

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

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

ANDREA ROSSI, *et al.*,

Plaintiffs,

v.

THOMAS DARDEN, *et al.*,

Defendants.

**PLAINTIFFS' MOTION FOR LEAVE TO FILE SUPPLEMENT
TO THEIR MOTION FOR PARTIAL SUMMARY JUDGMENT**

Brief Introduction

Plaintiffs seek leave to supplement their Motion for Partial Summary Judgement solely as it relates to newly discovered information obtained from the Court-ordered Rule 30(b)(6) re-deposition of Defendants IPH International B.V. (“IPH”) The re-deposition took place on May 5, 2017 as result of IPH’s failure to properly comply with Rule 30(b)(6). The proposed Supplement is attached hereto as **Exhibit 1**.

1. On March 21, 2017, the Court entered an Order granting all parties until March 22, 2017 to submit pretrial and *Daubert* motions. ECF No. 192. Pursuant to such Order, Plaintiffs filed their Motion for Partial Summary Judgment on such date. ECF No. 214.

2. After the motion deadline, on March 24, 2017, Magistrate Judge O’Sullivan granted Plaintiffs’ motion for sanctions against Defendants, Cherokee Investment Partners, LLC (“Cherokee”) and IPH International B.V. (“IPH”), for failure to comply with Rule 30(b)(6). ECF

No. 218. Judge O'Sullivan specifically found that the testimony given by Cherokee and IPH was insufficient, and granted Plaintiffs permission to re-depose such 30(b)(6) witnesses on or before April 7, 2017. *Id.*

3. However, on April 20, 2017, the parties returned before Magistrate Judge O'Sullivan, in part, on Defendants' motion for protective order with respect to the foregoing re-depositions. Judge O'Sullivan denied such protective order, and ordered that the depositions take place on or before May 5, 2017, absent an agreement of the parties. ECF No. 266.

4. Ultimately, the parties agreed to hold the re-depositions on May 5, 2017 and May 8, 2017.

5. Due to the fact Plaintiffs were unable to re-depose the 30(b)(6) representatives prior to May 8, 2017, Plaintiffs could not include such testimony in their March 22, 2017 Motion for Partial Summary Judgment.

6. Furthermore, following the re-depositions, Plaintiffs required time to obtain the transcripts thereof, review and analyze the same.

7. Plaintiffs accordingly request leave to supplement their Motion for Partial Summary Judgment only with the newly obtained testimony.

8. Plaintiffs request such leave in good faith, and acted diligently to prepare the Supplemental Motion within a reasonable time after the re-depositions.

WHEREFORE, Plaintiffs, Andrea Rossi and Leonardo Corporation, respectfully request the Court enter the Proposed Order attached hereto as **Exhibit 2**, grant Plaintiffs leave to file the Supplemental Motion for Partial Summary Judgment attached hereto as **Exhibit 1**, and grant any further relief the Court deems just and proper.

Dated: May 16, 2017.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH LOCAL RULE 7.1(a)(3)

The undersigned counsel hereby certifies that, in compliance with Local Rule 7.1(a)(3), the undersigned counsel has conferred with counsel for Defendants in a good faith effort to resolve by agreement the issues raised in this Motion. At the time of filing the present Motion, Defendants have advised that they do not consent to the relief requested by Plaintiffs.

/s/ Brian W. Chaiken
Brian W. Chaiken, Esq.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY, that a true and correct copy of the foregoing was served in the manner specified below on May 16, 2017 on all counsel and parties of record on the attached Service List.

/s/ Brian W. Chaiken
Brian W. Chaiken, Esq.

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**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' SUPPLEMENT TO THEIR
MOTION FOR PARTIAL SUMMARY JUDGMENT [DE 214]**

For their Supplement to their Motion for Partial Summary Judgment ("Plaintiffs' Motion"),
Plaintiffs state:

Supplement to Statement of Material Facts Based on Deposition of IPH's 30(b)(6) Witness

Plaintiffs state the facts below in supplement to their Statement of Material Facts set forth in their Motion for Partial Summary Judgment [DE 214]. The only supplemental exhibit is a series of excerpts from the deposition transcript of IPH's 30(b)(6) witness, attached hereto as **Suppl. Ex. 67**. To be able to read these facts in conjunction with those set forth in DE 214, Plaintiffs will designate its paragraphs as subparagraphs of those to which they relate (i.e. 52(a) relates to 52).

52(a). While the 1MW E-Cat was in Florida, IPH received reports from Penon, and IPH paid Penon for his services. **Suppl. Ex. 67**, p. 265:20 – p. 266:17. IPH is unaware of any agreement that would require IPH to pay Penon, but is aware that the License Agreement provided for payments to be made “50/50 between Leonardo and IH for Penon.” **Suppl. Ex. 67**, p. 266:18 – p. 267:19.

