

**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

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.)

**DEFENDANTS' OPPOSITION TO
PLAINTIFF'S MOTION FOR
PARTIAL SUMMARY JUDGMENT**

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Pursuant to Federal Rule of Civil Procedure 56 and Local Rules 7.1 and 56.1, Defendants Thomas Darden, John T. Vaughn, Industrial Heat, LLC (“IH”), IPH International, B.V. (“IPH”), and Cherokee Investment Partners, LLC (collectively, “Defendants”) hereby oppose Plaintiffs’ Motion for Partial Summary Judgment (“Mtn.”) [D.E. 214]. In support, Defendants state as follows:

INTRODUCTION

Plaintiffs Andrea Rossi (“Rossi) and Leonardo Corporation, a Florida Corporation (“Leonardo”), move for summary judgment in their favor on:

1. Count I of Plaintiffs’ Complaint (the “Complaint”) [D.E. 1] for breach of contract;
2. Counts I, II and IV of IH and IPH’s 4th Amended Answer, Additional Defenses, Counterclaims and Third-Party Claims (the “Counterclaims”) [D.E. 132], for breach of contract and violations of the Florida Deceptive and Unfair Practices Act (“FDUTPA”); and
3. Defendants’ affirmative defenses 1-5, 7 and 8.

For the reasons detailed herein, Plaintiffs are not entitled to summary judgment on their Count I for breach of contract. The undisputed facts show that Plaintiffs failed to comply with the terms of the License Agreement, and therefore, summary judgment in favor of IH and IPH is warranted instead. Summary judgment is also due IH and IPH – not Plaintiffs – with respect to Counts I, II and IV of the Counterclaims. The undisputed facts demonstrate that IH and IPH have satisfied the elements of their breach of contract and FDUTPA claims. Finally, Plaintiffs cannot prevail on their arguments for summary judgment as to Defendants’ affirmative defenses because there are genuine issues of material fact as to each (if not undisputed facts as to each in favor of Defendants).

FACTUAL BACKGROUND

Plaintiffs claim to have invented a technology called the “E-Cat” capable of violating the law of conservation of energy by producing far more energy than it consumes. Compl. [D.E. 1] ¶ 31. In October 2012, Plaintiffs, IH and AmpEnergy, Inc. (“AEG”)¹ entered into a License Agreement (the “License Agreement”) whereby Plaintiffs agreed (among other things) to transfer and license to IH the E-Cat technology (the “E-Cat IP”). Pl.’s Statement of Material Facts (“Pl. SOMF”) [D.E. 214] ¶ 5. In exchange, IH agreed to one absolute payment and two

¹ AEG had previously licensed the E-Cat technology from Plaintiffs but was relinquishing it to IH. AEG stood to obtain additional payments from IH if Plaintiffs could satisfy the Validation and Guaranteed Performance requirements of the License Agreement.

conditional payments. *Id.* Ex. 4. It would pay \$1.5 million upon entering the Agreement, \$10 million if Plaintiffs could complete a 24-hour “Validation Test” using a plant containing a collection of E-Cat reactors (the “1 MW Plant”), and \$89 million if thereafter Plaintiffs could operate the 1 MW Plant for 350 out of 400 days at the same level (or better) than the initial Validation Test (the “Guaranteed Performance” test). *Id.*

In October 2012, IH paid Leonardo \$1.5 million. *Id.* ¶ 12. On April 29, 2013, a day before the Validation Test, the parties executed the First Amendment to the License Agreement (“First Amendment”). *Id.* ¶ 7. Afterwards, the Validation Test took place in Ferrara, Italy and IH assigned certain of its rights under the License Agreement to IPH. *Id.* ¶¶ 9, 16. Following the Validation Test, IPH caused Leonardo to be paid an additional \$10 million. *Id.* ¶ 26. In exchange, Plaintiffs purportedly transferred all of the E-Cat IP to IH and IPH. *Id.* ¶ 25.

Leonardo delivered the 1 MW Plant to IH in August 2013. *Id.* ¶ 38. Nearly a year later, in June 2014, Plaintiffs advised IH that they had found a “real Customer” in Florida that allegedly had a commercial need for the steam produced by the 1 MW Plant. Defs.’ Opp. to Pl. SOMF (“Def. SOMF”) [D.E. 236] ¶ 122. That customer turned out to be a fake – it was Third-Party Defendant J.M. Products, Inc. (“J.M. Products”), which was operated by Rossi, had no products to sell, no money except what Plaintiffs provided it, and no purpose except to do the bidding of Plaintiffs. *Id.* ¶ 123. Not knowing this, IH entered into an agreement (the “Term Sheet”) with J.M. Products and Leonardo that involved sending the 1 MW Plant to J.M. Products’ facility in Florida.² *Id.* ¶ 122

From February 2015 to February 2016, Plaintiffs claim to have operated the 1 MW Plant in Florida for J.M. Products and, in doing so, achieved results that would satisfy the criteria for the “Guaranteed Performance” test. Pl. SOMF ¶¶ 49, 57. In reality, however, the E-Cat technology does not work as Plaintiffs claim, there was no “real Customer” in Florida, and Plaintiffs did not achieve Validation or Guaranteed Performance under the License Agreement. Def. SOMF ¶¶ 27, 112, 113, 115-117, 123. Plaintiffs saw IH as an eager investor able to raise substantial funds to invest in “new energy” technology. With the assistance and involvement of Third-Party Defendants J.M. Products, Henry Johnson (“Johnson”), James Bass (“Bass”), Fulvio

² At the time the Term Sheet was entered, J.M. Products did not even have a facility in Florida. Rossi later rented a warehouse in Doral under Leonardo’s name and then provided space in that warehouse to J.M. Products. Def. SOMF ¶ 124.

Fabiani (“Fabiani”) and United States Quantum Leap, LLC (“USQL”), they decided to deceive and manipulate IH and IPH in an effort to con them out of those funds. *Id.* ¶¶ 122-129.

ARGUMENT

I. Summary Judgment Standard

A motion for summary judgment must be granted “if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). Whereas “[a]n issue of fact is ‘material’ if, under the applicable substantive law, it might affect the outcome of the case, [a]n issue of fact is ‘genuine’ if the record taken as a whole could lead a rational trier of fact to find for the nonmoving party.” *Hickson Corp. v. N. Crossarm Co., Inc.*, 357 F.3d 1256, 1259-60 (11th Cir. 2004). A moving party “may discharge [its] ‘initial responsibility’ by showing that there is an absence of evidence to support the nonmoving party’s case or by showing that the nonmoving party will be unable to prove its case at trial.” *Id.* (quoting *United States v. Four Parcels of Real Prop.*, 941 F.2d 1428, 1437-38 (11th Cir. 1991)).

Once the movant bears its initial burden, summary judgment may only be granted if the nonmovant “fails to make a showing sufficient to establish the existence of an element essential to that party’s case as to which that party will bear the burden of proof at trial.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *see also Hickson Corp.*, 357 F.3d at 1260.

II. Plaintiffs Are Not Entitled to Summary Judgment As to Count I of the Complaint

Plaintiffs argue that they are entitled to summary judgment on Count I of their Complaint because they successfully completed the Guaranteed Performance test but IH and IPH have refused to pay Leonardo \$89 million pursuant to section 3(c) of the License Agreement. Mtn. 20-21. Plaintiffs do not dispute that they conducted their test well after the time period allowed under the License Agreement, but they argue that does not thwart their claim. Plaintiffs’ argument is premised on three points: (i) a Proposed Second Amendment to the License Agreement (the “Proposed Second Amendment”) extended the time for commencement of the Guaranteed Performance test, (ii) while the Proposed Second Amendment required testing of a Six Cylinder Unit, the parties agreed to test the 1 MW Plant instead, and (iii) even if there was no agreement extending the time period and changing the device to be tested, the subsequent conduct of the parties established a waiver of any written requirements in the License Agreement that Plaintiffs did not meet.

Plaintiffs failed to comply with the terms of the License Agreement in conducting either the Validation Test or the alleged Guaranteed Performance test. Therefore, summary judgment on Count I *in Defendants' favor* is warranted.

A. The Terms of the License Agreement

The License Agreement is crystal clear as to when Plaintiffs were required to conduct any Guaranteed Performance test:

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 [*i.e.*, IH] (“Guaranteed Performance”).

