

INTRODUCTION

Defendants Thomas Darden, John T. Vaughn, Industrial Heat, LLC (“IH”), IPH International B.V. (“IPH”) and Cherokee Investment Partners, LLC, hereby reply to the oppositions submitted by Plaintiffs Andrea Rossi and Leonardo Corporation and Third-Party Defendants J.M. Products, Inc. (“JMP”), Henry Johnson and James A. Bass (collectively “Respondents”) in response to Defendants’ Consolidated Motion in *Limine* (“Motion” or “Mot.”). Defendants’ motion should be granted for the following primary reasons:

- (1) Plaintiffs admittedly destroyed multiple categories of evidence that are crucial to the claims they assert in this litigation, so an adverse jury instruction is necessary;
- (2) Plaintiffs concede (at 3) that Defendants’ request to preclude Rossi and Penon from opining on the performance of the E-Cat IP and the 1MW Plant in Florida is “reasonable”; and only designated experts are eligible to give expert testimony under the Federal Rules of Civil Procedure; and
- (3) Plaintiffs admittedly lost the underlying data and shipped overseas the measuring devices allegedly supporting the reports of Fabio Penon (“Penon’s Reports”); because the information Penon relied on is patently unreliable, his report allegedly certifying that Plaintiffs successfully completed the Guaranteed Performance Test as required by the License Agreement should be deemed inadmissible.

Respondents’ counter-arguments rely largely on Florida state procedural law, which does not apply to this federal diversity case. Their suggestion that Defendants are somehow culpable for Plaintiffs’ destruction of material evidence in anticipation of this litigation, moreover, distorts the Eleventh Circuit’s spoliation law beyond recognition. Respondents’ arguments are without merit and should be rejected.

ARGUMENT

I. Plaintiffs’ and JMP’s Admission That They Destroyed Material Evidence Should Be Sanctioned—at a Minimum—with an Adverse Jury Instruction.

As explained in Defendants’ appeal of the Magistrate Judge’s oral denial of their spoliation motion [D.E. 285], Plaintiffs and Third-Party Defendants should be sanctioned for destroying material evidence in anticipation of this lawsuit. Specifically, the Court should dismiss Plaintiffs’ breach-of-contract claims or, at a minimum, instruct the jury that the missing evidence would have demonstrated that: (1) the 1MW Plant did not produce, and could not have produced, the steam output Plaintiffs claim; and (2) Rossi and Leonardo manipulated the results of the Guaranteed Performance Test to falsely claim \$89 million under the License Agreement.

“[S]poliation is established when the party seeking sanctions proves (1) that the missing evidence existed at one time; (2) that the alleged spoliator had a duty to preserve the evidence; and (3) that the evidence was crucial to the movant being able to prove its *prima facie* case or defense.” *Floeter v. City of Orlando*, No. 6:05-cv-400-Orl-22KRS, 2007 WL 486633, at *5 (M.D. Fla. Feb. 7, 2007) (citations omitted). In this case, two of the three elements of spoliation are undisputed, while the third is established by the allegations in Plaintiffs’ own complaint.

First, it is undisputed that, after filing this lawsuit, Plaintiffs destroyed three categories of evidence bearing on the merits: the output pipe, the purported heat exchanger, and the daily emails between Rossi and Penon regarding the status of the testing. At the April 20, 2017 hearing before the Magistrate Judge, Plaintiffs’ counsel conceded that the missing evidence existed at one time. April 20, 2017 Hearing Tr. (attached hereto as Exhibit 1) at 20, 26, 32, 31 (the output pipe “did exist at one time;” “we certainly claim [the heat exchanger] exists;” and “[m]y client has testified that he sent emails on a daily basis” but “[w]e don’t know what happened to them”—even though “the email communications between Dr. Rossi and . . . Dr. Penon is [sic], I have to say, would be material to the case”). Plaintiffs claim that they destroyed the output pipe and alleged heat exchanger, disassembled them both, and deployed them elsewhere at the Doral Warehouse. Leonardo Dep. (Mot. Ex. 4) 272:22-273:8, 273:24-274:5; Rossi Dep. (Mot. Ex. 1) 236:10-237:18; JMP Dep. (Mot. Ex. 8) 94:1-6.

