

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

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

ANDREA ROSSI et al.,

Plaintiffs,

v.

THOMAS DARDEN, et al.,

Defendants.

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

Counter-Plaintiffs,

v.

ANDREA ROSSI and LEONARDO
CORPORATION,

Counter-Defendants,

And

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

Third-Party Defendants.

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

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

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Statement of Material Facts in Opposition to Defendants' Additional Facts

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

111. Disputed. The License Agreement, as amended by the parties, does not provide that at least 54 E-Cat reactors would be used for the Validation Test. *See* **Ex. 4; Defs.' Ex. 2** at 151:1-2. On or about April 24, 2013, the parties mutually agreed in writing to test 30 reactors for purposes of the Validation Test. *See* **Supp. Ex. 44** (IH-00098392-96). The First Amendment to the License Agreement provided for testing of 30 E-Cat reactors over a period of 24 hours. *See* **Ex. 5** (First Amendment, Ex. A). Based upon Dr. Rossi's conversations with Italian authorities, Dr. Rossi determined that the parties should test 18 reactors. *See* **Supp. Ex. 46** ¶ 6. Defendants consented to testing 18 reactors. The ERV certified the Validation Test results pursuant to amended section 4 of the License Agreement. *See* **Ex. 12**. Defendants did not object to the ERV's report. *See* **Ex. 3** at 152:21-154:25; **Ex. 14**, at 257:15-20; 340:4-12. On June 9, 2013, Defendants tendered the \$10 million payment as contemplated by section 3.2(b) of the License Agreement. *See, e.g.*, Countercl. ¶¶ 58, 94.

112. Disputed. At no time did Dr. Rossi interpret, claim to have interpreted, or claim direct knowledge of Italian law; rather, Dr. Rossi communicated his understanding of what the Regional Agency for the Protection of the Environment of Ferrara told him. *See* **Supp. Ex. 46** ¶¶ 7-8. In April 2013, the Regional Agency for the Protection of the Environment of Ferrara informed Dr. Rossi that he was required to obtain authorization prior to conducting the test, but that if neighboring residents would agree to the test the Agency would not interfere. *See* **Supp. Ex. 45** at 148:20-149:11. The Agency informed Dr. Rossi that: "in Italy we do not have authorizations for experiments. There is not something that is called an authorization for 36 hours. You are either authorized or you are not." **Defs.' Ex. 2** at 148:12-25. Based upon the Ferrara Agency's representation, Dr. Rossi determined that an appropriate level would be the number of reactors actually tested. *See* **Supp. Ex. 46** ¶ 6. Defendants consented to testing 18 reactors and paid the \$10 million payment under the License Agreement. *See* Countercl. ¶¶ 58, 94.

113. Disputed. Plaintiffs do not dispute that the 18 E-Cat reactors were tested during the Validation Test. However, the mutually agreed to ERV, Fabio Penon, performed all measurements required by the mutually agreed to Validation Protocol. *See Ex. 3* at 115:4-25, 121:7- 11; **Exs. 11, 12**. After the ERV produced a final reporting clearly showing the test parameters and results, Defendants tendered the \$10 million payment in accordance with the License Agreement. *See Countercl. ¶¶ 56, 58; see also Ex. 9* at 97:14-22.

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

115. Disputed. Disputed. AEG's corporate representative testified that he could not remember whether AEG executed the Second Amendment. *See Supp. Ex. 55* at 78:22-79:18. AEG also testified that that they understood that by not signing the Second Amendment, the amendment would not be binding upon them. *See Defs.' Ex. 12* at 79:2-18, 87:2-11; **Defs.' Ex. 16** (IH-00089736-43). AEG testified that it did not favor the Second Amendment because AEG believed that the terms thereof would have a negative impact on their fee arrangement with Defendants. *See Defs.' Ex. 12* at 79:6-18.

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

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

118. Undisputed.

119. Disputed. Defendant IPH testified that it did not know what specific confidential information Plaintiffs disclosed, and further indicated that he did not know of any proof or facts that IPH has in support of this claim. *See Ex. 17* at 62:24-63:23. Defendant IPH testified that IPH did not know of any evidence or proof that IPH had in support of its claim for breach of Section 16.4 of the License Agreement. *See Ex. 17* at 48:24-49:19.

120. Disputed. The License Agreement itself grants to Defendants the purported "assignment" that Defendants sought in their February 2016 letter, thereby rendering the letter and its request redundant and unnecessary. *See Ex. 4* § 1 (the License Agreement grants to Defendants "the exclusive right and license under the Patents and other E-Cat IP to develop, manufacture, make, have made, use, have used, offer to sell, have offered for sale, sell, have sold, import, and have imported all the products deriving from the E-Cat IP in the Territory." In addition, as early as October 2013, Defendants had no intention of making the \$89 million payment to Plaintiffs. *See, e.g., Ex. 9* at 117-

121. IPH and IH readily admit that they did not pay the \$89 million sought by Plaintiffs. *See* Countercl. ¶¶ 74, 80; **Ex. 17** at 108:23-25.

121. Disputed. IPH testified that it was not aware of the damages associated with any purported breach of the License Agreement with respect to Leonardo's patent activities. *See Ex. 17* at 70:25-71:5. Defendant Darden testified that neither IH nor IPH had computed damages related to any purported violation of any such provision of the License Agreement. *See Ex. 9* at 7-24.

122. Disputed. Dr. Rossi reported to Defendants that Plaintiffs and Defendants had a potential customer who could use steam produced from the E-Cat. *See Supp. Ex. 45* at 191:17-192:24). Dr. Rossi did not represent to Defendants that J.M. Products was an affiliate of Johnson Matthey. *See Supp. Ex. 46* ¶ 13. Dr. Rossi represented to Plaintiffs that J.M. Products was a newly formed company that Henry Johnson – Dr. Rossi's attorney – would serve as the company's CEO and that Dr. Rossi would run the operations for the first year of business. *See Supp. Ex. 56* (IH-00011867, IH-00012026). Henry Johnson never intended J.M. to stand for Johnson Matthey, and Dr. Rossi never told Henry Johnson that J.M. Products would be related in any way to Johnson Matthey. *See Supp. Ex. 57* at 124:5-25, 171:13-19).