License Agreement (Pl. SOMF Ex. 4) § 5 (emphasis added). Plaintiffs acknowledge in their Statement of Material Facts that the 1 MW Plant was delivered to IH in August of 2013. Pl. SOMF ¶ 38. Therefore, to comply with the License Agreement, Plaintiffs would have had to begin the Guaranteed Performance test by no later than October 2013 so that they could operate the 1 MW Plant for “a period of 350 days (even if not consecutive) within a 400 day period commencing on the date immediately following delivery of the 1 MW Plant to the Company.” Pl. SOMF Ex. 4 (License Agreement) § 5. Plaintiffs admit they did not commence a Guaranteed Performance test either in 2013 or even in 2014. Instead, they did not allegedly commence such a test until 2015. Pl. SOMF ¶ 49.

B. The Proposed Second Amendment

Plaintiffs contend that Leonardo is nevertheless still entitled to \$89 million under the License Agreement because the Proposed Second Amendment provided them with additional time to commence the test. This contention fails for at least two independent reasons.

First, the Proposed Second Amendment was not effective because it was not signed and executed by all parties. *See* Def. SOMF ¶¶ 115-117. The general rule is that “a contract not signed by all of the parties, but otherwise valid, may be upheld against a signing party, unless the nature or the wording of the contract indicates that his signature was conditioned upon all other parties signing the contract.” *Skinner v. Haugseth*, 426 So.2d 1127, 1131 (Fla. Dist. Ct. App. 1983). The Proposed Second Amendment is little more than a page long, but Section 3 makes the parties’ intentions expressly clear: “This Amendment may be executed in counterparts . . . *provided that one or more counterparts collectively shall contain the signatures of all Parties to this Amendment*” (emphasis added). Proposed 2d Amendment (Pl. SOMF Ex. 7) § 3.

The Proposed Second Amendment was not effective because it was not signed by either AEG or IPH (or, for that matter, by Rossi in his individual capacity). Proposed 2d Amendment (Pl. SOMF Ex. 7); Def. SOMF ¶ 117. Both were essential to any License Agreement modification. Most of IH's rights under the Agreement had previously been assigned to IPH (with Rossi and Leonardo's consent) under an Assignment and Assumption of the License Agreement ("Assignment Agreement"). *See* 1st Amendment (Pl. SOMF Ex. 5) § 16.7; Assignment Agreement (Pl. SOMF Ex. 6); Pl. SOMF ¶ 9. Altering what would constitute "Guaranteed Performance" under the Agreement would directly impact IPH's rights. In addition, AEG could have received an additional payment if Rossi and Leonardo achieved "Guaranteed Performance." Def. SOMF ¶ 115. AEG thus had a direct interest in any change to the Agreement that would alter what had to be done to accomplish Guaranteed Performance. *See id.*

Not surprisingly, the parties recognized that the Proposed Second Amendment was not effective absent the signatures of all the relevant parties. *Id.* ¶ 117. Indeed, even Rossi admitted that the Proposed Second Amendment was not effective because AEG did not execute it. *See id.* ¶ 117 & Ex. 21 at IH-00091696 ("Ampenergo did not sign and the amendment has been cancelled.").

Second, even if the Proposed Second Amendment was effective, it is crystal clear that the Guaranteed Performance test thereunder could not be conducted using the 1 MW Plant; rather, a different "Six Cylinder Unit" needed to be used for any such test:

Payment of the amount set forth in Section 3(c) above is contingent upon ***a six cylinder Hot Cat unit reasonably acceptable to the Company (the "Six Cylinder Unit")*** operating at the same level (or better) at which Validation was achieved for a period of 350 days (even if not consecutive) within a 400 day period commencing on the date agreed to in writing between the Parties ("Guaranteed Performance").

Proposed 2d Amendment (Pl. SOMF Ex. 7) § 5 (emphasis added).

There is no question that what Plaintiffs used for their alleged Guaranteed Performance test was the 1 MW Plant, not the Six Cylinder Unit. Def. SOMF ¶ 118. These devices are clearly distinct: The latter is a round, tub unit containing six hot cat reactor units and is used to heat oil rather than water. *Id.* ¶ 118. The Six Cylinder Unit remains in North Carolina and was never sent to Florida, for testing or otherwise. *Id.* ¶ 118.

C. Alleged Oral Modification

Plaintiffs try to explain away the obvious fact that they did not comply with the terms of the License Agreement *or* with the terms of the Proposed Second Amendment (*the agreement they claims governs*) by arguing that there was a further modification by the parties.

Specifically, Plaintiffs claim that because IH shipped the 1MW Plant to Florida, and accepted Fabio Penon's ("Penon") test protocol, the "parties agreed that the unit to be tested would be the 1MW E-Cat Unit." Mtn. at 20. Assuming for purposes of this argument that the Proposed Second Amendment is the operative agreement – as Plaintiffs claim – Plaintiffs have completely failed to demonstrate any alleged modification.

The License Agreement clearly states:

This Agreement may be amended, superseded, canceled, renewed or extended, 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*. No delay on the part of any Party in exercising any right, power or privilege hereunder shall operate as a waiver thereof.

License Agreement (Pl. SOMF Ex. 4) § 16.9 (emphasis added). This paragraph was not altered or amended by the First Amendment or the Proposed Second Amendment, and therefore remained "in full force and effect." 1st Amendment (Pl. SOMF Ex. 5) § 2; Proposed 2d Amendment (Pl. SOMF Ex. 7) § 2. Florida law is clear that "when 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). As the *Okeechobee Resorts* court explained:

Contracts are voluntary undertakings, and contracting parties are free to bargain for—and specify—the terms and conditions of their agreement. That freedom is indeed a constitutionally protected right. Contracting parties are at liberty to address any issue they see fit, including the question of whether their agreement may be modified at all, and, if so, how. When contracting parties elect to adopt a term or condition, including one addressing the question of modification, it is not the province of a court to second guess the wisdom of their bargain, or to relieve either party from the burden of that bargain by rewriting the document. Rather, it is a court's duty to enforce the contract as plainly written.

Id. (internal citations omitted). A party thus bears a heavy burden in attempting to enforce an alleged oral modification of a contract requiring that modification must be 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.

Okeechobee Resorts, L.L.C., 145 So. 3d at 995. The Eleventh Circuit has held that *Okeechobee Resorts* is the correct statement of Florida law. See *Energy Smart Indus., LLC v. Morning Views Hotels–Beverly Hills, LLC*, 660 Fed. App’x 859, 864 (11th Cir. 2016).

Plaintiffs have “failed to plead any facts—or present any summary judgment evidence—that could trigger the *Cahill* exception.” *Okeechobee Resorts, L.L.C.*, 145 So. 3d at 995. Plaintiffs’ argument that the parties “agreed” to test the 1 MW Plant is insufficient as a matter of law. Further, the License Agreement already gave IH and IPH the license to and transfer of the E-Cat IP. Plaintiffs do not claim to have offered anything more to orally modify the Agreement. Thus, even if this Court finds that the Proposed Second Amendment was effectively entered – which it was not – Plaintiffs failed to comply with its terms by using the 1 MW Plant rather than the Six Cylinder Unit for the alleged Guaranteed Performance test. Plaintiffs are therefore not entitled to the payment of \$89 million.

D. Waiver Based on Subsequent Conduct

Plaintiffs’ final argument to allow them to depart from the terms of the License Agreement is that even if “no writing exists modifying the timing of the [Guaranteed Performance test] and equipment to be used therefore, the subsequent course of dealing establishes a waiver.” Mtn. at 21. This argument is meritless.

First, the License Agreement contains a clear anti-waiver provision which states that there can be no waiver absent “*a written instrument signed by... the Party waiving compliance*” and that “[n]o delay on the part of any Party in exercising any right, power or privilege hereunder shall operate as a waiver thereof.” License Agreement (Pl. SOMF Ex. 4) § 16.9 (emphasis added). Florida courts have consistently upheld anti-waiver provisions such as the

one contained in the License Agreement. *See, e.g., Nat'l Home Communities, L.L.C. v. Friends of Sunshine Key, Inc.*, 874 So.2d 631, 634 (Fla. Dist. Ct. App. 2004); *Rybovich Boat Works, Inc. v. Atkins*, 587 So.2d 519, 522 (Fla. Dist. Ct. App. 1991); *Eskridge v. Macklevy, Inc.*, 468 So.2d 337, 339 (Fla. Dist. Ct. App. 1985). Indeed, 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). Thus, the anti-waiver provision of the License Agreement bars Plaintiffs from arguing that IH or IPH waived the Agreement’s terms regarding the time for, and equipment to be used in, any Guaranteed Performance test.

Second, 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 – whereby IH and IPH did not tell Plaintiffs that what they were doing in Doral could not be the Guaranteed Performance test – 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 (“[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’” (citing *Cahill*, 90 So.2d at 918)); *Energy Smart Indus., LLC*, 660 Fed. App’x at 864.

Third, 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. Def. SOMF Ex. 3 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.