Second, it is undisputed that Plaintiffs anticipated this litigation putting the Guaranteed Performance Test at issue in December 2015. On December 4, 2015, IPH advised Plaintiffs’ counsel in writing that the activity at the Doral Warehouse did not constitute “guaranteed performance” under the License Agreement. Mot. Ex. 12. Plaintiffs’ counsel responded that IH had breached the License Agreement. *See* Mot. Exs. 13 & 14. At the April 20 hearing, Plaintiffs’ counsel represented that “in December 2015, it was clear that litigation was going to ensue if they didn’t pay, and that was the issue that we raised.” Tr. April 20, 2017 Hearing, at 20. In March of 2016, counsel for both sides jointly padlocked the 1MW Plant on the mutual understanding that its contents must be preserved. *See id.* at 8-9. Clearly, Plaintiffs and JMP reasonably anticipated this lawsuit when they spoliated the evidence in question.

Under *Flury v. Daimler Chrysler Corp.*, 427 F.3d 939 (11th Cir. 2005), the question remaining is whether the destroyed evidence was crucial to the proof or defense of Plaintiffs’

breach-of-contract claims.¹ Rather than framing a substantive argument under the applicable federal law for spoliation sanctions, Respondents claim (at 2) that the Magistrate Judge's oral denial of Defendants' spoliation motion is somehow dispositive of the instant motion. To the extent Respondents cite legal authority, it is mostly inapposite state law – whereas “federal law governs the imposition of spoliation sanctions. *Flury*, 427 F.3d at 944.”² With respect to the Magistrate Judge's order, for the reasons set forth in Defendants' appeal, the Magistrate Judge's misapplication of Eleventh Circuit case law was reversible error. And, with respect to the Magistrate Judge's order, for the reasons set forth in Defendants' appeal, its misapplication of Eleventh Circuit case law was reversible error.

On the merits, *Flury* undercuts Plaintiffs' opposition. In that case, the plaintiff sued a car manufacturer for injuries sustained in an accident resulting from a defective airbag system. The manufacturer asked to inspect the vehicle, but received no response. Eventually the car was sold for salvage by the insurer. On summary judgment, the district court determined that the manufacturer “had several months to follow up on its request to inspect the vehicle” and thus “shared some of the culpability and dismissal was not warranted;” it instead instructed the jury to apply a presumption that the lost evidence was unfavorable to the plaintiff. *Id.* at 942. The Eleventh Circuit reversed, finding that “the extraordinary nature of the plaintiff's actions coupled with extreme prejudice to the defendant warrants dismissal,” as “Plaintiff failed to preserve an allegedly defective vehicle in a crashworthiness case.” *Id.* at 943.

Similarly, Plaintiffs failed to preserve evidence of their alleged compliance with the License Agreement in a case *they brought* to enforce that Agreement. Plaintiffs filed suit in

¹ The law in this Circuit is unclear as to whether bad faith is a mandatory fourth element for spoliation claims, but even if it is, it is met here. No reasonable finder of fact could credit Plaintiffs' claim that they routinely and legitimately repurposed generic piping and scrap parts from their alleged heat exchanger, particularly given their knowledge as of December 2015 that a lawsuit regarding the purported Guaranteed Performance Test was imminent. *See Managed Care Solutions, Inc.*, 736 F. Supp. 2d at 1326, 1331 (S.D. Fla. 2010) (reciting factors for circumstantial evidence of bad faith); D.E. 285.

² Even if Florida state law applied, there is nothing untimely about Defendants' spoliation motion, which was filed prior to a decision on summary judgment. *Cf.* Plfs' Opp. 3. Likewise, “in diversity cases, the Federal Rules of Evidence govern the admissibility of evidence in federal courts.” *Flury*, 427 F.3d at 944 (quotation omitted). Thus, Plaintiffs' reference to the so-called “statement of legal consequence” doctrine under Florida law (at 6), as well as their general statements of Florida law governing motions *in limine* and exceptions to hearsay (at 7), are beside the point.