123. Disputed. Dr. Rossi made clear to Defendants that J.M. Products was a newly formed company. *See Supp. Ex. 56*. Dr. Rossi made clear to Defendants that J.M. Products would use Johnson Matthey as a supplier. *See Defs.' Ex. 41*. J.M. Products did use steam generated by the 1MW Plant to create platinum-sponge and/or graphene based catalyzers for sale to Leonardo. *See Supp. Ex. 59* at 214:23-215:3, 220:16-19, 225:5-10; **Supp. Ex. 58**; **Supp. Ex. 45** at 185:23-186:20. IPH has no proof to contradict this representation. *See Ex. 17* at 149:19-150:8. In exchange and consideration for J.M. Products' sale to Leonardo Corporation of the catalysts that J.M. Products produced using the 1MW Plant steam, Leonardo Corporation paid J.M. Products' expenses and employee/contractor income. *See Defs.' Ex. 17* at 208:3-209:21. Dr. Rossi controlled J.M. Products' technical and product development activities, as well as the company's day-to-day activities. *See Defs.' Ex. 36* at 17:11-16, 22:23-23:1. At all relevant times, Defendants knew that Dr. Rossi would direct the operations of the J.M. Products. *See Defs.' Ex. 36* at 34:15-20.

124. Undisputed.

125. Disputed. J.M. Products was a real customer with its own operations to use steam produced by the 1MW Plant to treat platinum sponge to create catalyzers for sale. *See Supp. Exs. 58, 45* at 185:23-186:20. IPH has no proof to contradict this representation. *See Ex. 17* at 149:19-150:8. In fact, J.M. Products did use steam generated by the 1MW Plant to create platinum-sponge and/or

grapheme based catalyzers for sale to Leonardo. *See* **Supp. Ex. 59** at 214:23-215:3, 220:16-19, 225:5-10. Regardless, Defendants did not care what J.M. Products was using steam for or what the company was producing. *See* **Supp. Ex. 48** at 196:8-196:11. At all times, Dr. Rossi distinguished J.M. Products from Rossi and Leonardo: (a) to respect corporate formalities; and (b) because the entities and individuals were separate and distinct. *See* **Supp. Ex. 46** ¶ 17. J.M. Products was in fact satisfied with the power that it was receiving from the 1MW Plant. *See* **Defs.’ Ex. 47** at Leonardo Corp. Dep. Ex. 20.

126. When necessary, Mr. Fabiani transmitted to Fabio Penon data that was stored on equipment used to measure the 1MW Plant output. *See* **Supp. Ex. 65** at 105:6-106:4. None of the data could be manipulated without the equipment recording such manipulation. *See id.* at 105:6-106:4, 171:2-10. The only data that Dr. Rossi transmitted to Fabio Penon was a logbook containing performance data. *See* **Supp. Ex. 59** at 37:16-38:5. At all times, Dr. Rossi rigorously logged information relevant to the logbook, including “water flow, the water temperature, the steam temperature, the bars, etcetera.” *See id.* at 132:16-19.

127. Disputed. The 1MW Plant was sent to Florida in a container whose construction was not yet complete. *See* **Supp. Ex. 45** at 248:6-10). When the container arrived in Florida, Plaintiffs completed the construction. *See id.* Plaintiffs made no substantial changes to the container or 1MW Plant, including any changes that would make evaluating the 1MW Plant’s performance more difficult. *See id.* at 249:17-250:16; **Supp. Ex. 46** ¶ 19. Plaintiffs did not remove any steam trap. *See* **Supp. Ex. 45** at 248:11-19. In addition, section 5 of the License Agreement clearly provides that: “Each of Leonardo and Rossi will use their commercially reasonably best efforts to cause Guaranteed Performance to be achieved, including making repairs, adjustments and alterations to the Plant as needed to achieve Guaranteed Performance.

128. Disputed. Plaintiffs did not have the authority to grant Defendants access to the J.M. Products side of the Doral Facility. *See* **Supp. Ex. 46** ¶ 18. None of Dr. Rossi’s claims about the 1MW Plant were false. *See* **Supp. Ex. 46** ¶ 21. Murray is not a qualified to assess Dr. Rossi’s claims about the 1MW Plant. *See* **Supp. Ex. 66** (Expert Report of Dr. K. Wong).

129. Plaintiffs never orchestrated any fraudulent scheme to induce Defendants into any action whatsoever, and Defendants had full knowledge regarding J.M. Products, its new facility, and its officer (Henry Johnson). *See* **Supp. Ex. 46** ¶ 22; *See also* facts outlined in DE 238 ¶¶ 1-88.

Memorandum of Law

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

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

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

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

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

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

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

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

I. Plaintiffs are entitled to summary judgment as to Count I of the Complaint.

a. Plaintiffs timely completed the GPT as required by the terms of the License Agreement.

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

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

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

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

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

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

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

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

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

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

I.

a. Validation

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

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

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

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

b. Replication.

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

Regardless, Defendants knowingly and intentionally omitted any such requirement in the License Agreement. *See* SOF ¶¶ 28-29. There is no provision in the License Agreement that conditions performance by any party upon Defendants’ independent ability to replicate any test result or generate any energy whatsoever. *See* SOF ¶¶ 28-33; SOFO ¶ 40. It is a “commonsense principal of [contract] interpretation that ‘the absence of a provision from a contract is evidence of an intention to exclude it rather than an intention to include it.’” *Megdal Assocs.*, 2016 U.S. Dist. LEXIS 119168, at *11 (quoting *Azalea Park Util., Inc. v Knox-Fla. Dev. Corp.*, 127 So. 2d 121, 123 (Fla. 2d DCA 1961)). The parties did agree to validate the technology by virtue of two separate tests: the Validation Test and the GPT Test. If Defendants intended Plaintiffs to have further obligations, they could have insisted they be placed in the License Agreement. They did not.