59(a). IPH does not recall or was unable to identify when in time it first discovered that Plaintiffs were engaged in an alleged scheme to deceive IPH. **Suppl. Ex. 67**, p. 259:10 - 22. Between February and May 2015, IPH was in the process of raising funds and brought investors to the Doral facility. **Suppl. Ex. 67**, p. 260:19 – p. 261:8. IPH does not recall any communication wherein IPH, or IH acting on behalf of IPH, told potential investors that Plaintiffs had breached the License Agreement. **Suppl. Ex. 67**, p. 261:16-22. IPH was unaware of any communication with Woodford, who invested \$50 million in May of 2015, wherein IPH, or IH acting on behalf of IPH, told Woodford that Leonardo was in breach of the License Agreement. **Suppl. Ex. 67**, p. 262:25 – p.263:23.

64(a). Defendant IPH is unaware of anyone using the E-Cat IP because of Defendants' claim of breach of confidentiality, and IPH has made no attempt to quantify any damages as a result of its claim for breach of confidentiality. **Suppl. Ex. 67**, p. 222:25- p. 224:22. Defendant IPH does not know when it first discovered that Plaintiffs' allegedly breached the confidentiality provisions of the License Agreement. **Suppl. Ex. 67**, p. 243:24- p. 244:21. After discovery of the alleged breach of confidentiality, IPH claimed to have put Plaintiffs on notice of the breach, but IPH did not terminate the License Agreement, and continued to perform under the License Agreement. **Suppl. Ex. 67**, p. 245:18- p. 247:6.

76(a). Defendant IPH has not calculated a dollar amount of damages related to its claim that Plaintiffs failed to assign patents. **Suppl. Ex. 67**, p. 225:25- p. 226:4.

82(a). With respect to Defendant IPH's claim that Plaintiffs breached the License Agreement due to their alleged failure to inform/consult on patent applications, an unidentified staff member prepared an exhibit listing the alleged patent applications; however, IPH does not know how the list was prepared. **Suppl. Ex. 67**, p. 227:14- p. 228:25. IPH believes that such patent filings were made

and then IPH was informed of them after the fact. **Suppl. Ex. 67**, p. 229:2-12. IPH claims it was harmed because of not being able to participate in the decision to make filings, but IPH has not attempted to quantify its damages in this regard. **Suppl. Ex. 67**, p. 230:17- p. 231:5.

82(b). Defendant IPH is not aware if any of the patents it listed were provisional patents or full patent applications, or if IPH incurred any expenses related to any of them. **Suppl. Ex. 67**, p. 229:13-20. IPH does not know when it first became aware that Plaintiffs failed to inform or consult IPH regarding patent applications. **Suppl. Ex. 67**, p. 249:12 – p. 251:7. IPH, prior to filing the present counterclaim, never informed Plaintiffs that it believed their failure to inform/consult regarding patents was a material breach, and never sought to terminate the License Agreement because of said breach. **Suppl. Ex. 67**, p. 252:12 – 23.

82(c). An unidentified staff member also prepared a list of patent applications that IPH claims were abandoned, but IPH does not know how it was prepared. **Suppl. Ex. 67**, p. 232:10 - p. 233:10. IPH is not aware of any amount of damages it is claiming because of the alleged abandonment of patents. **Suppl. Ex. 67**, p. 234:23 - p. 235:2. IPH is not aware of the date it first learned of Plaintiffs' breach of contract related to Plaintiffs allegedly having allowed patents to be abandoned, nor did IPH seek to terminate the License Agreement because of this alleged breach. **Suppl. Ex. 67**, p. 253:2 – 18.

85(a). The only evidence IPH is aware of in support of its claim for breach of the License Agreement's covenant not to compete is a series of blog posts made Dr. Rossi and the testimony of Dr. Rossi as the corporate representative of Plaintiff Leonardo. **Suppl. Ex. 67**, p. 235:22 - p. 236:22. The testimony of Dr. Rossi as the corporate representative of Leonardo is limited to a statement that Leonardo is planning to work with a company called Hydrofusion in Sweden. See **Def Ex. 17**. Sweden is not a territory covered under the License Agreement, and, in fact, the License Agreement specifically identifies Hydrofusion as a company with whom Leonardo has an exclusive commercial license in North Europe. See **Pla. Ex. 4 at Ex. D**. IPH does not know if the blog posts in support of its claim refer to activities in territories outside the scope of the License Agreement. **Suppl. Ex. 67**, p. 256:15 - p. 258:2. IPH does not know when it first discovered that Plaintiffs had breached the covenant not to compete. **Suppl. Ex. 67**, p. 258:3-14. IPH did not inform Plaintiffs that they had breached the covenant not to compete, and IPH did not seek to terminate the License because of such alleged breach. **Suppl. Ex. 67**, p. 258:15 - p. 259:5.

90(a). With respect to Defendants' claim of breach of the License Agreement for failure to pay taxes, Defendants' have made no attempt to quantify its damages. **Suppl. Ex. 67**, p. 240:21-23. The only evidence in support of this claim are Plaintiffs' tax returns, and Defendants have not consulted

with any independent third party tax experts. **Suppl. Ex. 67**, p. 240:21 – p. 240:3.