April 2016—after they destroyed the output pipe and heat exchanger—claiming that they satisfied the Agreement’s requirement that they successfully conduct a Guaranteed Performance Test showing that the steam carried by the output pipe was consistently at least 100 degrees Celsius and that, as a result, Defendants owe them \$89 million. Compl. [D.E. 1] Ex. B. § 5, ¶¶ 46.c, 71-74 (\$89 million payment hinged on “the successful completion of a three hundred fifty (350) day test period (hereafter the ‘Guaranteed Performance Test’)”); *see id.* ¶ 6 (stating that this lawsuit was brought “to enforce the terms of the License Agreement”); Plfs’ Opp. 6 (restating that lawsuit concerns whether “Defendants were legally obligated to pay Plaintiffs the amount of \$89 million upon . . . Guaranteed Performance”).

Hence, as in *Flury*, “plaintiff should have known that [materials used in the purported Guaranteed Performance Test], which was the very subject of his lawsuit, needed to be preserved and examined as evidence central to his case.” 427 F.3d at 945. Because Plaintiffs and JMP destroyed the output pipe, it could not be examined for signs of water flowing through the pipe. Yet if the output pipe carried water instead of steam, Plaintiffs did not satisfy their obligations under the License Agreement or their burden of proof on their breach-of-contract claims. Similarly, the parties’ experts agree that without the heat exchanger, the 1MW Plant—if functioning as claimed—would produce temperatures that were too high to sustain human life in the Doral Warehouse. If the heat exchanger did not work—or if it did not exist, which the complete absence of documenting evidence suggests—Plaintiffs lose their breach-of-contract claim. Both Rossi and Penon also testified that they had daily email communications about the operation of the 1MW Plant during the supposed Guaranteed Performance Test. *See* Penon Dep. (Mot. Ex. 9) 190:2-17; Leonardo Dep. (Mot. Ex. 4) 37:5-39:24. If those emails demonstrated that the 1MW Plant was not performing as required under the License Agreement, Plaintiffs’ breach-of-contract claims for an \$89 million payout must again fail. As in *Flury*, therefore, Plaintiffs’ and JMP’s spoliation materially and unjustifiably hampered Defendants’ ability to mount a defense on the merits, and should be sanctioned.

Plaintiffs’ excuse for avoiding spoliation sanctions—that *Defendants* bore the burden of putting Plaintiffs on additional, particularized notice that Plaintiffs should not destroy crucial evidence—is neither credible nor an accurate statement of the governing law. In *Flury*, the Eleventh Circuit flatly rejected an analogous argument, exclaiming that “[t]he record makes it evident that only one party was at fault for the vehicle’s spoliation—the plaintiff!” 427 F.3d at

945. The same holds true here. “Defendant[s] could not have prevented spoliation, nor could any action have been expected,” because Defendants were never informed of the heat exchanger’s existence, were not allowed into the portion of the Doral Warehouse that allegedly housed the heat exchanger, and were not informed that the output pipe had been dismembered and scattered—rather than stored for Defendants’ inspection—until long after the spoliation. *Id.* Accordingly, at a very minimum, an adverse inference jury instruction—which the Eleventh Circuit *rejected as insufficient* to remedy the prejudice in *Flury*—should be given in this case.

II. Because Rossi and Penon Are Neither Designated—Nor Qualified—Experts, They Should Not Be Allowed to Testify as to Whether the E-Cat Technology Worked.