To the extent that Count 1 is predicated on their inability to accomplish goals not contained in the parties’ contract, Defendants’ claim fails as a matter of law.

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

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

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

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

a. **Breach of Confidentiality.**

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

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

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

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

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

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

b. Failure to Assign Licensed Patents.

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

Plaintiffs are entitled to summary judgment on this count for at least two reasons. First, as a matter of law, the License Agreement itself was an exclusive license “equivalent to an assignment.” See *Hako-Med USA, Inc. v. Axiom Worldwide, Inc.*, No. 8:06-CV-1790-T-27EAJ, 2006 U.S. Dist. LEXIS 94239, at *9 (M.D. Fla. Nov. 15, 2006 (citing *Prima Tek II, LLC v. A-Roo Co.*, 222 F.3d 1372, 1378 (Fed. Cir. 2000)). Given that the License Agreement itself provided for precisely what Defendants’ February 2016 letter purported to demand, Defendants cannot seriously maintain that Plaintiffs have materially breached the License Agreement.

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

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

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

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

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

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

d. Breach of the Covenant Not to Compete.

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

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

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

e. Failure to Pay Taxes.

First, this is not an affirmative claim. *See* Countercl. ¶ 132. Next, Defendants have neither alleged nor suffered any damages whatsoever. *See* SOF ¶¶ 89-91; DE 237 at 26. Nor could Defendants suffer any damages since, as a matter of law, any lien that the federal government might issue would attach to the property that Plaintiff owned at the time of issuance and to any property obtained thereafter, and would not extend beyond Plaintiffs' property interests. *See United States v. Barnes*, 509 F. App'x 837, 840 (11th Cir. 2012); *United States v. Rodgers*, 461 U.S. 677, 690-91 (1982). As noted *supra*, Florida law requires that Defendants plead and prove damages, even if such damages are nominal. *See* DE 238 at 14-15; *see also Vital Pharms.*, 2016 U.S. Dist. LEXIS 113942 at *14.

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

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

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

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

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

b. Defendants Cannot Show Causation.

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

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

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

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

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

c. Defendants suffered no actual damages.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Dated: April 11, 2017.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served by in the manner specified below on April 11, 2017, on all counsel or parties of record on the attached Service List.

/s/ John W. Annesser

John W. Annesser, Esq.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

ANDREA ROSSI and LEONARDO
CORPORATION,

Plaintiffs,

VS.

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,

Vs.

ANDREA ROSSI and LEONARDO
CORPORATION,

Counter-Defendants,

And

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

Third-Party Defendants.

No. 1:16-cv-2119-CMA

Videotaped Deposition of
THOMAS DARDEN

(Taken by Plaintiff)

3509 North Haworth Drive, Suite 403, Raleigh, North Carolina

February 16, 2017

Reported in Stenotype By

Leslie Christian

Transcript produced by computer-aided transcription

1 **A. Makes sense.**

2 Q. Is there any point in time that you --
3 based on your recollection that you were not an officer
4 or director of Industrial Heat, LLC?

5 **A. I don't remember not being. I don't**
6 **remember that.**

7 Q. Okay. There's a few other entities that
8 I'm really not concerned about other than just to
9 understand what your role is. L Holdings, LLC.

10 MR. BELL: What's the question?

11 MR. CHAIKEN: Is he an officer or
12 director?

13 **THE WITNESS: I don't remember.**

14 (BY MR. CHAIKEN)

15 Q. New Heat, LLC?

16 **A. Also don't remember.**

17 Q. Are both of those companies wholly owned by
18 IH Holdings International Limited?

19 **A. I believe that both of those are wholly**
20 **owned. I believe, but I would want to consult with our**
21 **attorneys or accountants to confirm that.**

22 Q. What about IHJ Holdings Limited?

23 **A. I would also want to consult with our**
24 **accountants about the precise structure there. It's a**
25 **complicated structure that we relied heavily on limited**

1 with the technology. No, in fact, I'm almost sure they
2 had been to meetings observing the technology with
3 other potential investors or developers of it. And so,
4 yeah, they were relatively familiar with the
5 technology.

6 Q. Did you just have conversations with them
7 about it or did you ask them for documents or
8 materials? Did you make due diligence requests to
9 them?

10 A. I don't remember what all we asked them
11 for, but I'm sure that they did give us some materials.

12 Q. Okay. And on that same subject, what due
13 diligence did you do before you entered into the
14 license agreement with Leonardo?

15 A. Well, J.T. Vaughn went to a conference or a
16 demonstration of some kind that Rossi had. We visited
17 facilities. We talked to a lot of different people who
18 were in the field. When I say "in the field," people
19 who were knowledgeable about LENR and what's going on.
20 We saw equipment operating. So we did a lot of
21 research. Just a broad-based set of activities.

22 Q. Did you conclude that it was a
23 controversial field?

24 A. Yes. We definitely knew that it was a
25 controversial field from the very beginning.

1 Q. And that the chances of it being a -- you
2 know, maybe something that doesn't work, something
3 that's not provable, something that has a lot of risk
4 with it? Is that your understanding?

5 MR. BELL: Objection to form.

6 THE WITNESS: Yes. We felt that there
7 was a good chance that the technology would not work.
8 We also felt that there were -- there was enough
9 evidence of LENR being observed in different settings
10 that it was worth investing in even knowing that it
11 might not be successful.

12 Q. I'm going to distinguish Dr. Rossi the
13 person from the technology for a second. Did you do
14 any due diligence into Dr. Rossi the person prior to
15 entering into the license agreement?