94(a). Defendant IPH is seeking, as part of its damages, the return of \$5.5 million paid to non-party Ampenergo (“AEG”), a party who has a separate agreement with IH, which was then assigned to IPH. IPH acknowledges that Plaintiffs did not receive those monies, and that such monies were received by AEG. **Suppl. Ex. 67**, p. 241:17 – p. 242:14. AEG has not been named as a party to this action.

94(b). The IPH corporate representative had scanned (not an item-by-item review) the Facts to be Litigated section of the Joint Pre-Trial Stipulation filed in this case. **Suppl. Ex. 67**, p. 296:19 – p. 298:16. IPH’s corporate representative testified that he had not seen any receipts in support of the amounts IPH is seeking as damages pursuant to paragraphs 121 (\$1,000) and 122 (\$5,000) of the Joint Pre-Trial Stipulation. **Suppl. Ex. 67**, p. 300:4 – p. 301:2. IPH believes that there was a ledger prepared to support the \$302,567 IPH claims as amounts paid to Rossi and Leonardo after shipment of the 1MW plant, but does not know if the ledger was produced in this case. **Suppl. Ex. 67**, p. 301:3 – 15. IPH claims as damages \$212,082.56 for payments made by IH to Barry West and reimbursed by IPH, but IPH has not seen any evidence or the cancelled checks showing payments made to Barry West. **Suppl. Ex. 67**, p. 301:16 – p. 302:23. IPH claims as damages \$225,440 for payments made to USQL/Fabiani (by IH and reimbursed by IPH), but IPH does not know how that amount was derived, when it was developed or by whom it was developed. **Suppl. Ex. 67**, p. 302:24 – p. 303:20.

94(c). IPH seeks damages for breach of contract for \$422,311.79, but does not know who or how the number was created other than it was developed out of the accounting records of the company. **Suppl. Ex. 67**, p. 303:21 – p. 304:12. Nor does IPH know for which of the breaches the \$422,311.79 applies. **Suppl. Ex. 67**, p. 304:13 – p. 306:5. IPH does not know for which breach of contract it is seeking \$25,511.60 allegedly paid to Penon, the \$251,094.21 allegedly paid to Barry West or \$355,659.10 allegedly paid to USQL/Fabiani. **Suppl. Ex. 67**, p. 306:6 – p. 307:14. IPH claims \$256,151.59 in patent-related expenses paid to Rossi or Leonardo, but does not know how that number was compiled or who compiled it; nor did the IPH corporate representative attempt contact any such person. **Suppl. Ex. 67**, p. 307:15 – p. 308:20.

94(d). IPH is not familiar with the ledger entitled “Industrial Heat Rossi payments as of 2-5-16” which had been attached as Composite Exhibit 30 to Defendants’ Statement of Material Facts [DE247]. **Suppl. Ex. 67**, p. 213:2 – p. 214:19. IPH based its damages calculations on the financial statements of IPH, and one could not ascertain what IPH is claiming for damages without having the IPH financial statements. **Suppl. Ex. 67**, p. 220:11 – p. 222:6.

106(a). IPH claims it was deceived because of paying expenses it otherwise should not have, but IPH is not aware of Plaintiffs making any misrepresentations to anyone at IPH. **Suppl. Ex. 67**, p. 181:16 – p. 183:2. IPH was not a party to the Term Sheet, but IPH was paying expenses incurred that were related to the investment in Rossi’s technology. **Suppl. Ex. 67**, p. 185:6 – 17. IH passed on the expenses related to the operation of the 1MW Plant to IPH pursuant to the services agreement between IH and IPH, and there was work being done pursuant to the license agreement at the Doral facility. **Suppl. Ex. 67**, p. 185:10 – p. 187:2.

107(a). Defendant IPH has made no attempt to quantify or allocate any damages related to its claim that Plaintiffs violated the Florida Unfair Deceptive Trade Practices Act (“FDUTPA”). **Suppl. Ex. 67**, p. 243:3–13.

Supplement to Memorandum of Law

The above referenced facts are relevant to the following sections contained in Plaintiffs’ Motion [DE 214]:

- I. **Plaintiffs are entitled to summary judgment as to Count I of the Complaint.** (See Plaintiffs’ Motion, pp.21-2)

Defendants’ claims that the GPT did not take place are contradicted by the fact that IPH paid the ERV, Fabio Penon, 50% of his invoices, notwithstanding the fact that IPH claims it was unaware of any agreement which required such payments other than the License Agreement. See Supplement Statement of Material Facts (“SSMF”) ¶ 52(a). Additionally, during Plaintiffs’ performance of the GPT, Defendants raised \$50 million from Woodford in May of 2015 – yet neither IH nor IPH informed Woodford that Plaintiffs’ had allegedly breached the License Agreement prior to receiving the funds. SSMF ¶ 59(a).