E. Plaintiffs' Prior Breaches of License Agreement

Count I of the Complaint fails for the reasons stated above. It also fails because, prior to Plaintiffs demanding \$89 million under the License Agreement in March 2016, they had repeatedly breached the Agreement, as demonstrated in Defendants' summary judgment motion [D.E. 203] and statement of undisputed material facts [D.E. 207]. A party's "[p]rior material breach of a contract excuses further performance by the other party." *Managed Care Sols., Inc. v. Cmty. Health Sys., Inc.*, No. 10-60170-CIV, 2012 WL 12861133, at *6 (S.D. Fla. May 14, 2012), report and recommendation adopted, No. 10-60170-CIV, 2012 WL 12861134 (S.D. Fla. June 4, 2012); *Cheezem Dev. Corp. v. Intracoastal Sales & Serv., Inc.*, 336 So.2d 1210, 1212 (Fla. Dist. Ct. App. 1976) ("As the party who initially committed a substantial breach of the contract, Intracoastal was not entitled to avail itself of a claimed subsequent breach by Cheezem" (citing *Chatlos v. Morse Auto Rentals, Inc.*, 183 So.2d 854, 855 (Fla. Dist. Ct. App. 1966))).

Based on the foregoing, summary judgment on Count I of the Complaint should be entered *in favor of IH and IPH, not Plaintiffs*. The undisputed material facts show that Plaintiffs did not comply with the written terms of the License Agreement *or* the Proposed Second Amendment. Plaintiffs cannot cherry-pick for enforcement only the contractual provisions they deem favorable and discard the rest. Plaintiffs' arguments for oral modification and waiver fail as a matter of law, and therefore, Plaintiffs were not entitled to a payment of the \$89 million.

III. Plaintiffs Are Not Entitled to Summary Judgment on Count I of the Counterclaims.

In Count I of the Counterclaims, IH and IPH allege that Plaintiffs breached the License Agreement by failing to achieve Validation as required by the License Agreement Section 4, and by failing to transfer and deliver to IH and IPH all of the E-Cat IP. 4th Am. AACT at 52-53. Plaintiffs' efforts to seek summary judgment on Count I are futile.

A. Plaintiffs Did Not Complete a Successful Validation Test.

The Validation Test required Plaintiffs to operate the 1 MW Plant for a 24 hour period to produce at least six times the energy it consumed in the form of “steam ... consistently 100 degrees Celsius or greater.” License Agreement (Pl. SOMF Ex. 4) §4. The Validation Test was to be certified by an Expert Responsible for Validation (“ERV”), who would “measure the flow of the heated fluid” from the 1 MW Plant and the temperature difference “of the fluid before and after the E-CAT reaction.” *Id.* The 1 MW Plant would involve at least 54 E-Cat reactors. Def. SOMF ¶ 111. The only Validation Test requirement listed above that the First Amendment modified was the number of E-Cat reactors to be tested, lowering the number to 30. 1st Amendment (Pl. SOMF Ex. 5).

Plaintiffs breached the License Agreement because they only used 18 E-Cat reactors for the Validation Test. Def. SOMF ¶ 113. They also did not satisfy the License Agreement’s requirements that the Test run for 24 hours or that the ERV “measure the flow of the heated fluid.” *Id.*

The First Amendment was executed just before the Validation Test, and the reason Plaintiffs offered for needing to reduce to 30 the number of reactors used in the Validation Test was that Italian law required this reduction. *Id.* ¶ 112. Then, after the First Amendment was executed, Plaintiffs claimed an even greater reduction was needed – they said Italian law permitted them to test 18 reactors, but only 18 reactors. *Id.* These statements all turned out to be lies, as Rossi admitted in his deposition. *Id.* According to his testimony, Italian law did not define how many reactors could be tested; instead, this was determined by Rossi in negotiating with his neighbors in Italy as to how much overnight noise they would tolerate during the Validation Test. *Id.*

In short, Plaintiffs fraudulently induced IH to enter into the First Amendment by falsely claiming the modification was mandated to comply with Italian law. They cannot avoid their breach of the License Agreement by fraudulently inducing an amendment to the Agreement. *See Mazzone Farms, Inc. v. E.I. DuPont De Nemours and Co.*, 761 So.2d 306, 313 (Fla. 2000). Moreover, Plaintiffs did not even comply with the First Amendment’s condition of testing 30 E-Cat reactors since they only tested 18 reactors. *See* 1st Amendment (Pl. SOMF Ex. 5) Ex. A; Def. SOMF ¶ 113.

Knowing full well that they did not comply with the Validation Test requirements of the License Agreement, whether or not it was modified by the First Amendment, Plaintiffs argue desperately that the ERV's report asserting that validation was achieved cannot be challenged. That fails on two grounds. To start, nothing in the License Agreement states that the ERV's report cannot be challenged, even in the case of clear fraud. Such a draconian provision – which would have required one contracting party to accept the ERV's report even if the other party bribed the ERV to write the report its way – cannot be implied into the License Agreement (or any other contract, for that matter). In addition, Plaintiffs' non-compliance with the License Agreement and First Amendment are demonstrated on the very face of Penon's report. Thus, the Court need not reject Penon's report in order to conclude IH and IPH are entitled to summary judgment on Count I. The report expressly states that only 18 E-Cat reactors were tested.³ Def. SOMF Ex. 18 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.

Finally, the subsequent payment of \$10 million to Leonardo does not excuse Plaintiffs' contract breach. The payment does not modify the License Agreement, which (a) could be “amended...and the terms hereof [] waived, only by a written instrument signed by the Parties or, in the case of a waiver, by the Party waiving compliance” and (b) provided that “[n]o delay on the part of any Party in exercising any right, power or privilege hereunder shall operate as a waiver thereof.” License Agreement (Pl. SOMF Ex. 4) § 16.9. IH and IPH would have been justified in not paying Leonardo the \$10 million in 2013. That the \$10 million *was* paid in 2013 does not bar them from recovering the \$10 million now because there was no successful Validation Test under the License Agreement. Additionally, the fraudulent nature of Plaintiffs' representations to induce IH to accept the testing of fewer E-Cat reactors than the Agreement required was not known to IH or IPH in 2013. It is known now, and entitles them to recover the \$10 million paid on false pretenses in 2013. *See D & M Jupiter, Inc. v. Friedopfer*, 853 So.2d 485, 489 (Fla. Dist. Ct. App. 2003).

³ The report states “[i]n order to comply with the Italian law the trial was conducted by activating only 18 E-Cat units.” Def. SOMF Ex. 18 at PENON0000076. Penon admitted in his deposition that this Italian law requirement was provided to him by Rossi. Def. SOMF Ex. 17 at 149:25-151:12.

Because the evidence is so clear that Plaintiffs did not comply with the validation testing requirements of the License Agreement, IH and IPH – not Plaintiffs – are entitled to summary judgment on Count I of the Counterclaims.

B. IH’s Inability to Replicate Plaintiffs’ Claimed E-Cat Testing Results Shows Either Validation Was Not Achieved or Plaintiffs Did Not Transfer All of the E-Cat IP.

Plaintiffs do not dispute that IH and IPH were not able to replicate the results Plaintiffs claim they have achieved using the E-Cat IP. Indeed, no one has been able to replicate or duplicate the results Plaintiffs claim they are achieving, with their E-Cats allegedly producing tens of times, even over 100 times, the energy put into the E-Cats. 4th Am. AACT at 43-44, 62-63. But Plaintiffs argue that Count I of the Counterclaims fails because the License Agreement does not require that IH or IPH be able to replicate Plaintiffs’ results. This is wrong on many grounds.

To begin, of course, whether or not the License Agreement required IH and IPH to be able to replicate Plaintiffs’ results does not change the fact that Plaintiffs did not comply with the License Agreement’s validation testing requirements. *See* Section III(A) *supra*.

In addition, IH and IPH’s ability to replicate Plaintiffs’ results is reflected in the License Agreement. Plaintiffs represented and warranted that the E-Cat IP delivered under the Agreement would be “all the . . . intellectual property that [was] necessary or useful for the Company to develop, manufacture, make . . . and sell . . . all the products deriving from the E-Cat IP.” License Agreement (Pl. SOMF Ex. 4) § 12(b). Additionally, the Agreement required Rossi to “provide ongoing training and support to the Company in the use of the [1 MW] Plant and the production of the E-Cat Products . . . to enable it to utilize the E-Cat IP, operate the [1 MW] Plant and produce E-Cat Products.” *Id.* § 13.3; Def. SOMF Ex. 5 at 146:14-147:10, 148:6-150-7. IH and IPH’s inability to replicate Plaintiffs’ claimed results using the E-Cat IP (Def. SOMF ¶ 27 & Ex. 9 ([Rossi__00006555])) is clear proof that Plaintiffs did not comply with License Agreement Sections 12(b) and 13.3.