16 A. Yes, we did.

17 Q. What due diligence did you do?

18 A. We talked to him about his background and
19 the experiences he had had. And he was very
20 forthcoming that he had been in jail. He was -- said
21 that it was a function of him having not agreed to give
22 half of his business to the Mafia and that after
23 refusing to do that the police came and arrested him,
24 that his business was operating well at the time that
25 they came.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

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

ANDREA ROSSI, ET AL.,

Plaintiffs,

vs.

THOMAS DARDEN, ET AL.,

Defendants.

_____ /

PERLMAN, BAJANDAS, YEVOLI &
ALBRIGHT, P.L.
282 CATALONIA AVENUE
SUITE 200
CORAL GABLES, FL 33134
Monday, February 13, 2017
9:07 a.m. - 5:18 p.m.

VIDEOTAPED DEPOSITION OF JOHN THOMAS VAUGHN
(Corporate Representative of Industrial Heat, LLC)

Taken on behalf of the Plaintiff before
Elizabeth Cordoba, RMR, CRR, FPR, Notary Public in
and for the State of Florida at Large, pursuant to
Plaintiff's Notice of Taking Deposition in the above
cause.

1 So we were trying to go back and reconstruct a
2 timeline of what had happened in the field of LENR, as
3 well as with regard to Andrea. So that with regard to
4 Andrea, aside from his field, you know, he also -- there
5 were a number of people who clearly did not believe that
6 he was a legitimate character, a legitimate actor. And
7 they voiced their opinions very strongly online and, you
8 know, we raised concerns about his past. And so it was an
9 -- I would say it was an interesting process and
10 interesting timeline that was built around both the field
11 of LENR, as well as Andrea personally at that time.

12 Q. What specifically did you learn about
13 Dr. Rossi's background?

14 A. We learned that, you know, there are a number
15 of claims at that time about him having previously gone to
16 prison. I believe we confronted him about these claims.
17 He explained it -- he never denied having been in prison.
18 But he explained it as tax fraud and that it was --
19 effectively, there was no way for him to be compliant or
20 it was almost impossible for him to be compliant under
21 Italy's tax code. And he hadn't done a good job of
22 compliance, and so he ended up in jail for that.

23 You know, his other partners AEG seemed to also
24 kind of affirm that that was the case. And so we didn't
25 -- you know, in retrospect, maybe we should have dug a

1 I believe, is the attachment to that e-mail.

2 A. Okay. Thank you.

3 Q. Exhibit 4 has been Bates stamped 831 -- IH83131
4 through 83149. I believe that is the attachment to that
5 e-mail.

6 Do you recall seeing this? And you can take a
7 minute, to make sure. And I just have a real simple
8 question.

9 A. Okay.

10 Q. It relates to the e-mail, not necessarily the
11 report.

12 A. Okay.

13 Q. But in the e-mail it seems that, at least as of
14 August 16, 2012, Tom Darden had a copy of this report.
15 Would you agree with that?

16 A. I would agree with that, based on this e-mail.

17 Q. Okay. And at least he considered that Fabio
18 Penon could have been part of a fraud regarding this
19 technology. Would you agree with that?

20 A. Well, he did say, "Of course, the report could
21 be by someone who was part of a broader fraud. The
22 writer/professor is at the university there in Bologna, I
23 think. It has not been released."

24 So I am wondering if Tom was -- I agree this
25 report is appears to be about Penon. As I read Tom's

1 e-mail, I am wondering if he was referring to Penon or to
2 Levi when he says "professor at the university there in
3 Bologna." Because I was -- and Penon references a
4 validation test on July 16, 2012. Which I think that was
5 conducted by Levi. If you have that, it might help us
6 out.

7 Q. I don't have a copy of it right now.

8 A. Yeah.

9 Q. But my question, I don't mean to interrupt you,
10 but my question is really simply, do you recall having any
11 conversations with the team about, you know, this report
12 and Penon and whether or not he was -- could be, you know,
13 part of a greater fraud.

14 A. I recall that we -- that one of the possible
15 scenarios, right, is that this could be a pathological
16 scientist. So that was a term developed by LENR critics.
17 Which means that these guys want something to happen so
18 badly that they believe that it is happening, even though
19 it is really not happening. There was one scenario.
20 Another scenario that could be outright fraud. Right?

21 But do I recall specifically discussing Penon
22 and fraud in this time period? I don't . It is not to
23 say that it -- it may have been discussed, and as you are
24 pointing out, this appears to be from Penon. But offhand
25 I recall more particularly Levi and having questions about

1 Levi and his group, who had done -- I believe they did the
2 July 16th test and then they later did a -- I believe it
3 was December and March, December '12 and March '13 test,
4 which were combined and one report was written about both
5 of them. So -- but, you know, Penon it appears was doing
6 some work at that time, as well.

7 Q. You know, before I go any further, I wanted to
8 ask this question I forgot to ask. Are you also going to
9 be appearing as the corporate representative for IPH at
10 tomorrow's deposition?

11 MR. BELL: Why is that appropriate to ask him
12 now?

13 MR. CHAIKEN: So I don't have to duplicate a
14 lot of the work.

15 THE WITNESS: I think we are still working to
16 determine who -- who that is going to be.

17 BY MR. CHAIKEN:

18 Q. Okay.

19 A. But we are still trying to decide about that.

20 Q. Okay. Are you currently an officer or director
21 of IPH?

22 A. I am not.

23 Q. Okay. Are the -- well, I will ask that later.

24 When approximately did your team complete its
25 due diligence on Dr. Rossi and the E-Cat technology?

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

ANDREA ROSSI and LEONARDO)
CORPORATION,)

Plaintiffs,)

vs.)

No. 1:16-cv-2119-CMA

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,)

vs.)

ANDREA ROSSI and LEONARDO)
CORPORATION,)

Counter-Defendants,)

and)

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

Third-Party Defendants.)