In response to Defendants’ motion for an order precluding Rossi, Penon and others from testifying as experts under the guise of lay witnesses, Respondents’ response is stunning. Essentially, Plaintiffs argue that—though not timely designated or qualified as experts—Penon and Rossi should be allowed to testify regarding the ultimate issue on the merits of Plaintiffs’ breach-of-contract claim: whether the E-Cat technology worked as promised during the Guaranteed Performance Test, thereby triggering an \$89 million payment from Defendants. *See* Plfs’ Opp. at 4 (stating that “Rossi . . . will testify as to . . . conclusions within his knowledge related to the nature of the E-Cat technology,” that “Penon . . . will also testify as to . . . conclusions gathered and formulated by him during the Guaranteed Performance Test,” and that “both Dr. Rossi and Dr. Penon” will be asked to respond to the opinions of “Defendants[’] expert witnesses”).

But there is no valid evidence supporting Plaintiffs’ claims to have invented a “disruptive technology.” Indeed, the United States Patent Office (“USPO”) found, in rejecting Plaintiffs’ patent application, that Rossi makes “the incredible claim of exothermic fusion of hydrogen and nickel in a laboratory environment . . . [and] the known and existing laws of nature do not support this reaction.” *See* Ex. 1 to 4th AACT, U.S. Patent and Trademark Office “Non-Final Rejection,” dated January 11, 2016 as to Patent App. No. 12/736,193 (attached hereto as Exhibit 2) ¶ 21.³

³ The USPO further noted that “claims directed to this mode of fusion have been rife with fraud and fail to measure up to even cursory examination under the generally accepted laws of physics.” Ex. 3, ¶13. The USPO noted that “there exists no credible independent, peer-reviewed evaluation of the e-Cat device. Nor has there been a credible attempt at explaining the purported nickel phenomenon. Additionally, attempts to independently verify the Rossi device appear to

Against this background, it is especially important to observe the Eleventh Circuit's admonition that, in "distinguishing between law and expert testimony, . . . trial courts must be vigilant in ensuring that the reliability requirements set forth in Rule 702 [governing expert testimony] not be evaded through the simple expedient of proffering an expert in lay witness clothing." *Williams v. Mast Biosurgery USA, Inc.*, 644 F.3d 1312, 1317 (11th Cir. 2011) (quoting *United States v. Henderson*, 409 F.3d 1293, 1300 (11th Cir. 2005)). Such "hybrid witnesses" may testify in some instances about personal observations, but generally only when such testimony is "helpful in understanding the witness' decision making process." *Kaplan v. Kaplan*, No. 2:10-cv-237-FtM-99SPC, 2012 WL 1660605, at *1 (M.D. Fla. May 11, 2012). However, "[s]uch witnesses may not cross the line and offer expert testimony, which must comply with the requirements of Federal Rules of Evidence and the strictures of *Daubert*." *Id.* "If these experts are proffered for their expert opinions, such opinions must be disclosed in accordance with Federal Rule of Civil Procedure 26." *Id.*

Plaintiffs conflate "observations" with "measurements" and "conclusions," but these are dramatically different types of evidence. In connection with both the Validation test and the purported Guaranteed Performance Test, neither the inputs nor outputs for the tests are based on observations, but require expert opinions as to how and what measurements were made and what conclusions can be drawn from those measurements. No one "observed" the temperature of the heated fluid in the output pipe; rather, the temperature was measured by thermocouple devices, which are designed to measure relative temperature differences between two locations (and hence are very dependent on whether the reference temperature for the thermocouple is set correctly). See https://en.wikipedia.org/wiki/Thermocouple#Characteristic_function. Also, no one "observed" the flow of cooled fluid into the 1 MW Plant; instead, the fluid flow was measured by a meter that approximates how much liquid flows through it based on how often a turbine is rotated – and its accuracy depends on whether the correct meter is used and used properly. See Ex. 5 to 4th AACT (attached hereto as Exhibit 3). Testimony on measurements of the input and output of the 1 MW Plant, whether for "validation" or "guaranteed performance,"

(continued...)

have been met with resistance." *Id.* ¶20. Thus, the USPO concluded, "the absolute dearth of independent confirmation and the carefully crafted 'demonstrations' would cause a person of ordinary skill in the art to doubt the operability of the [E-Cat] device as claimed." *Id.* ¶21.

would require specialized knowledge subject to expert disclosure obligations, as so clearly would any conclusions about the 1 MW Plant's purported performance based on such measurements.