Finally, of course, IH and IPH’s inability to replicate Plaintiffs’ claimed results is also relevant to whether Plaintiffs transferred all of the E-Cat IP as required by License Agreement Section 3.2(b). If the E-Cat IP works as Plaintiffs claim, and if they provided all of that E-Cat IP to IH and IPH, then IH and IPH should have been able to replicate Plaintiffs’ results. That they could not creates at least a triable issue of fact as to whether Plaintiffs transferred “all E-Cat IP”

to IH and IPH. Rossi's conclusory and self-serving statement in his Affidavit that he transferred all of the E-Cat IP, in the face of the evidence that IH and IPH could not use that IP to replicate Plaintiffs' results, is insufficient to require summary judgment in Plaintiffs' favor. *State Farm Mut. Auto. Ins. Co. & State Farm Fire & Cas. Co. v. B&A Diagnostic, Inc.*, 145 F.Supp.3d 1154, 1158 (S.D. Fla. 2015). Equally insufficient is Plaintiffs' argument that IH's corporate representative testified to "additional possible conclusions that one may draw with respect to Defendants' purported inability to replicate, including, inter alia, the conclusions that: (a) Defendants are lying about their inability to replicate; (b) IH did not have competent scientists or engineers working for it when it tried to replicate; (c) IH used faulty equipment in its attempts to replicate; or (d) IH used inferior materials for the catalysts." Pl. SOMF ¶33. This ignores the representative's full testimony. With respect to whether Defendants are lying about their inability to replicate, IH's corporate representative testified: "[W]e did not lie about our ability to replicate." Def. SOMF Ex. 5 at 159:11-14. With respect to whether IH had competent scientists or engineers, the corporate representative testified: "[T]hat would seem to me that that would be equally absurd." *Id.* 159:19-160:9. With respect to whether IH used faulty equipment, the corporate representative testified: "I don't believe that, you know, if you were – if an expert were to go back and review all that we did and how we did it, that is not a conclusion they would come to." *Id.* 160:10-17. With respect to whether IH used inferior materials, the corporate representative testified: "[W]e know what we did and we exhaustively tested this, so that we would know before entering into a conflict like this if it did, in fact, work or not." *Id.* 160:19-161:4.

In short, IH and IPH have paid Leonardo over \$11 million for technology that they have never been able to use to achieve the results Plaintiffs claim can be achieved (or even anything remotely close to those results). Plaintiffs' position that this is immaterial to this litigation is absurd.

C. IH's "Standing" Is Not Limited to Its Interest in the 1MW Plant, Nor Are IPH's Damages Limited to \$460,000.

Plaintiffs know full well that they breached the License Agreement and have no right to keep the \$11.5 million paid to them under the License Agreement (along with additional amounts paid pursuant to the Agreement). Nevertheless, they advance the patently bizarre theory that, at least as to the \$11.5 million, IH and IPH can only recover less than \$2 million.

The theory is premised on the notions that (a) IH only has standing to recover the \$1.5 million it paid for the 1 MW Plant and (b) IPH is only entitled to recover the \$460,000 that it paid IH for the assignment of the License Agreement. Both premises are flawed.

As to the first premise, it incorrectly conflates the issues of standing and damages, which explains why Plaintiffs do not cite a single case to support their position. Under the Amended Assignment Agreement, IH did not assign all of its rights in the License Agreement to IPH, but retained rights because it retained ownership of the 1 MW Plant. That does not, however, mean that IH can only recover under the License Agreement for the cost of that ownership. For example, IH also paid AEG \$3,219,950 after Plaintiffs claimed to have complied with the License Agreement's validation testing requirements. Def. SOMF ¶ 114. As shown above, Plaintiffs did not comply with those requirements, so IH is entitled to recover this additional payment. Moreover, expenses were paid for Plaintiffs that were not required under the License Agreement given their failure to comply with the Validation testing requirements. To the extent those expenses were paid on behalf of IH, IH can recover those expenses (and to the extent they were paid on behalf of IPH, IPH can recover those expenses). Def. SOMF ¶ 129. Stated differently, IH is entitled to full compensatory damages for Plaintiffs' breach, which cannot be artificially capped by Plaintiffs based on what IH paid for the 1 MW Plant. *See Mnemonics, Inc. v. Max Davis Associates, Inc.*, 808 So.2d 1278, 1280 (Fla. Dist. Ct. App. 2002) ("An award of damages for breach of contract is intended to place the injured party in the position he or she would have been in had the breach not occurred. Damages recoverable by a party injured by a breach of contract are those that naturally flow from the breach and can reasonably be said to have been contemplated by the parties at the time the contract was entered into.") (internal citations omitted)).

As to the second premise, IPH likewise is entitled to full compensatory damages for Plaintiffs' breach. Plaintiffs want to limit IPH's damages to the \$460,000 it paid IH for the partial assignment of the License Agreement, but again cite no case law to support their request. Indeed, their request ignores that the \$10 million paid to Leonardo was paid on behalf of IPH. Def. SOMF. Ex. 8 at 59:18-24; 102:24-103:22. It also ignores any other expenses paid on behalf of IPH pursuant to the License Agreement that were not required to be paid because Plaintiffs breached the License Agreement. *See Mnemonics, Inc.*, 808 So.2d at 1280.

IV. Plaintiffs Are Not Entitled to Summary Judgment on Count II of the Counterclaims.

Plaintiffs seek summary judgment on the multiple License Agreement breaches identified in Count II of the Counterclaims. In most instances, Plaintiffs rely solely or primarily on the testimony of IPH's corporate representative that IPH did not have any more information or evidence than IH had as to the breaches identified in Count II. This, of course, does not mean that there is no evidence in support of the breaches. In fact, there is ample evidence, as Plaintiffs well know but consciously avoid, and as further addressed below.

A. Counterclaim Count II: Breach of Confidentiality

License Agreement Section 16.4 contains two distinct confidentiality provisions – one as to disclosure of the License Agreement's terms and transactions, and one as to disclosure of the E-Cat IP. The evidence shows that Plaintiffs breached both.

The first confidentiality provision states in part:

While this Agreement is in effect and after this Agreement terminates, each party hereto and its Affiliates shall keep confidential and shall not disclose, the terms of this Agreement to any other person without the prior consent of each other Party hereto[.]

License Agreement (Pl. SOMF Ex. 4) § 16.4. There is ample evidence that Plaintiffs violated this provision by disclosing aspects of the Guaranteed Performance test set forth in License Agreement Section 5. Most notable, Rossi and Leonardo repeatedly made statements on Rossi's website, Journal of Nuclear Physics ("JONP"), www.journal-of-nuclear-physics.com, which revealed that the License Agreement required a test of the 1 MW Plant, a test to be conducted over 400 days, a test involving 350 days of operation of the 1 MW Plant, and a guaranteed performance or "guarantees of performance" test. *See* Def. SOMF ¶ 119.

For example, on July 2, 2015, Rossi posted on JNOP:

My uninterrupted presence in the plant installed in the factory of the Customer of IH [Industrial Heat] is due to the fact that it is our first plant installed in the factory of a Customer, operating for unlimited time. We have to be always present for at least 1 year due to our contractual agreement[.]

See id. ¶ 119 & Ex. 12 at July 2, 2015. Again, on December 21, 2015, in response to a question about the timing of the "test on course" for the 1 MW Plant, Rossi stated:

It is not possible to state a precise date, because we have to complete 350 days of efficient operation within a period of 400 days from the official start up of the test on course. The 400 days will expire at the end of March ...

See id. ¶ 119 & Ex. 12 at Dec. 21, 2015. Counter-Defendants did not obtain IH or IPH's prior consent to make these disclosures, and hence breached the License Agreement.

Plaintiffs also breached the first confidentiality provision when they unnecessarily filed the entire License Agreement as an exhibit to their Complaint. Plaintiffs contend this is not a breach because they believe the Agreement was over after they were not paid \$89 million. As explained above, they are wrong in their stated belief that IH or IPH owed them \$89 million. Further, the first confidentiality provision expressly continues "after this Agreement terminates," so even if Plaintiffs could have terminated the License Agreement, they still had to respect the confidentiality requirement. License Agreement (Pl. SOMF Ex. 4) § 16.4.