Videotaped Deposition of
JOHN THOMAS VAUGHN
(Taken by Plaintiff)

3509 North Haworth Drive, Suite 403, Raleigh, North Carolina
January 19, 2017, 9:04 a.m.

Reported in Stenotype By
Margaret M. Kruse, CSR, RMR, CRR
Transcript produced by computer-aided transcription

1 likely. I think it probably just doesn't work. But --
2 that's why I say less than 1. If you run a device that
3 doesn't produce excess heat, you do have a COP of less than
4 1.

5 Q. Now -- but at that time, did you have any
6 objection to reporting to investors that it had produced a
7 COP of 1.3?

8 A. Yes. See I've mentioned that. I mentioned the
9 1.3 times COP test; but if you feel we should phrase it in
10 a better way, let me know, meaning more caveats.

11 So clearly that was being discussed. And I don't
12 know for certain if that was the draft that went to
13 investors or not. I don't know. So if that was ultimately
14 communicated to investors, again, it's not like Tom was
15 communicating something gravely positive. It was more or
16 less a negative. Right?

17 I mean, we -- we thought that this thing was
18 simple and easy and that you would have a much higher COP
19 than that. So it was a -- it was not a -- even though it's
20 reporting an over 1 COP, it was overall a negative
21 communication, as you can tell from reading.

22 Q. Go going back for just a moment to the validation
23 test carried out in Ferrara, Italy, on or about April 30 or
24 the beginning of May 2013, that's referenced in this update
25 as well from July 2013. And I would direct you under the

1 Industrial Heat update July 2013, the second paragraph,
2 about halfway through, it says [as read]: During the test,
3 we operated 37 different reactors for periods ranging from
4 24 hours to a few hours and the results were good. Our
5 engineer and the independent engineer operating the test
6 reported that the machines produced far more energy than
7 they required to operate, nearly 11 times as much in some
8 instances, versus our test requirements of 6 times during
9 the 24-hour test.

10 Do you see that?

11 **A. I see that.**

12 Q. Was that the update that you provided to
13 investors?

14 **A. I image that some form of this update went out.
15 And this may be a final draft. I'm not sure. But, again,
16 it's -- the context there is that broadly we were feeling
17 positive at the time and we didn't know what we didn't
18 know.**

19 **And, frankly, we weren't as sophisticated in the
20 -- in the measurement of heat, heat flows and calorimetry
21 as we should have been. So I think that is apparent in
22 later updates. Anyway. . .**

23 Q. So at the time you had no question whatsoever as
24 to those results?

25 MR. BELL: Objection to form.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

ANDREA ROSSI and LEONARDO)
CORPORATION,)

Plaintiffs,)

vs.)

No. 1:16-cv-2119-CMA

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,)

vs.)

ANDREA ROSSI and LEONARDO)
CORPORATION,)

Counter-Defendants,)

and)

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

Third-Party Defendants.)

Videotaped Deposition of
JOHN THOMAS VAUGHN
(Taken by Plaintiff)

3509 North Haworth Drive, Suite 403, Raleigh, North Carolina
January 19, 2017, 9:04 a.m.

Reported in Stenotype By
Margaret M. Kruse, CSR, RMR, CRR
Transcript produced by computer-aided transcription

1 Q. You knew at the time that J.M. Chemical Products
2 was a newly form entity, not a long-existing entity, it was
3 formed shortly before this agreement, you know that, right?

4 A. I can't recall if we got into the specifics of
5 when J.M. Chemical Products was formed. And I still don't
6 know when it was formed. I'm sure it's out there. I'm
7 sure you can look up the Secretary of State filing.

8 But what we believed is that it was formed
9 Johnson Matthey in the UK.

10 Q. Okay. I understand. I understand that's your
11 belief. But what I'm asking you is: At the time, before
12 you entered into this agreement, was it your understanding
13 that J.M. chemical products, not Johnson Matthey, was a
14 newly formed company for the sole purpose of the -- of
15 working under the transaction contemplated in this term
16 sheet?

17 A. I did not recall at the time -- you know, as I
18 said, my recollection is that it was an affiliate of the UK
19 company, Johnson Matthey. I don't know when it was formed;
20 I'm not sure.

21 Q. Do you know if J.M. Chemical Products had a
22 facility operating in Miami prior to entering into this
23 term sheet?

24 A. I don't know.

25 Q. If there had been a facility in Miami, would you

1 have asked to see it? Could you have asked to visit the
2 facility?

3 **A. Not necessarily.**

4 Q. Why not?

5 **A. Why would I have?**

6 Q. To see what they would use the E-Cat for I would
7 imagine.

8 **A. I previously told you we didn't care how they**
9 **were -- you know, what they were using it for. We didn't**
10 **care if they were producing nickel, platinum, whatever. It**
11 **didn't -- didn't make a difference to us.**

12 Q. Now -- I'm sorry. We have to change the tape
13 again. Take a five-minute break.

14 THE VIDEOGRAPHER: We're off the record at 3:03
15 p.m.

16 (Recess at 3:03 p.m. until 3:11 p.m.)

17 THE VIDEOGRAPHER: We're back on the record at
18 3:11 p.m.

19 BY MR. ANNESSER:

20 Q. Sir, before the break, you had just finished
21 telling me that you were not concerned with what was being
22 done with the steam or what was being produced with the
23 steam, but you did indicate that it was important to you
24 that it was affiliated with Johnson Matthey; is that
25 correct?

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

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

ANDREA ROSSI, ET AL.,

Plaintiffs,

vs.

THOMAS DARDEN, ET AL.,

Defendants.

_____ /

PERLMAN, BAJANDAS, YEVOLI &
ALBRIGHT, P.L.
282 CATALONIA AVENUE
SUITE 200
CORAL GABLES, FL 33134
Monday, February 13, 2017
9:07 a.m. - 5:18 p.m.

VIDEOTAPED DEPOSITION OF JOHN THOMAS VAUGHN
(Corporate Representative of Industrial Heat, LLC)

Taken on behalf of the Plaintiff before
Elizabeth Cordoba, RMR, CRR, FPR, Notary Public in
and for the State of Florida at Large, pursuant to
Plaintiff's Notice of Taking Deposition in the above
cause.