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

- a. **Breach of Confidentiality.** (See Plaintiffs’ Motion, p. 29)

Defendant IPH is unaware of anyone using the E-Cat IP because of Defendants’ claim of breach of confidentiality, and IPH has made no attempt to quantify any damages as a result of its claim for breach of confidentiality. SSMF ¶ 64(a). Defendant IPH does not know when it first discovered that Plaintiffs’ allegedly breached the confidentiality provisions of the License Agreement. SSMF ¶ 64(a).

After discovery of the alleged breach of confidentiality, IPH claimed to have put Plaintiffs on notice of the breach, but IPH did not terminate the License Agreement, and continued to perform under the License Agreement. SSMF ¶ 64(a). To establish a claim for breach of contract, a party must prove: "(1) the existence of a valid contract; (2) material breach thereof; and (3) damages flowing from the breach." *Axiom Worldwide, Inc. v. HTRD Group H.K. Ltd.*, 2013 U.S. Dist. LEXIS 107322, *14, 2013 WL 3975675 (M.D. Fla. July 31, 2013). As Defendant IPH cannot identify what, if any, damages flowed from the alleged breach, the elements of the cause of action cannot be satisfied.

b. Failure to Assign Licensed Patents. (See Plaintiffs' Motion, pp. 29-30)

Despite having an additional two months past the discovery deadline to have done so, Defendants still have not even attempted to calculate any dollar amount related to its claim that Plaintiffs failed to assign patents. SSMF ¶ 76(a). For the same reason stated above, Defendant IPH has not, and cannot, satisfy the requisite damage element necessary to maintain its cause of action for breach of contract with respect to this alleged breach.

c. Failure to Inform/Consult on Patent Applications. (See Plaintiffs' Motion, pp. 31-32.)

With respect to Defendant IPH's claim that Plaintiffs breached the License Agreement due to their alleged failure to inform/consult on patent applications and allowed them to be abandoned, an unidentified staff member prepared exhibits listing the alleged patent applications; however, IPH does not know how the lists were prepared. SSMF 82(a), (c). IPH believes that such patent filings were made and then IPH was informed of them after the fact. SSMF 82(a). IPH claims it was harmed because of not being able to participate in the decision to make filings, but IPH has not attempted to quantify its damages in this regard. SSMF 82(a), (c).

Defendant IPH is not aware if any of the patents it listed were provisional patents or full patent applications, or if IPH incurred any expenses related to any of them. SSMF 82(b). "It is certainly true that, without proof of damages, a plaintiff cannot prevail on a breach of contract claim." *Local Access, LLC v. Peerless Network, Inc.*, 2016 U.S. Dist. LEXIS 131274, *26 (M.D. Fla. Sept. 26, 2016).

IPH does not know when it first became aware that Plaintiffs failed to inform or consult IPH regarding patent applications SSMF 82(b). IPH, prior to filing the present counterclaim, never informed Plaintiffs that it believed their failure to inform/consult regarding patents was a material

breach, and never sought to terminate the License Agreement because of said breach. SSMF 82(b). IPH is not aware of the date it first learned of Plaintiffs' breach of contract related to Plaintiffs allegedly having allowed patents to be abandoned, nor did IPH seek to terminate the License Agreement because of this alleged breach. SSMF 82(c).

d. Breach of the Covenant Not to Compete. (See Plaintiffs' Motion, p. 31.)

The only evidence IPH is aware of in support of its claim for breach of the License Agreement's covenant not to compete is a series of blog posts made Dr. Rossi and the testimony of Dr. Rossi as the corporate representative of Plaintiff Leonardo. SSMF 85(a). The testimony of Dr. Rossi as the corporate representative of Leonardo is limited to a statement that Leonardo is planning to work with a company called Hydrofusion in Sweden. SSMF 85(a). Sweden is not a territory covered under the License Agreement, and, in fact, the License Agreement specifically identifies Hydrofusion as a company with whom Leonardo has an exclusive commercial license in North Europe. SSMF 85(a). IPH does not know if the blog posts in support of its claim refer to activities in territories outside the scope of the License Agreement. SSMF 85(a). "A court shall construe a restrictive covenant in favor of providing reasonable protection to all legitimate business interests established by the person seeking enforcement." *Proudfoot Consulting Co. v. Gordon*, 576 F.3d 1223, 1240, 2009 U.S. App. LEXIS 17057, *46, 2009-2 Trade Cas. (CCH) P76,696, 29 I.E.R. Cas. (BNA) 806, 22 Fla. L. Weekly Fed. C 16 (11th Cir. Fla. 2009). Pursuant to the License Agreement, Defendant IPH does not have any "legitimate business interest" in any contract, license or operations outside of the Licensed Territory. Accordingly, Defendant IPH has failed to establish any "reasonable business interest" which they seek to protect. Moreover, IPH does not know when it first discovered that Plaintiffs had breached the covenant not to compete. SSMF 85(a). IPH did not inform Plaintiffs that they had breached the covenant not to compete, and IPH did not seek to terminate the License because of such alleged breach. SSMF 85(a).

e. Failure to Pay Taxes. (See Plaintiffs' Motion, p. 31.)