The License Agreement's second confidentiality provision applies to Plaintiffs, but not to Defendants. It states that, with limited exceptions not relevant here (and that Plaintiffs do not even argue are relevant here), "[d]uring the term of this Agreement, each of Leonardo, Rossi, and AEG agrees to keep the E-Cat IP strictly confidential and not disclose any of the E-Cat IP to any other party." *Id.*

Plaintiffs do not deny that they disclosed some of the E-Cat IP to others (notably, the Lugano Report authors and Professor Cook), but they claim that IH knew of, and at least implicitly approved, the disclosures. But the second confidentiality provision does not allow for disclosures with IH's prior consent. It simply bans Plaintiffs from making disclosures of the E-Cat IP. *Id.* The ban could be modified, but only by complying with License Agreement Section 16.9's requirement that any modification be in a writing signed by the parties. There is no such signed writing.

The foregoing evidence is sufficient to support IPH's claim for breach of the confidentiality provisions in the License Agreement, and therefore, summary judgment in favor of Plaintiffs cannot be granted. Plaintiffs' argument that IPH lacks damages does not change that. Florida law is clear that proof of actual damages is not necessary to prevail on a breach of contract claim. *See, e.g., MSM Golf, L.L.C. v. Newgent*, 853 So.2d 1086, 1087 (Fla. Dist. Ct. App. 2003); *Destiny Const. Co. v. Martin K. Eby Const.*, 662 So.2d 388, 390 (Fla. Dist. Ct. App. 1995); *Beverage Canners, Inc. v. Cott Corp.*, 372 So.2d 954, 956 (Fla. Dist. Ct. App. 1979).⁴

⁴ IPH is entitled to prove its actual damages at trial. The point here is simply that it need not prove its actual damages at this stage to defeat Plaintiffs' summary judgment argument.

B. Counterclaim Count II: Breach for Failure to Assign Licensed Patents

Plaintiffs argue they did not breach License Agreement Section 10 because the License Agreement itself operated to give IPH effective control over the Licensed Patents, and IPH has not suffered damages due to Plaintiffs' refusal to assign the Licensed Patents.

License Agreement Section 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 (Pl. SOMF Ex. 4) § 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. Def. SOMF ¶ 120. Plaintiffs refused. *Id.* This is a breach of Section 10's clear terms.

This breach cannot be avoided or ignored simply because Plaintiffs believe Section 10 is unnecessary; the parties included Section 10 in the Agreement, so Plaintiffs had to abide by it. Also, as discussed above, IPH does not need to prove actual damages to prevail on this claim. *See, e.g., MSM Golf, L.L.C.*, 853 So.2d at 1087; *Destiny Const. Co.*, 662 So.2d at 390; *Beverage Canners, Inc.*, 372 So.2d at 956. As a result, Plaintiffs breached Section 10 by refusing to assign the Licensed Patents, and **IPH** is entitled to summary judgment on this breach.

C. Counterclaim Count II: Breach For Failure to Inform/Consult on Patent Applications

Plaintiffs argue that they are entitled to summary judgment on IPH's claim that they breached License Agreement Sections 7.1 and 7.2 by failing to inform and consult with IH or IPH regarding the filing or abandonment of patent applications because witnesses in depositions could not identify the patents Leonardo filed or abandoned without consulting with IH or IPH. Mtn. at 30-31.

It is of no surprise that witnesses could not list specific patent applications during their depositions. But the patent applications Leonardo filed or abandoned without prior approval from IH or IPH have been identified for Plaintiffs in a sworn response to an interrogatory, and there are over one hundred such applications. Def. SOMF ¶ 81, Ex. 11. Rossi's conclusory and self-serving declaration stating that Leonardo did not abandon any patent applications without prior written consent and that Rossi never failed to inform and consult with IPH regarding patent prosecution and maintenance of the E-Cat IP (a) does not even address this list of over one hundred applications provided in discovery, and (b) does not include any prior written consents

as supporting evidence (because they do not exist). Plaintiffs cannot obtain summary judgment based on such flimsy “evidence.”

Plaintiffs also ignore another aspect of the breach pled by IPH – that it paid for fees and expenses associated with Leonardo’s patent activities that, under the clear language of Section 7.1, Leonardo had to pay. *See, e.g.*, Def. SOMF ¶ 121, Ex. 27.

Finally, IPH again notes that, to defeat summary judgment on its contract claims, it need not prove its damages at this stage. It can prevail on those claims even without providing damages, and it can prove up damages at trial after liability is determined.

D. Counterclaim Count II: Breach of Covenant not to Compete

The License Agreement contains a broad non-compete provision prohibiting Plaintiffs, while performing services for IH and for two years thereafter, from being “connected in any manner with any business or enterprise . . . engaged in the design, development, manufacture, distribution, lease, rental or sale of any E-Cat Products, or the provision of any services related thereto” absent IH or IPH’s prior written consent. License Agreement (Pl. SOMF Ex. 4) § 13.3 (emphasis added). Plaintiffs claim this provision is limited to their activities within the “Territory” defined in the License Agreement: “Reading the non-compete provision in light of the provisions of the contract as a whole, it is clear that section 13.3 is limited to competitive acts in the territory.” Mtn. at 31. But as Plaintiffs note, “[t]he ‘plain language of the contract’ is the ‘best evidence’ of the parties’ intent, and the parties’ intent controls the contract’s construction and interpretation.” *Id.* at 23; *see also Ferox, LLC v. ConSeal Int’l, Inc.*, 175 F.Supp.3d 1363, 1371 (S.D. Fla. 2016). No “Territory” limitation is reflected in Section 13.3, even though *other* provisions of the License Agreement are expressly limited to acts within the “Territory.” And this makes perfect sense: Allowing Plaintiffs to assist another company operating outside the Territory to design or develop E-Cat products would (a) violate Section 16.4’s confidentiality provision, (b) undermine the fact that Plaintiffs had to “transfer . . . all E-Cat IP” to IH per Section 3.2(b), and (c) risk that that other company could sell its products within the Territory.

Plaintiffs have been open in broadcasting that they are engaged in designing and developing what are classified as “E-Cat Products” under the License Agreement. Def. SOMF ¶ 87 & Ex. 12. For example, Rossi has publicly stated that in June 2016 he conducted a “very important test” with a “very important customer” that was not IH or IPH. *See id.* Ex. 11 at Resp. No. 3 & Ex. 12 at April 27 & June 26, 2016. Rossi has also broadcasted his work with Hydro

Fusion, Ltd. and ABB Group. *Id.* Ex. 12 at June 4 & 16, July 16, 23 & 24, Aug. 8, Oct. 2 & 6, & Nov. 15, 2016. These actions violate Section 13.3.⁵

E. Counterclaim Count II: Failure to Pay Taxes

Plaintiffs' only argument against IPH's allegations that they did not report as income, or pay taxes on, revenue received under the License Agreement (as required by the License Agreement) is that IPH was not damaged by Plaintiffs' failure to pay taxes. As explained repeatedly above, however, IPH need not prove actual damages to prevail on a breach of contract claim. *See, e.g., MSM Golf, L.L.C.*, 853 So.2d at 1087; *Destiny Const. Co.*, 662 So.2d at 390; *Beverage Cannery, Inc.*, 372 So.2d at 956.

As demonstrated in Defendants' summary judgment motion, the evidence is clear that Plaintiffs did not report or pay taxes on the revenue received under the License Agreement. [D.E. 203] at 20-21; *see also* Def. SOMF ¶ 90 & Ex. 14. In fact, one would never know from Leonardo's tax returns that it was paid \$10 million (or anything even close to \$10 million) pursuant to the Agreement in 2013. Plaintiffs cannot eliminate this breach – which preceded any breach they claim against IH or IPH – by reasoning that only the United States Government was harmed by their failure to report revenue and pay taxes.

V. Plaintiffs Are Not Entitled to Summary Judgment on IH and IPH's Florida Deceptive and Unfair Trade Practices Act ("FDUTPA") Claim.

Plaintiffs argue that they are entitled to summary judgment in their favor on Count IV of the Counterclaims (FDUPTA) because (i) IH and IPH cannot show a deceptive or unfair act that harms consumers; (ii) IH lacks standing to pursue the FDUTPA claim; and (iii) IH and IPH cannot show that the alleged deceptive and unfair acts caused them actual damages.

A. IH and IPH Can Pursue an Action under FDUPTA.

Plaintiffs argue that IH and IPH cannot maintain a FDUPTA claim because they are not consumers nor were Plaintiffs distributing a good or service. As to the first point, a non-consumer – at least after the 2001 amendments to FDUPTA – can sue under FDUTPA. *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, Plaintiffs

⁵ As with the other contract breaches discussed above, IPH need not prove actual damages to prevail on this breach claim. *See, e.g., MSM Golf, L.L.C.*, 853 So.2d at 1087; *Destiny Const. Co.*, 662 So.2d at 390; *Beverage Cannery, Inc.*, 372 So.2d at 956.

ignore the broad definition of “consumer” in FDUPA, which includes a corporation as well as “any commercial entity, however denominated.” Fla. Stat. § 501.203(7).