1 Q. So at that time, at least at the time of this
2 document, was Industrial Heat willing to postpone the
3 start of the guaranteed performance test?

4 MR. BELL: Objection to form.

5 THE WITNESS: It appears that that was
6 contemplated by this amendment, which was never put
7 into effect.

8 BY MR. CHAIKEN:

9 Q. Okay. And whose signature is on page three?

10 A. Tom Darden's and Andrea Rossi's.

11 Q. And you say this agreement was not put into
12 effect, and you say that because why?

13 A. It was never signed by AEG. For it to be
14 effective, it had to be signed by all parties. And I
15 think there was later notice circulated that said it was
16 not in effect because it had never been signed by AEG.

17 Q. Got it. Did -- any time after October 2013 and
18 prior to this lawsuit beginning, did Industrial Heat
19 inform Dr. Rossi that, The time had passed, you could no
20 longer achieve guaranteed performance, and you could no
21 longer achieve an \$89 million payment?

22 A. I'm not sure that we informed him of that
23 verbatim, as you stated.

24 Q. Okay. Did you say it to him in any -- any
25 summary of that, in any -- in any way did you say, Listen,

1 the time has passed, you are -- we are not having a
2 guaranteed performance test?

3 A. I am trying to recall. You know, I -- I don't
4 recall.

5 Q. Do you think that was something that would be
6 important to inform him, that he no longer had the
7 opportunity to earn \$89 million?

8 A. Again, we were planning to pay him, if he could
9 perform. Notwithstanding the fact that he had violated
10 the agreement, not met the conditions of the agreement.
11 So if we had done that, let's take a hypothetical
12 scenario, dealing with a volatile character, you don't
13 know how he is going to respond. Our goal, as stewards
14 and as managers, is to determine definitively the state of
15 the art. And by being confrontational, sooner rather than
16 later, it ensured that you would just blow up in -- there
17 was a chance, at least, that you would blow up the entire
18 relationship and Andrea would stop working on it
19 altogether and so, therefore, we just wouldn't know.
20 Versus getting more information and getting more data to
21 determine the state of the art.

22 Q. Well, couldn't you have told him, Hey,
23 Dr. Rossi, we think that the time has passed, but if you
24 perform, we are willing to still pay you?

25 MR. BELL: Objection to form.

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF FLORIDA)
3 ANDREA ROSSI and LEONARDO)
4 CORPORATION,)
5 Plaintiffs,)
6 VS.)
7) No. 1:16-cv-2119-CMA
8 THOMAS DARDEN; JOHN T. VAUGHN;)
9 INDUSTRIAL HEAT, LLC; IPH)
10 INTERNATIONAL B.V.; and)
11 CHEROKEE INVESTMENT PARTNERS,)
12 LLC,)
13 Defendants.)
14 INDUSTRIAL HEAT, LLC and IPH)
15 INTERNATIONAL B.V.,)
16 Counter-Plaintiffs,)
17 Vs.)
18 ANDREA ROSSI and LEONARDO)
19 CORPORATION,)
20 Counter-Defendants,)
21 And)
22 J.M. PRODUCTS, INC.; HENRY)
23 JOHNSON; FABIO PENON; UNITED)
24 STATES QUANTUM LEAP, LLC;)
25 FULVIO FABIANI; and JAMES)
BASS,)
Third-Party Defendants.)

21 Videotaped Deposition of
22 THOMAS DARDEN
23 (Taken by Plaintiff)
3509 North Haworth Drive, Suite 403, Raleigh, North Carolina
24 February 16, 2017
25 Reported in Stenotype By
Leslie Christian
Transcript produced by computer-aided transcription

1 can't prove that we have anything that we know works.
2 If something didn't even work as well as three times we
3 would be pretty excited. But, you know, can we get
4 something to work two times COP."

5 I mean, you know, we're -- money is not our
6 concern. It's the effectiveness of the technology. We
7 would say that to him. Like, we have plenty of money.
8 That's not the problem. We can pay all the money that
9 anybody wants whether it's fair or whether it's
10 consistent with the contract. That's a different
11 issue. But we're willing to pay money if we have
12 technology that worked.

13 Q. Okay. Now, talking about the timeframe
14 October 2013 going forward, you were performing tests
15 -- and when I say "you," Industrial Heat was performing
16 tests on various -- various reactors or various single
17 units in Raleigh; was it not?

18 A. Um-hm.

19 Q. At anytime between October 2013 through,
20 let's say, June 2014 did Dr. Rossi ever refuse to
21 perform tests that Industrial Heat requested of him?

22 A. Yes.

23 Q. When?

24 A. Often during that time period. So we had
25 built a device that -- that where the unit -- it was a

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

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

ANDREA ROSSI, ET AL.,

Plaintiffs,

vs.

THOMAS DARDEN, ET AL.,

Defendants.

_____ /

PERLMAN, BAJANDAS, YEVOLI &
ALBRIGHT, P.L.
282 CATALONIA AVENUE
SUITE 200
CORAL GABLES, FL 33134
Monday, February 13, 2017
9:07 a.m. - 5:18 p.m.

VIDEOTAPED DEPOSITION OF JOHN THOMAS VAUGHN
(Corporate Representative of Industrial Heat, LLC)

Taken on behalf of the Plaintiff before
Elizabeth Cordoba, RMR, CRR, FPR, Notary Public in
and for the State of Florida at Large, pursuant to
Plaintiff's Notice of Taking Deposition in the above
cause.

1 word "replicate" appear anywhere in the agreement?

2 MR. BELL: Objection to form.

3 THE WITNESS: As I stated earlier this morning,
4 we were, when Andrea drafted the agreement, we were
5 trying not to change his language unless we felt
6 absolutely we needed to. And when you combine 12 (b)
7 and 13-1, we believe that gets the same effect.

8 BY MR. CHAIKEN:

9 Q. During the one year following validation, call
10 it May 1, 2013, did Industrial Heat ever tell Dr. Rossi
11 that it could not replicate?