With respect to Defendants' claim of breach of the License Agreement for failure to pay taxes, Defendants' have made no attempt to quantify its damages. SSMF 90(a). The only evidence in support of this claim are Plaintiffs' tax returns, and Defendants have not consulted with any independent third party tax experts. SSMF 90(a). Faced with a similar claim for breach of contract resulting from a

party's alleged failure to pay taxes, at least one court has found that "[i]t cannot seriously be argued that [a plaintiff's] failure to pay taxes was a material breach of their performance contracts, and [d]efendants were not harmed by Plaintiffs actions in any way, shape, or form." *Vaughan v. M - Entm't Props., LLC*, 2016 U.S. Dist. LEXIS 186291, *43, 2016 WL 7365201 (N.D. Ga. Mar. 15, 2016). Accordingly, as here, the defendants' breach of contract counterclaim "fails as a matter of law." *Id.*

f. Breach of Contract Damages

Defendant IPH, in a last-ditch attempt to preserve its claim for breach of contract, claimed to have identified actual dollar amounts (for the first time in this case) in support of their damages in the parties' Joint Pre-Trial Stipulation [DE 280]. While IPH's corporate representative claimed to have performed a cursory review of these dollar amounts, he could not testify as to who prepared them, how they were prepared or when they were prepared. SSMF 94(b)-(d). Nor could the IPH corporate representative tie such amounts to specific claims of breach. SSMF 94(c)-(d). IPH claims that it calculated its damages based on the financial statements of IPH, and that one could not ascertain IPH's damages claim without having IPH's financial statements. SSMF 94(d). IPH has not produced its financial statements in this case. *See Local Access, LLC* at 26.

IV. Plaintiffs are entitled to summary judgment as to Defendants' FDUTPA Counterclaim. (See Plaintiffs' Motion, p. 32-34.)

IPH claims it was deceived because of paying expenses it otherwise should not have, but IPH is not aware of Plaintiffs making misrepresentations to anyone at IPH. SSMF 106(a). IPH admits that it was not a party to the Term Sheet, but IPH claims it was paying expenses incurred that were related to the investment in Rossi's technology. SSMF 106(a). IPH claims that IH passed on the expenses related to the operation of the 1MW Plant to IPH pursuant to the services agreement between IH and IPH, and there was work being done pursuant to the license agreement at the Doral facility. SSMF 106(a). Again, despite having had an additional two months to do so, Defendant IPH has made no attempt to quantify or allocate any damages related to its claim that Plaintiffs FDUTPA. SSMF 107(a). Where, as here, the claimant has failed to provide any evidence of actual damages despite a protracted and ample time in which to do so, the claimant cannot maintain a cause of action under FDUTPA and summary judgment is appropriate. *See Nat'l Union Fire Ins. Co. v. Tyco Integrated Sec., LLC*, 2015 U.S. Dist. LEXIS 82646, *100, 2015 WL 3905018 (S.D. Fla. June 24, 2015).

Dated: May 16, 2017.

Respectfully submitted,

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Leonardo Corporation*

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served by in the manner specified below on May 16, 2017, on all counsel or parties of record on the attached Service List.

/s/ Brian Chaiken
Brian Chaiken, Esq.

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SUPPL. EX. 67

IPH International, B.V. Corporate Representative
5/5/2017

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

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

ANDREA ROSSI and LEONARDO
CORPORATION,

Plaintiff,

-vs-

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

Defendants.

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

Counter-Plaintiffs

-vs-

ANDREA ROSSI and LEONARDO
CORPORATION,

Counter-Defendants,

and

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

Third-Party Defendants

IPH International, B.V. Corporate Representative
5/5/2017

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DEPOSITION OF IPH INTERNATIONAL, B.V.
CORPORATE REPRESENTATIVE
SLOCUM FOGLEMAN

Friday, May 5, 2017
ANNESSE & CHAIKEN, PLLC
2525 Ponce De Leon Boulevard, Suite 625
Coral Gables, Florida 33134
9:30 a.m. - 6:21 p.m.

Melanie Stinson-Konstantinidis, RPR
Registered Professional Reporter

1 corporate rep of IPH, with respect to the
2 deception that you claim Plaintiffs and
3 Third-Party Defendants took part in?

4 A. Well, I recall IPH was not a party to
5 the term sheet.

6 Q. Okay. So is IPH making any claim with
7 respect to the term sheet?

8 A. But IPH was aware of the term sheet and
9 in fact, I think approved the term sheet.

10 Q. And how did that come about?

11 A. Tom Darden approved the execution of
12 that contract by JT Vaughn.

13 Q. Okay. Was his approval required?

14 A. On behalf of IPH, that's my
15 recollection.

16 Q. Okay. Other than with respect to the
17 term sheet and putting that one aside, how was IPH
18 deceived by Plaintiffs and Third-Party Defendants?

19 MR. BELL: Objection to form.

20 THE WITNESS: IPH incurred the cost of
21 the operation, the billings that were being sent
22 up from that operation were charged through in the
23 services agreement to IPH.