As to Plaintiffs’ second point, they seem to be implying that FDUPA does not apply because their activities did not involve “the conduct of any trade or commerce.” Fla. Stat. § 501.204(1). This is clearly incorrect. FDUPA broadly defines “trade or commerce” to include “advertising, soliciting, providing, offering, or distributing, whether by sale, rental, or otherwise, of any good or service, or any property, whether tangible or intangible, or any other article, commodity, or thing of value, wherever situated.” Fla. Stat. § 501.203(8). Plaintiffs’ conduct clearly involved trade or commerce since they were charging IH and IPH for expenses associated with operating the 1 MW 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. Def. SOMF ¶¶ 122, 129, Ex. 10. Through their deceptive conduct, they also induced IH to transport the 1 MW Plant from North Carolina to Florida to supposedly provide the steam product to J.M. Products in Florida. *Id.* ¶ 122. Others also charged IH and IPH for expenses as a result of the deceptive and manipulative scheme pled in the Counterclaims, such as the expenses Fabiani charged IH for assisting Rossi in allegedly providing steam to J.M. Products, the fake customer in Florida *Id.* ¶ 129.⁶ Finally, of course, Plaintiffs sought and demanded a payment of \$89 million from IH and IPH in Florida for allegedly performing a service of completing a “Guaranteed Performance” test. The unfair and deceptive acts at issue in this case unquestionably involve “the conduct of any trade or commerce.” Fla. Stat. § 501.204(1).

B. IH Has Standing to Bring the FDUTPA Claim.

Plaintiffs’ argument that IH lacks standing to bring this claim also fails. Without any legal support, Plaintiffs attempt to tie IH’s standing to bring a FDUTPA claim to its interest in the License Agreement. The case law is clear, however, that a FDUTPA claim is not dependent on contractual privity. *See Ellis v. Warner*, No. 15-10134-CIV, 2017 WL 634287, at *24 (S.D. Fla. Feb. 16, 2017) (“[P]rivacy is not required to bring a FDUTPA claim under Florida law.”);

⁶ A FDUTPA claim does not require “show[ing] [that] [a] defendant was the principal actor involved in the violative acts, or that [a] defendant initiated those acts.” *Galstaldi v. Sunvest Cmtys. USA, LLC*, 637 F.Supp.2d 1045, 1056 (S.D. Fla. 2009). “[I]t is sufficient to allege that a party directly participated in a violation of the FDUTPA, even if that violation was initiated by another.” *Sundance Apartments I, Inc. v. Gen. Elec. Capital Corp.*, 581 F.Supp.2d 1215, 1222 (S.D. Fla. 2008).

Nature's Prods., Inc., 990 F.Supp.2d at 1322 (“A claim under FDUTPA is not defined by the express terms of a contract, but instead encompasses unfair and deceptive practices arising out of business relationships.”); *Barnext Offshore, Ltd. v. Ferretti Group USA, Inc.*, No. 10-23869-CIV, 2012 WL 1570057, at *10 (S.D. Fla. May 2, 2012). Therefore, Plaintiffs’ argument fails as a matter of law. Moreover, even if IH’s standing were somehow tethered to its ownership of the 1 MW Plant as Plaintiffs incorrectly claim, they ignore that part of their scheme involved deceiving and manipulating IH to part with that Plant and ship it to Florida to provide steam for a “real Customer” Plaintiffs claimed operated in Florida that was, in fact, just a company controlled by Rossi with no real business operations (J.M. Products). IH’s ownership of the 1 MW Plant is thus directly implicated by the FDUPTA claim.

C. IH and IPH Have Established Causation.

Plaintiffs argue that their unfair or deceptive acts involving a fake customer in Florida did not cause IH or IPH harm because IH and IPH did not care about any customer in Florida, but only cared about whether the 1 MW Plant worked. Mtn. at 33.⁷ This, however, is a mischaracterization of the evidence. The Eleventh Circuit has held that, in a FDUTPA action, the element of causation is met “when the alleged misrepresentations would have deceived an objectively reasonable person.” *Toback v. GNC Holdings, Inc.*, No. 13-80526-CIV, 2013 WL 5206103, at *3 (S.D. Fla. Sept. 13, 2013). Proving actual reliance is not necessary, but is sufficient to establish causation. *Id.*

Plaintiffs led IH and IPH to believe that the 1 MW Plant was being shipped to Florida to provide steam power for a Johnson Matthey affiliate. J.T. Vaughn testified that this was “important to us . . . [W]ow, this is a chance to test the technology in a commercial setting with a very reputable customer.” Def. SOMF Ex. 6 at 182:7-12. He later confirmed that having a Johnson Matthey affiliate be the customer for the 1 MW Plant was significant: “[I]f a group like Johnson Matthey can affirm that this technology performs as advertised, that is a good thing. So we allowed that to proceed.” Def. SOMF Ex. 5 at 214:6-9; 218:13-19 (“Once we heard that that customer was Johnson Matthey, we thought, Well, that is a real customer. And if they affirmed

⁷ In passing, Plaintiffs also state the conclusion that IPH has “no actual proof or evidence” to support its FDUPTA claim because an IPH corporate representative testified that IPH did not have evidence in support of this claim beyond what was possessed by IH. That, of course, is not a statement that no evidence exists. Moreover, Plaintiffs are fully aware of the wealth of evidence that supports this claim, much of which is summarized or referenced in Defendants’ motion for summary judgment [D.E. 203] and statement of material facts [D.E. 207] at ¶¶56-89.

that they consumed the amount of power that was supposedly being supplied, then that would be a – that would be a positive thing. It would be credibility-enhancing.”). Tom Darden mirrored Vaughn’s sentiments, noting that whether the 1 MW Plant worked as claimed was the most important thing to IH and IPH, but also that having “[a] credible third party who’s taking the steam would be valuable to us.” Def. SOMF Ex. 3 at 141:7-9; 195:6-8 (“In our case because there was, you know, a history of obfuscation or hiding results, it was important to us who the customer was.”).

Furthermore, Plaintiffs incorrectly contend that whether the 1 MW Plant worked as advertised by them and whether they were providing steam power to a legitimate customer are two completely separate matters. They are not. In fact, Rossi told IH that having a “real Customer” with a need for steam would be an independent check on how the 1 MW Plant was operating because the customer could confirm the level of steam the Plant was producing. Def. SOMF ¶ 122.⁸ Both Tom Darden and J.T. Vaughn endorsed this same benefit: “We felt that having a bona fide customer would be an additional way of being able to measure energy output. That if someone credible was receiving the energy then that would be one added way to ratify the power production.” Def. SOMF Ex. 3 at 159:1-5, 159:21-22 (“[H]aving a very credible customer would be beneficial in terms of verification[.]”); Def. SOMF Ex. 6 at 182:24-183:5 (IH wanted to know that the customer would be “accurately assessing the energy that [it] consumed” because “that’s a check on whether or not it’s a – how much energy is actually being produced.”).⁹

In short, the evidence is clear that IH and IPH did care who the customer was allegedly receiving power from the 1 MW Plant in Florida, and cared very much that this customer be both legitimate and capable of measuring the steam power being provided to it. Plaintiffs deceived IH

⁸ Plaintiffs (a) represented J.M. Products as an entity separate from Rossi and Leonardo by, for example, distinguishing it from Plaintiffs in discussions with IH and others, *see* Def. SOMF ¶ 125; (b) represented J.M. Products as having its own operations and using the 1 MW Plant’s steam to manufacture and process its own products, *see id.*; and (c) represented J.M. Products as satisfied with the power it was purportedly receiving from the 1 MW Plant, *see id.*

⁹ *See also* Def. SOMF Ex. 3 at 165:7-11 (“We wanted to be sure that they measured it and that we could use them as a way of knowing how much steam was produced. So to have a third-party sophisticated, you know, technical company that needed steam and that could measure it was important to us.”); 191:21-23 (“[T]he nature of the customer and the measurement of the steam were core issues for us in deciding how the technology worked[.]”); 160:20-25; 162:4-5.

and IPH into believing both of these existed when, in fact, neither did: J.M. Products was not a real company with a real manufacturing process; it was a shell company controlled by Rossi with no products, no money except what Plaintiffs provided it, and no customers other than Leonardo. Def. SOMF ¶ 123. J.M. Products also had no measuring or assessing the steam power being provided to it; rather, J.M. Products simply accepted whatever measurements Rossi provided it, without any independent check or evaluation whatsoever. *Id.* ¶ 125 n. 12.