12 A. Yes.

13 Q. When did it do that?

14 A. I believe on numerous different occasions. But
15 one explicit conversation that comes to mind is a
16 conversation that Tom and I had with Andrea around the
17 kitchen table at Triangle Drive. Triangle Drive is where
18 the initial facility where Andrea worked is located. And
19 the basis of that conversation was to say to Andrea, you
20 know, Look, you think things are going swimmingly. We
21 don't believe that is the case. We can't replicate it.
22 You think it's -- the results are fine. We are not seeing
23 the same results.

24 And it became a heated conversation. And Tom
25 eventually, you know, after he kind of pounded the table

1 quite literally, stormed out. And I think that was in the
2 fall -- I know that was in the fall of '13. I don't
3 remember was it September, October, November. I don't
4 remember exactly. But it was during that period of time.

5 Q. Did Industrial Heat ever make that
6 communication to Dr. Rossi in writing?

7 A. I don't know if we did. And we were seeing him
8 quite frequently in person at that time. And so it
9 wouldn't surprise me if we did not, that it was only
10 verbal. But I don't know. There may be some written
11 communication along those lines.

12 And, you know, the other thing is, it was much
13 easier to communicate in person with Andrea than it was
14 via e-mail because of the way he would react or appeared
15 to react via e-mail. You can see that in his responses.

16 Q. Mr. Vaughn, did you ever -- and I was hoping to
17 get a yes or no question to this, you can explain if you
18 need to -- did you ever in writing point to those two
19 contractual provisions that you just pointed me to, and
20 put those in writing and say, Dr. Rossi, you are in
21 violation of these two provision?

22 A. I don't believe that we did, with the
23 explanation I just provided.

24 (Exhibit 19, Fourth Amended Answer, Additional
25 Defenses, Counterclaims and Third Party Claims, was

1 the time has passed, you are -- we are not having a
2 guaranteed performance test?

3 A. I am trying to recall. You know, I -- I don't
4 recall.

5 Q. Do you think that was something that would be
6 important to inform him, that he no longer had the
7 opportunity to earn \$89 million?

8 A. Again, we were planning to pay him, if he could
9 perform. Notwithstanding the fact that he had violated
10 the agreement, not met the conditions of the agreement.
11 So if we had done that, let's take a hypothetical
12 scenario, dealing with a volatile character, you don't
13 know how he is going to respond. Our goal, as stewards
14 and as managers, is to determine definitively the state of
15 the art. And by being confrontational, sooner rather than
16 later, it ensured that you would just blow up in -- there
17 was a chance, at least, that you would blow up the entire
18 relationship and Andrea would stop working on it
19 altogether and so, therefore, we just wouldn't know.
20 Versus getting more information and getting more data to
21 determine the state of the art.

22 Q. Well, couldn't you have told him, Hey,
23 Dr. Rossi, we think that the time has passed, but if you
24 perform, we are willing to still pay you?

25 MR. BELL: Objection to form.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

ANDREA ROSSI and LEONARDO)
CORPORATION,)

Plaintiffs,)

vs.)

No. 1:16-cv-2119-CMA

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,)

vs.)

ANDREA ROSSI and LEONARDO)
CORPORATION,)

Counter-Defendants,)

and)

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

Third-Party Defendants.)

Videotaped Deposition of
JOHN THOMAS VAUGHN
(Taken by Plaintiff)
3509 North Haworth Drive, Suite 403, Raleigh, North Carolina
January 19, 2017, 9:04 a.m.

Reported in Stenotype By
Margaret M. Kruse, CSR, RMR, CRR
Transcript produced by computer-aided transcription

1 We can go back and look. Just because communications with
2 him were so -- so tenuous, I should say. And, you know,
3 before kind of confronting him via email, which often, as
4 you'll see the emails, he was very -- you couldn't tell
5 what he meant in his response because he would respond in
6 all caps, for example.

7 And so we were careful not to try to say things
8 that would totally alienate him or make him mad in email.
9 Because we were patient and hopeful. We were wanting to
10 get to the truth. And challenging him in the email, as was
11 our perception at the time, wasn't the best way to go about
12 that.

13 Q. Sir, your company had invested at that point in
14 time 11.5 million dollars --

15 A. Right.

16 Q. -- and paid that to Dr. Rossi.

17 A. Right.

18 Q. And you're telling me that you had doubts, but
19 you did not have someone qualified other than Dr. Rossi to
20 perform tests or evaluations for you or validations?

21 A. Correct. Because we thought that it was simple
22 and easy and that anybody could replicate it.

23 As I mentioned, T. Barker, who has some -- has an
24 engineering degree, was involved. But more or less, he was
25 there to help Dr. Rossi and be nice to Dr. Rossi. And T.

1 MR. BELL: Same objection.

2 THE WITNESS: As I mentioned, he was -- we were
3 there. He was -- you know, he was in Raleigh. He was --
4 we saw him routinely. So a lot of these concerns were
5 articulated in person.

6 As I said also, communicating via email was not
7 ever that productive. You can go back and review all the
8 emails, not ever that productive with Dr. Rossi because he
9 would respond and often he would respond like in all caps.
10 And you didn't know if he was just trying to distinguish
11 between what you said and what he said or if he was
12 screaming and yelling, you know. When we entered the
13 exclamation points, we figured maybe he was yelling too or
14 yelling louder.

15 But anyway, what you're talking about is
16 pretty -- you're directly confronting someone's what
17 appeared to be his life's work. Right. So if you were
18 going to do that, would it make sense to send an email
19 saying, as you described, email as you described it, our
20 assessment of that time was that's not the most effective
21 way to get to the truth.

22 MR. ANNESSER: I believe we have to change the
23 tape, so we'll take a short break.

24 THE VIDEOGRAPHER: We're off the record at
25 12:31 p.m.

1 know, those sorts of -- I don't know.