24 BY MR. CHAIKEN:

25 Q. I didn't ask how IPH would be damaged.

1 I asked how IPH was deceived.

2 A. Okay. Again, I'm not, obviously, not a
3 lawyer, but the deception affects IPH in that it
4 was paying the bills that were a result of the
5 deception that took place in part.

6 Q. Okay. I understand your answer, but it
7 didn't answer my question. So you're here on
8 behalf of IPH, not IH, right?

9 A. That's right.

10 Q. Okay. So how was IPH deceived as a
11 result of the actions of my clients?

12 A. There's a correlation in my mind and I
13 don't know if these are legal terms or not, but a
14 correlation in my mind that IPH was paying for
15 expenses that were being put forth in connection
16 with the deception that was being operated in
17 Florida.

18 Q. Did --

19 A. So putting forth expenses that shouldn't
20 have been put forth that ended up in IPH's ledgers
21 connects the deception. They're impacted by the
22 deception. They're affected by the deception.

23 Q. Did my clients make any representations
24 to anyone from IPH?

25 MR. BELL: Objection to form.

1 THE WITNESS: Again, I don't recall that
2 being in the record.

3 BY MR. CHAIKEN:

4 Q. Did any of the Third-Party Defendants
5 make misrepresentations to anyone from IPH?

6 A. Again, Brian, in my mind, the deception
7 affected IPH by IPH being billed for costs
8 including costs related to the third-party
9 defendants. So that deception extends to IPH in
10 my mind.

11 Q. I'll get to the damages that are being
12 claimed, but I'm trying to get to what the
13 deceptions IPH --

14 A. I'm explaining to you how I perceive the
15 deception to get to IPH.

16 Q. Okay. I understand that's your
17 perception. What deception is it that caused IPH
18 to incur expenses?

19 A. I'm sorry, what cost?

20 MR. BELL: What was the deception?

21 MR. CHAIKEN: What was the deception?

22 MR. BELL: He's just asking what was the
23 deception?

24 BY MR. CHAIKEN:

25 Q. That caused IPH to incur expenses?

1 A. My recollection is it approved the term
2 sheet.

3 Q. That's not what I asked.

4 A. But it's that connection that's being
5 made.

6 Q. I understand that's the connection that
7 you're making. I'm asking you simply: Was IPH a
8 signatory to the term sheet?

9 A. No.

10 Q. Okay. Why would IPH be paying expenses
11 as it relates to the Doral facility if it wasn't a
12 party to the term sheet?

13 A. It was paying them under the terms of
14 the service agreement. The costs being incurred
15 were connected with the investment related to
16 Rossi's technology. And so IPH was paying those
17 expenses. These would be the services agreement.

18 Q. But I thought you just told me the term
19 sheet didn't mention any IP related issues with
20 respect to the term sheet.

21 MR. BELL: That's not what he said.

22 BY MR. CHAIKEN:

23 Q. That there was no information about
24 testing in the term sheet, right?

25 MR. BELL: Objection to form. My God.

1 THE WITNESS: There were expenses being
2 passed through for the operation of the plant. If
3 I remember, Barry West or Fulvio, that were be
4 passed through under the terms of the service
5 agreement.

6 BY MR. CHAIKEN:

7 Q. Is that because there was some
8 implication with respect to the license agreement?

9 A. I don't recall that distinction exactly,
10 whether it was licensing or some other term, some
11 other service being provided under the service
12 agreement.

13 Q. What other reason would expenses passed
14 on to IPH if it didn't impact the license
15 agreement at issue in this case?

16 MR. BELL: Objection to form.

17 THE WITNESS: There was a correlation
18 between IPH through the service agreement with
19 Industrial Heat that IPH would absorb costs
20 related to the license agreement and work being
21 done around that license agreement.

22 BY MR. CHAIKEN:

23 Q. Okay. So based on that answer, would
24 you agree that there was work being done pursuant
25 to the license agreement at the Doral facility?

1 MR. BELL: Objection to form.

2 THE WITNESS: Connected to it, yes.

3 BY MR. CHAIKEN:

4 Q. Okay. How? How was it connected to it?

5 MR. BELL: Objection to form.

6 THE WITNESS: Well, it had been the
7 practice to, for example, Barry West's work was
8 routinely or regularly charged to IPH, and, I
9 believe, Fulvio Fabiani's as well.

10 MR. CHAIKEN: I'm sorry. Can you read
11 that answer back?

12 (Thereupon, The court reporter was asked to read
13 back the aforementioned answer.)