Furthermore, in focusing on the role of J.M. Products as the alleged customer using the steam power produced by the 1 MW Plant, Plaintiffs ignore that the FDUPTA claim also involves Plaintiffs and Third Party Defendants' deceptive and manipulative conduct involving the operation of the 1 MW Plant and the measurements of those operations. Plaintiffs (through Penon) and Fabiani and USQL (themselves and through Penon) provided measurement data to IH and IPH (*see id.* ¶ 126) that was fabricated, obtained as the result of manipulating the 1 MW Plant's operations, or incomplete such as to render it misleading. For one, the power absorption data that Fabiani and Penon provided IH and IPH (which were nearly identical to each other, *see id.* ¶ 126 n. 14) materially conflicted with the data provided by Florida Power and Light ("FPL"). Indeed, during certain time periods, the false data from Fabiani and Penon reflecting that the 1 MW Plant used more power than FPL was providing to the entire warehouse facility where the 1 MW Plant was located – an impossible feat even if every single light, fan and computer at the warehouse was turned off during these time periods. *See id.* ¶ 126. Plaintiffs admitted to IH and IPH that FPL's electrical usage data "[would] be a confirmation of the [1 MW Plant's] COP." *See id.* ¶ 122 & Ex. 28 at 4th Am. AACT Ex. 16. Fabiani and Penon provided fabricated electrical usage data instead of the real data from FPL in order to avoid IH and IPH being able to use the real data as a check or confirmation of Plaintiffs' claims about the 1 MW Plant's performance.

Plaintiffs also altered the 1 MW Plant's setup in Florida from the design created by IH personnel in North Carolina in order to make evaluating the 1 MW Plant's performance more difficult. *Id.* ¶ 127. For example, the 1 MW Plant was designed to produce steam, yet Plaintiffs removed the steam trap and condensate line placed on the pipe intended to carry the steam out of the 1 MW Plant. *See id.* These devices would have helped measure whether the 1 MW Plant was producing pure steam as claimed or just water or a combination of water and steam. In addition, Plaintiffs refused to grant IH personnel access to the Doral facility in both July and

December 2015, and they prohibited IH personnel from entering or knowing anything about J.M. Products' side of the Doral facility entirely. *See id.* ¶ 128. Once an IH engineer finally gained access to the Doral facility in February 2016, he was promptly able to determine that Plaintiffs' claims about the performance of the 1 MW Plant were simply impossible. *See id.*

D. Plaintiffs' Deceptive and Unfair Acts Have Caused Actual Damages to IH and IPH.

Plaintiffs' deceptive and unfair acts have caused actual damages to IH and IPH. FDUTPA allows a party to recover "actual damages" suffered as a result of an unfair or deceptive trade practice. Fla. Stat. § 501.211. The term "actual damages" is not defined in the FDUTPA statute, 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 the product or service in the condition in which it was delivered and its market value in the condition in which it should have been delivered according to the contract of the parties." Mtn. at 34; *Rollins, Inc. v. Heller*, 454 So.2d 580, 585 (Fla. Dist. Ct. App. 1984). "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, in reliance on Plaintiffs and Third-Party Defendants' deceptive and manipulative scheme, IH and IPH incurred their own expenses, and reimbursed Plaintiffs and Third-Party Defendants for their expenses, which IH and IPH would not have done had they known the truth. For example, in reliance on Plaintiffs, Johnson and J.M. Products' manipulation as to the 1 MW Plant's relocation to Florida, IH and IPH paid for (1) the 1 MW Plant's transportation to Florida; (2) the procurement and delivery of equipment for the 1 MW Plant's reassembly in Florida; and (3) the procurement and transportation of personnel to assemble the 1 MW Plant in Florida. Def. SOMF ¶ 129. IH and IPH also relied on Plaintiffs and Third-Party Defendants' portrayal of J.M. Products and representations of measurement data and performance in paying for, among other things, (1) repairs and maintenance to the 1 MW Plant while in Florida; (2) new equipment for the Doral warehouse facility; and (3) personnel to work at the warehouse and on maintenance of the 1 MW Plant (such as Barry West and Fabiani). *See id.* Furthermore, IH and IPH clearly incurred actual damages arising from this litigation, as Rossi and Leonardo would have had no

basis to sue IH and IPH if they had not been able to use J.M. Products and the 1 MW Plant's relocation to Florida as a cover for conducting their purported Guaranteed Performance test and then thereafter suing IH and IPH.

VI. Summary Judgment in Favor of Plaintiffs on Defendants' Affirmative Defenses is Unwarranted

Plaintiffs have wholly failed to demonstrate the absence of any genuine issue of material fact with respect to Affirmative Defenses 1 through 5, 7, and 8 such that summary judgment in their favor is warranted with respect to those defenses.

A. Defendants' Affirmative Defense No. 1: Standing

For their first Affirmative Defense, Defendants state that (a) Plaintiff Leonardo lacks standing to bring any claims because any transfer of the License Agreement from Leonardo Corporation, Inc., a New Hampshire Corporation ("Leonardo New Hampshire"), to Plaintiff Leonardo was invalid, and (b) Rossi lacks standing to bring the breach of contract claim in Count I of the Complaint because the \$89 million payment was due, if at all, to Leonardo New Hampshire, not to Rossi.

Plaintiff Leonardo's position that it has Leonardo New Hampshire's rights under the License Agreement because the latter was merged into the former suffers from two fatal flaws. First, Leonardo New Hampshire continues to exist as a separate company. Def. SOMF ¶ 116 n. 3. Second, even if it were merged into Plaintiff Leonardo, its rights under the License Agreement could not have been transferred to Plaintiff Leonardo because Agreement Section 16.4 provides:

[N]either Leonardo nor Rossi, nor the Company, shall assign or otherwise transfer any of its rights, or delegate or otherwise transfer any of its obligations or performance under this Agreement, in each case whether voluntarily, involuntarily by operation of law or otherwise, without the other party's prior written consent. No delegation or other transfer will relieve Leonardo or Rossi or the Company of any of their obligations or performance under this Agreement. Any purported assignment, delegation or transfer in violation of this Section 16.7 is void.

License Agreement [Pl. SOMF Ex. 4] § 16.4. The broad language of Section 16.4 covers not only assignments, but any other form of transfer, even if "by operation of law or otherwise." *See id.* Thus, it naturally extends to the situation where Leonardo Corporation, a New Hampshire corporation, is merged into Leonardo Corporation, a Florida corporation, and it

establishes that “[a]ny purported assignment, delegation or transfer” of the License Agreement in connection with such a merger “is void.” *See id.*

To counter this natural conclusion, Plaintiffs rely upon on the commentary to the Model Business Corporation Act (“MBCA”) that a merger does not result in an assignment or transfer, but the Florida Legislature did not adopt that MBCA commentary as part of the Florida merger statute. *See Fla. Stat. § 607.1106.* In addition, the MBCA states that “all property owned by, and every contract right possessed by, each corporation or eligible entity that merges into the survivor is vested in the survivor without reversion or impairment.” MBCA § 11.07. Florida Statutes § 607.1106(1)(b), however, only states that “*title* to all real estate and other property, or any interest therein, owned by each corporation party to the merger is vested in the surviving corporation without reversion or impairment.” How the authors of the MBCA interpreted in their commentary a provision addressing “every contract right possessed” is irrelevant to what the Florida Legislature meant when it adopted a narrow statute only governing “title” to property or an “interest” in the title to property.

Plaintiffs also argue that because Rossi is a signatory to the License Agreement, he has standing to sue for payment of the \$89 million even though it is undisputed that the payment, if due at all, would only be due to Leonardo New Hampshire under License Agreement Section 3.2(c). But Plaintiffs cite no legal support for the theory that Rossi can sue IH and IPH to enforce Leonardo New Hampshire’s purported right to payment, especially since Rossi is no longer the owner of either Leonardo New Hampshire or Plaintiff Leonardo (Def. SOMF ¶¶ 116 n. 4, 123). Indeed, Florida law is to the contrary (as Plaintiffs know because Defendants cited the following case in a prior court filing, [D.E. 59]): In *Dinuro Invs., LLC v. Camacho*, 141 So.3d 731, 741-42 (Fla. Dist. Ct. App. 2014), the 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. The same rationale prohibits Rossi from suing to enforce Leonardo New Hampshire’s alleged right to \$89 million under the License Agreement.