Obviously, any opinions or "observations" offered to rebut Defendants' experts are not offered for the purpose of understanding Plaintiffs' "decision-making process." They would be offered purely to rebut Murray and Smith. The time for Rule 26 disclosures has long passed. Accordingly, Rossi and others may only testify as to their personal factual knowledge; testimony regarding lay opinions must be confined to personal experience that is helpful in understanding their decision-making process. It may not be offered to rebut Defendants' experts, and furthermore any "conclusions drawn" by Rossi or Penon on the ultimate issue of whether Plaintiffs satisfied the Guaranteed Performance Test within the meaning of the License Agreement are outside the scope of proper lay testimony and must be excluded. Plfs. Opp. 5.

III. Penon's Reports Are Based on Patently Unreliable Data and Should Be Excluded.

Penon's Reports should be deemed inadmissible because they are meaningless and utterly reliable. Indeed, Plaintiffs offer *no response* to Defendants' argument that Penon's Reports fail Fed. R. Evid. 403.⁴ Plaintiffs merely state that they "contained his observations and his measurements." Plfs' Opp. 6. According to the evidence adduced during discovery, the information in Penon's Reports was *not* based on his actual observations of the energy output of the 1MW Plant. In fact, Penon was only physically at the Doral Warehouse *four times* over the course of more than a year. Penon Dep. 105:8-11 (attached hereto as Exhibit 4). He could not observe any steam allegedly flowing through the sealed output pipe. His purported electrical measurements do not correspond with official data from Florida Power & Light ("FPL") on the dates in question. Expert Disclosure of Joseph Murray (Mot. Ex. 6) at 1-2. And there is conflicting evidence regarding the source of data allegedly reflected in Penon's Reports. Penon testified that he put his own thermal sensors on the output pipe to measure its temperature and that Fabiani read those sensors and emailed the data to Penon on a daily basis—emails that have mysteriously disappeared or were intentionally destroyed. Penon Dep. (Mot. Ex. 9) 170:15-172:2. By contrast, Fabiani testified that he used his own set of sensors and sent his own data—

⁴ Rule 403 provides that "[t]he court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence."

not Penon's—to Penon. Fabiani Dep. (Mot. Ex. 10) 38:25-40:12; 46:10-47:19. Moreover, temperature measurement data produced in discovery reflect anomalous results, such as continuing high temperatures in the output pipe after the 1 MW Plant was shut down. *See* Fabiani temp. data Feb. 16-17, 2016 (attached hereto as Exhibit 5). In short, the data underlying the Penon Reports is unreliable. In addition, the incongruent factual scenarios regarding Penon's data are all the more reason why the spoliated evidence—which could have been used to test Penon's Reports—is so prejudicial to Defendants, and should be sanctioned.

Plaintiffs next suggest that the reliability of Penon's Report is “undisputed” because the parties allegedly agreed that Penon—a prior associate of Rossi's—would perform the validation test, which *preceded and was entirely distinct from* the Guaranteed Performance Test. *See* Plfs' Opp. 6. In stating that “[t]he report represents” proof that they “achieved Guaranteed Performance,” Plaintiffs apparently read paragraph 5 of the License Agreement—setting forth the terms and conditions of the Guaranteed Performance Test—as entitling them to \$89 million *regardless of whether the E-Cat technology actually produced the “revolutionary” heat and energy they claimed it would*. *See id.* 6 (“The report represents such certification, thereby giving rise to the legal consequences of the \$89 million payment.”); Compl. Ex. B. § 5. This is folly.