14 BY MR. CHAIKEN:

15 Q. Okay. Why was Barry West's work charged
16 back to IPH?

17 A. It was charged per the terms of the
18 service agreement.

19 Q. The service agreement specifically said
20 that Barry West would be compensated by IPH?

21 A. No, Brian. No. That's not the way
22 business works.

23 Q. Explain it to me.

24 A. Barry West was assigned to work on the
25 work associated with Dr. Rossi's project, license

1 BY MR. CHAIKEN:

2 Q. I'm going to show you what's been marked
3 as Exhibit 27. Exhibit 27, the first page says
4 Composite Exhibit 30, so I don't want to confuse
5 you, but it's marked at the bottom as Number 27.
6 And it's Bates stamped, starting on the next page,
7 IH131929. And then after that is two pages worth
8 of or three pages worth of looks like an Excel
9 spreadsheet. And there are several other
10 documents attached with various Bates stamped
11 numbers that look to be invoices from Leonardo
12 Corporation. Do you see that?

13 A. I see it.

14 Q. Okay. Have you seen this before?

15 A. Which filing? Is this part of a filing?

16 Q. Yes. This is part of your filing DE247
17 and it's an exhibit to that filing.

18 A. Okay. It's a lot of filings, but, you
19 know, I don't recall this exact one. I've seen a
20 lot, so let's go through it and see if it will
21 help.

22 Q. Right. So I believe that the first --
23 after IH131929, there's an Excel spreadsheet
24 that's three pages long. Is this something that
25 you prepared?

1 A. It does not look familiar to me.

2 Q. The title of the spreadsheet states
3 Industrial Heat Rossi payments as of 2-5-16.

4 A. Okay. I see that.

5 Q. Okay. I don't think I got an answer to
6 the question, but have you seen this before?

7 A. No, I'm going to say, no, I don't think
8 I have seen this before.

9 Q. Okay.

10 A. I've seen others, but I'm got going to
11 say this was the exact schedule that I saw.

12 Q. But you recall seeing an exact schedule?
13 Let me rephrase that.

14 A. I looked at a lot of schedules.

15 Q. Do you recall seeing this schedule?

16 A. No. I looked at a lot of schedules in
17 the filings and I don't remember if this is
18 exactly one of those schedules in the filings that
19 I reviewed. Does that help you?

20 Q. That helps me.

21 A. Good.

22 Q. Do you know, after you have a chance to
23 look at it, if this is a list of all of the
24 expenses that IPH incurred as it relates to the
25 License Agreement?

1 the one and a half million dollar payment made for
2 the plant.

3 Q. Okay.

4 A. So that's not in my numbers. But then
5 this other ledger appears to be a ledger of costs.
6 It's titled Rossi payments.

7 Q. Right.

8 A. So that seems to be focused just on Dr.
9 Rossi. Just seems to be a list or a ledger
10 related to Dr. Rossi.

11 Q. Do you know who prepared this list?

12 A. You know, it would be a guess, Brian.
13 Sorry. But my reaction to the list and the reason
14 I said what I said is this is not all the costs.

15 Q. Okay. Is there some other ledger that
16 you could refer me to that would show all the
17 other costs?

18 A. Well, I'm telling you my numbers from
19 reading the financial statements of IPH
20 International.

21 Q. Okay.

22 A. And so that's the total of costs
23 incurred associated with that license and this
24 project.

25 Q. Okay. Are you aware or did you review

1 any other documents in preparation for today's
2 deposition which identified the other costs that
3 comprise that approximately five and a half
4 million dollars that you're talking about?

5 A. The financial statements of IPH
6 International.

7 Q. Okay. And were those produced in this
8 case?

9 A. I don't know. You mean, like a
10 discovery in the files?

11 Q. Yes.

12 A. I don't know that.

13 Q. Other than --

14 A. I didn't see them there. I mean, I
15 didn't do my review in the filings of the case. I
16 did mine in the office.

17 Q. Other than reviewing the financials of
18 IPH, how would I be able to ascertain what damages
19 IPH claims they incurred?

20 A. I think that's a good place to start. I
21 think that's a good place to start.

22 Q. But if the financial statements weren't
23 provided in discovery in this case, how would I
24 know what damages IPH is claiming?

25 A. I'm not sure I know how to answer that

1 question. I told you where I'm coming from in
2 terms of what I know.

3 Q. Well, would I be able to ascertain what
4 IPH is claiming for damages if I didn't have the
5 financials?

6 A. I don't see how you can.

7 Q. Okay. Let's go back to the fourth
8 amended counterclaim. IPH has -- let's go to
9 count two. Count two is for breach of contract.
10 I'll turn you to the page. Page 53 at the bottom.
11 The first breach of contract claim that IPH is
12 bringing against Leonardo and Rossi is for breach
13 of Section 16.4 of the license agreement. Are you
14 familiar with that?

15 A. I think I remember that. Okay.

16 Q. My question is, is how has IPH been
17 damaged as a result of their claim that plaintiffs
18 breached the confidentiality provision?

19 A. I think that my recollection is that the
20 filings include various testimonies by people
21 representing different entities and so consistent
22 with that, there was a, you know, provision to
23 keep this contract confidential and all that's in
24 it.

25 Q. Right. I understand the allegations.

1 My question is whether or not or what evidence is
2 in support of your claim, my question is, is how
3 have you been damaged? How has IPH been damaged
4 as a result?