2 Q. So sitting here today, you do not know?

3 A. I do not know?

4 Q. Other than -- other than the number of smaller
5 E-Cats within this one-megawatt plant that were operating
6 at any time, you do not know of any other --

7 A. I don't know if I know of any other.

8 Q. You don't know what you don't know.

9 A. That's right. I'm sorry.

10 Q. Either you know or you don't. If you don't, the
11 answer is no.

12 A. I'd have to go through and review all of this and
13 see if the backup detail exists or not.

14 Q. Did you ever receive statements from J.M. as to
15 the amount of power that they received and requested that
16 you send them an invoice for that power?

17 A. I did.

18 Q. Did you ever send an invoice?

19 A. Not to my recollection.

20 Q. Why?

21 A. Because we -- we could -- that was irrelevant to
22 us. And if, in fact, it were a fraud, we didn't want to
23 participate in that.

24 Q. So you believed at the time it could be a fraud?

25 A. We didn't know.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

ANDREA ROSSI and LEONARDO)	
CORPORATION,)	
)	
Plaintiffs,)	
)	
VS.)	No. 1:16-cv-2119-CMA
)	
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,)	
)	
vs.)	
)	
ANDREA ROSSI and LEONARDO)	
CORPORATION,)	
)	
Counter-Defendants,)	
and)	
)	
J.M. PRODUCTS, INC.; HENRY)	
JOHNSON; FABIO PENON; UNITED)	
STATES QUANTUM LEAP, LLC;)	
FULVIO FABIANI; and JAMES)	
BASS,)	
)	
Third-Party Defendants.)	

HIGHLY CONFIDENTIAL

Videotaped Deposition of JOSEPH ALAN MURRAY
(Taken by Plaintiff)
Raleigh, North Carolina
Friday, February 17, 2017

Reported in Stenotype by
Lauren M. McIntee, RPR
Transcript produced by computer-aided transcription

1 Q. But your average applies -- I'm sorry. I'm
2 looking at your baseline --

3 A. Yeah.

4 Q. -- power.

5 A. So there are, I need to be careful. There
6 are two things -- it's, it's actually energy per day.
7 There are two things being shown here. There is a line,
8 a dotted line shown at zero, right, meaning that
9 anything below zero is, is indicative of the power
10 absorbed by the reactor being higher than the power
11 available from Florida Power and Light, and that's a
12 problem. And why, and as I said, whether it's a problem
13 with Florida Power and Light or with Penon's
14 measurements or something else, we don't know at this
15 point.

16 Then the other line is, if you consider that
17 the building, which is the explanation in this previous
18 plot, the explanation for the difference between what
19 Penon and Fulvio Fabiani measured and what Florida Power
20 and Light said they delivered, that difference would be
21 the amount of power used outside of the reactors for
22 whatever purpose.

23 Q. Okay.

24 A. Office, whatever. So that difference right
25 there is reflective of the nominal power absorbed in, in

1 the building. But what we did was instead of using
2 that, because that's really difficult to say because we
3 don't know if, what was going on over in JM Products.
4 What we did is we just looked at the windows outside of
5 those periods of time to establish a very conservative
6 number and drew that very conservative number on this.
7 And so that's indicative of that number that I just
8 described. Does that make sense?

9 Q. To be honest, not really.

10 A. Okay.

11 Q. But I, I'm not going to ask you to do it
12 again.

13 A. Okay.

14 Q. The cumulative energy absorption, FP&L minus
15 Penon, what does that tell you?

16 A. So what we're doing is for each one of these
17 data points --

18 Q. I'm going to back you up for a second. What
19 conclusion were you able to draw from --

20 A. Again --

21 Q. -- that graph?

22 A. -- this was included in here. The, the only
23 area of concern is actually right here where the
24 cumulative energy is actually decreasing in that period
25 of time. So there's a slight decrease in the cumulative

1 energy when you compare Florida Power and Light to
2 Penon, which indicates that one of those measurements is
3 clearly in error because you can't give energy back.

4 Q. But you don't know which one?

5 A. No, we don't.

6 Q. So what does this, what does this tell you
7 other than there's an error in one of the measurements?

8 A. What this tells us is anywhere that the value
9 is below zero is a, is an impossibility in the case
10 where the measurements are correct. If the measurements
11 are incorrect, then that may be described by an error in
12 the data.

13 Q. Okay. So it says that there is an error in
14 the data, whether manipulated or --

15 (Conference call interruption.)

16 Q. So sir, that just tells you that there's an
17 error, there's an error or inaccuracy in one of the data
18 sets, correct?

19 A. Yes.

20 Q. Okay.

21 A. I think that's fair to say, yes.

22 Q. So you've got two data sets that report one
23 thing consistently, fairly equivalent to each other, and
24 one data set that is different. And of those three data
25 sets, at least one of them is incorrect?

1 **A. I would agree with that, yes.**

2 Q. Okay. But you don't know which one?

3 **A. No, not at this point.**

4 Q. And the investigation you've done doesn't
5 tell you whether it was Penon's or FP&L's or Fabiani's?

6 **A. Penon, FPL -- yes.**

7 Q. Okay. How did you decide on what data to
8 review?

9 **A. In what context? What are you --**

10 Q. In, in doing this analysis.

11 **A. Oh, in this?**

12 Q. Yes.

13 **A. I took the, the data from the final report.**

14 I took the data that Fulvio Fabiani had provided us, and
15 then I took the data from the, the Florida Power and
16 Light subpoena. That data were the only sources that I
17 was aware of for power absorption data.

18 Q. Okay. Who provided you that data?

19 **A. These three sources of data? Well, I**
20 **received a copy of the final report from I, I believe I**
21 **may have even been on the distribution from Mr. Penon.**
22 **The data from Fulvio Fabiani was what he provided when**
23 **he met with us in Jones Day office. And the Florida**
24 **Power and Light data was provided to me by counsel.**

25 Q. So ultimately based on the graphs that you