The License Agreement is clear that in order to trigger payment, the expert responsible for the validation test (the “ERV”) must provide written confirmation of the “guaranteed performance” *in addition to*—not in lieu of—Plaintiffs' successful achievement of the Guaranteed Performance Test itself. The License Agreement provides:

Payment of the amount set forth in Section 3(c) above *is contingent upon the Plant operating at the same level (or better)* at which Validation was achieved for a period of 350 days (even if not consecutive) within a 400 day period commencing on the date immediately following delivery of the Plant to the Company (“Guaranteed Performance”). . . The ERV (or another party acceptable to the Company and Leonardo) will be engaged to confirm in writing the Guaranteed Performance . . . that during such time period the Plant consistently produced energy that is at least four times greater than the energy consumed by the Plant and that the temperature of the steam produced by the Plant was consistently 100 degrees Celsius or greater Guaranteed Performance will not be deemed achieved unless such written confirmation is received or waived by the Company. . . *If neither the foregoing standard nor Guaranteed Performance is achieved, the Company shall not be required to pay any amount pursuant to Section 3(c) above*

Compl. Ex. B. § 5 (emphasis added). It is thus clear that the License Agreement is written in the conjunctive—*both* the Guaranteed Performance Test *and* the certification of completion must be

satisfied to trigger payment. Nothing in the Agreement states that the ERV's report cannot be challenged—even in the case of clear fraud. Nor can such a draconian provision—which would have required one contracting party to accept Penon's Reports even if the other party bribed him to write their way—be reasonably implied from the License Agreement.

Couched as a “legal consequence” test under Florida law (at 6), Plaintiffs' argument in essence is that Penon's Reports are not hearsay because they are not being offered for the truth of the matter asserted but merely as evidence that Penon rubber-stamped a certain outcome. Of course, not only are Penon's Reports in fact being offered to show that the E-Cat technology actually produced the extraordinary levels of heat Plaintiffs promised—the very subject for which the spoliated evidence would have been examined—and is therefore hearsay,⁵ but it clearly fails Rule 403. Plaintiffs' veiled admission that the Penon Report itself is substantively unreliable should dictate, in Defendants' favor, the outcome of the instant motion.

IV. No Evidence Defendants Provided the E-Cat IP to Others, and No Evidence of Rossi Illness Resulting From 1MW Plant Work

Plaintiffs do not contest that there is no evidence that IH or IPH provided the E-Cat IP to any third party. Plfs' Opp. at 8-9. They also state that they will not argue that Rossi's current physical ailments resulted from his time at the Doral Warehouse. *Id.* at 5 n.1. If Plaintiffs sign a stipulation (attached as Exhibit 6) reflecting these positions, Defendants will withdraw as moot their motion with respect to these issues. Barring a written stipulation, the Court should treat these issues as conceded and enter an order prohibiting the introduction at trial of any argument suggesting that Defendants shared the E-Cat technology with third parties or that Rossi was physically harmed in connection with his work at the Doral Warehouse. As to the Woodford Funds' investment, the very documents Plaintiffs present to the Court show that the investment was not in the E-Cat IP, but in an LENR investment portfolio. This is in accord with Defendants' request in their motions in *limine*.

⁵ Plaintiffs' argument that Penon's Reports are a business record under Florida state law (at 7) is irrelevant. Under Federal law, “[t]he touchstone of admissibility under the business records exception to the hearsay rule is reliability,” and “the proponent must establish that it was the business practice of the recording entity to obtain such information from persons with personal knowledge and the business practice of the proponent to maintain the records” *U.S. v. Bueno-Sierra*, 99 F.3d 375, 378-79 (11th Cir. 1996). Penon's Reports fail this test on numerous fronts, and Plaintiffs make no showing to the contrary. The recorded recollection exception is also unavailing (*see* Plfs' Opp. at 7), because even “[i]f admitted, the [record] . . . may not itself be received as an exhibit unless offered by an adverse party,” Fed. R. Evid. 803(5).

CONCLUSION

For the foregoing reasons, Defendants' Motion should be granted.

Dated: May 9, 2017

Respectfully submitted,

/s/ Christopher R. J. Pace

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

Bernard P. Bell
Miller Friel, PLLC
1200 New Hampshire Ave, NW, Ste. 800
Washington, DC 20036
Tel: 202-760-3158
Fax: 202-459-9537

Attorneys for Defendants/Counter-Plaintiffs

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May 9, 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