B. Defendants’ Affirmative Defense No. 2: Estoppel, Waiver, Laches

Plaintiffs take issue with Defendants’ affirmative defenses of estoppel, waiver and laches, but aside from quoting or summarizing what they believe to be the elements for each defense, say little more. Plaintiffs do not dispute that if the License Agreement is valid, their unjust

enrichment claim is not viable. Mtn. at 37; *compare* 4th Am. AACT Second Defense. They do dispute that entering the License Agreement can waive their fraudulent inducement claim because otherwise no one who signed a contract could ever claim fraudulent inducement. Mtn. at 37. But that is not Defendants' position. The License Agreement, as explained below, has a merger and integration clause that bars Plaintiffs' reliance on alleged prior oral promises, and Plaintiffs make no argument that this clause was anyhow obtained by fraud. *See* Section VI(G) *infra*. A party does not waive a fraudulent inducement claim based on prior oral promises not included in a contract by signing any written contract, but a party does waive (or is estopped from asserting) such a claim by signing a written contract expressly stating that it "supersede[s] all prior agreements, written or oral, with respect thereto." Pl. SOMF Ex. 4 (License Agreement) 16.8; *see also* Section VI(G) *infra*.

Similarly, Plaintiffs miss the boat with their argument that there can be no laches because they sued Defendants only months after they completed their "Guaranteed Performance" testing. First, as Plaintiffs recognize, their unjust enrichment claim is viable only if the License Agreement is invalid. The Agreement was entered in 2012, but Plaintiffs never claimed it was invalid when Leonardo accepted \$1.5 million pursuant to the Agreement in 2012, and they never claimed it was invalid when Leonardo accepted \$10 million pursuant to the Agreement in 2013 (after defrauding IH in connection with the 2013 Validation Test, *see* Section III(A) *supra*). Instead, they waited until 2016 to claim that, based on oral promises allegedly made to them back in 2012, the Agreement was fraudulently induced, and even then Plaintiffs have never offered to return the \$11.5 million paid to Leonardo pursuant to this alleged fraudulently induced contract.

Finally, Plaintiffs simply ignore Defendants' position, stated in the 4th Am. AACT Second Defense, that Plaintiffs deceptive and manipulative conduct – addressed in more detail above, *see* Section V(C), *supra*, and in Defendants' summary judgment motion and statement of material facts – estopped them from invoking this Court's equitable powers. Plaintiffs cannot manipulate and deceive IH and IPH over the course of the past few years and then come running to this Court claiming that it would only be equitable for Plaintiffs to be compensated somehow for this conduct because their conduct "enriched" IH and IPH.

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

In support of their argument for summary judgment on Affirmative Defense No. 3, Plaintiffs merely argue that they should prevail because they are entitled to summary judgment on Counterclaims Count IV. Mtn. at 38. As shown above, they are not entitled to summary judgment on that Count, and hence also not on Affirmative Defense No. 3. Furthermore, Plaintiffs ignore that their fraudulent inducement which is the basis for Counterclaims Count III – a count on which Plaintiffs do not seek summary judgment – supports this affirmative defense, as does their admitted deception in connection with the Validation Test, as discussed above (in Section III(A)).

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

In support of their argument for summary judgment on Affirmative Defense No. 4, Plaintiffs merely argue that they should prevail because they are entitled to summary judgment on Counterclaims Counts I and II. Mtn. at 38. As shown above, they are not entitled to summary judgment on those Counts, and hence also not on Affirmative Defense No. 4.

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

In support of their argument for summary judgment on Affirmative Defense No. 5, Plaintiffs merely argue that they should prevail because they are entitled to summary judgment on Counterclaims Count IV. Mtn. at 38. As shown above, they are not entitled to summary judgment on that Count, and hence also not on Affirmative Defense No. 5. Moreover, even if Plaintiffs could defeat Count IV for lack of actual damages (which they cannot), the affirmative defense of Plaintiffs' unlawful actions would remain.

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

Defendants agree that Plaintiffs, not Defendants, bear the burden of proof on demonstrating causation between any purported violation or breach of duty by Defendants and any purported damages of Plaintiffs. Mtn. at 38. Beyond this, Plaintiffs say that Defendants' position in its Seventh Defense is "nonsensical" that any injury Plaintiffs suffered was because of the acts or omissions of Plaintiffs or persons other than Defendants because Defendants have not shown how the actions of Plaintiffs or others "resulted in Defendants being unjustly enriched." Id. What is nonsensical, however, is this argument by Plaintiffs. Defendants do not have to show they were "unjustly enriched" to prevail on the position that they did not cause injury to Plaintiffs. In fact, Defendants agree with Plaintiffs that no actions by Plaintiffs "resulted in

Defendants being unjustly enriched,” which by definition means that Count III in Plaintiffs’ Complaint for “Unjust Enrichment” must be dismissed.¹⁰

G. Defendants’ Affirmative Defense No. 8: Merger and Integration Clause

For its eighth Affirmative Defense, Defendants claim that Plaintiffs’ fraudulent inducement claim is barred by the merger and integration clause contained in License Agreement Section 16.8, which states:

This Agreement (including Exhibits and Schedules hereto) and the other agreements, certificates and documents specifically incorporated herein by reference thereto, or delivered pursuant to this Agreement contain the entire agreement among the parties with respect to the transactions described herein, and supersede all prior agreements, written or oral, with respect thereto.

License Agreement (Pl. SOMF Ex. 4) § 16.8. Plaintiffs argue that summary judgment on this defense is warranted because in Florida, the existence of a merger and integration clause does not affect oral representations which are alleged to have fraudulently induced a person to enter into the agreement. But while Plaintiffs would have the Court believe that the law on this issue is well settled, it is not, as the Eleventh Circuit recognized in *Adrienne Roggenbuck Trust v. Dev. Res. Grp.*, 505 F. App’x 857, 861 (11th Cir. 2013). The Fifth District Court of Appeals of Florida recently addressed and reconciled two Florida Supreme Court cases that are in tension with each other to conclude that “a superficial resolution of the apparent conflict between the cases is that a ‘merger’ clause negates a fraud claim but a ‘non-reliance’ clause does not,” and further that a contract containing both merger and non-reliance clauses negates a fraud claim because of the effect of the merger clause.” *Billington v. Ginn-La Pine Island, Ltd., LLLP*, 192 So. 3d 77, 83 (Fla. Dist. Ct. App. 2016). The *Billington* court questioned whether this was the best rule of decision and called upon the Florida Supreme Court to address the issue, *see id.* at 85, but the Florida Supreme Court has not. Thus, Florida law remains as stated in *Billington* – that “a ‘merger’ clause negates a fraud claim.” *Id.* at 83; *see also Hillcrest Pacific Corp. v. Yamamura*, 727 So.2d 1053, 1055-56 (Fla. Dist. Ct. App. 1999). The License Agreement

¹⁰ The Seventh Defense is broader than just addressing the lack of Defendants being unjustly enriched. It also addresses the lack of causation between any of Plaintiffs’ supposed non-contractual injuries and Defendants’ actions. For example, Plaintiffs appear to have largely abandoned their trade secrets claim, but had they not, it is clear that any disclosure by Defendants of the E-Cat IP was authorized by the License Agreement, which (among other things) put no restrictions on IH’s disclosure of the E-Cat IP and allowed IH in its “sole and exclusive discretion” to sub-license the E-Cat IP to anyone it wanted. License Agreement §§1, 16.4.

contains just such a merger and integration clause that expressly “supersede[s] all prior agreements, written or oral, with respect thereto.”

Plaintiffs claim Defendants represented that Cherokee would be a party to, or at least guarantee payments under, the License Agreement. But the License Agreement clearly states the parties to that Agreement, and Cherokee is not one of them. The detailed Agreement also does not provide for any guarantee of IH’s obligations thereunder from Cherokee or anyone else. Because the License Agreement supersedes all prior oral agreements, Plaintiffs cannot sue Defendants for allegedly making such oral promises. *See, e.g., Mac-Gray Servs., Inc. v. DeGeorge*, 913 So.2d 630, 634 (Fla. Dist. Ct. App. 2005) (“A party cannot recover in fraud for alleged oral misrepresentations that are adequately covered or expressly contradicted in a later written contract.”).¹¹

CONCLUSION

WHEREFORE, Defendants respectfully request that the Court deny Plaintiff’s Motion for Partial Summary Judgment, and for the reasons stated in Defendants’ Motion for Summary Judgment [D.E. 203], grant summary judgment in favor of Defendants on all claims in the Complaint and Fourth Amended Answer, Additional Defenses, Counterclaims, and Third-Party Claims.

¹¹ This defense is further bolstered by First Amendment Section 2, which “ratified and confirmed” the License Agreement even though it did not contain any of the promises Plaintiffs claim fraudulently induced them to enter into the License Agreement. 1st Amendment (Pl. SOMF Ex. 5) § 2.

Dated: April 4, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on April 4, 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