5 A. Well, if we have rights to protect it,
6 IP here and that IP is exposed outside the parties
7 to the contract, and another party is able to take
8 advantage of that, then that would be a way that
9 we're damaged.

10 Q. Has that happened as far as you know?

11 A. It's in the record that there are
12 breaches of confidentiality.

13 Q. Has another company used this IP based
14 on breaches of confidentiality and used it to
15 their advantage as far as you know?

16 A. I'm not aware of anyone -- in the big
17 picture?

18 Q. Yes.

19 A. I'm not aware of anyone making good on
20 any of this IP. It doesn't work and I'm not aware
21 of anyone making it work.

22 Q. Okay. So if the confidentiality was
23 breached, there was no harm because it doesn't
24 work in the first place; is that true?

25 A. It sounds like a legal conclusion. I

1 don't think I understand how to make a legal
2 analysis of what you're asking.

3 Q. I'm not asking in the world of
4 possibility now. I'm asking has IPH been harmed
5 as a result of breach of confidentiality?

6 A. I'm not aware of -- I'm aware of the
7 breach.

8 Q. Okay.

9 A. But I'm not aware of the harm.

10 Q. Okay.

11 A. There could be harm.

12 Q. Let's go to the next one. It's on
13 page --

14 A. There could be harm some day.

15 Q. Okay. Has -- before I go to the next
16 one, has IPH attempted to quantify in dollars any
17 harm that's incurred as a result of breach of
18 confidentiality?

19 MR. BELL: Objection to form.

20 THE WITNESS: I think that is, again,
21 allocating something for a breach and we haven't
22 done that.

23 BY MR. CHAIKEN:

24 Q. Okay. Page 56. The next one is failure
25 to assign licensed patents. Are you familiar with

1 what licensed patents IPH claims Plaintiffs failed
2 to assign?

3 A. I've seen the list of the patents. I've
4 seen the list.

5 Q. Okay. And how has IPH been harmed as a
6 result?

7 A. It's breach of the contract. It's
8 simply a breach of contract. It's a party
9 ignoring his duties in a contract. And so, I'm
10 sorry, IPH, for the patents not being assigned,
11 doesn't have, I guess, some sort of legal
12 ownership of those patents and its legal stuff
13 and/or abandoning patents without notice.

14 Q. We will get to that in a second, so
15 let's just keep down to this one.

16 A. Right.

17 Q. So I understand that you're saying that
18 there was a breach because they failed to assign.
19 I'm asking how has IPH been harmed as a result of
20 that breach?

21 A. They don't have the assigned patents.

22 Q. Okay.

23 A. They don't own something they should
24 own.

25 Q. Okay. Is there a dollar amount of

1 damages that IPH has calculated as a result of
2 that breach?

3 A. No, we have not calculated a dollar
4 amount.

5 Q. Okay. The next one is failure to inform
6 consult on patent applications. Do you know what
7 patent applications Dr. Rossi or Leonardo failed
8 to inform or consult IPH on?

9 A. There is a list of those patents in the
10 filings. I've seen lists in the filings. So I'm
11 familiar with the patents you're referring to.

12 Q. What forms the basis of your statement
13 that Plaintiffs failed to inform or consult IPH on
14 those patents?

15 A. These were filed or abandoned?

16 Q. Well, you say inform or consult so I'm
17 thinking filed.

18 A. It's my understanding with the
19 provisions of the license agreement, IPH was to be
20 informed before patents were filed and what
21 happened in actuality is patents would be filed
22 and then IPH would be informed later.

23 Q. Do you know if there is a difference
24 between a provisional patent and a formal patent
25 application?

1 A. I don't -- I'm not aware of that -- I'm
2 not familiar with that distinction.

3 Q. Do you know if there's a difference in
4 cost between filing a provisional patent versus a
5 full patent application?

6 A. I have been told there is. I haven't
7 done an analysis, but that's my understanding.

8 Q. Do you know if it costs \$250 to file a
9 provisional patent application?

10 A. I don't recall that fact.
11 (Whereupon, Exhibit 28 was marked for
12 identification.)

13 BY MR. CHAIKEN:

14 Q. Let me show you what's been marked as
15 Exhibit 28. Exhibit 28 is the copy of the
16 defendant IPH International BV's responses and
17 objections to Plaintiff, Andrea Rossi's first set
18 of interrogatories.

19 If you look on page 10, it's
20 interrogatory number six. Interrogatory six on
21 page 10 states: To the extent that you claim that
22 Leonardo filed patent applications relating to the
23 licensed patents without informing IPH as alleged
24 in paragraph 117 of your counterclaims, please
25 identify the patent application number and the

1 filing date of the patent applications applied
2 for. And in your response, you say: See Exhibit
3 B attached hereto. And Exhibit B is at the end of
4 the document.

5 My question, as it pertains to Exhibit B
6 is: Who prepared Exhibit B?

7 A. One of the staff at Industrial Heat who
8 worked with patents would have prepared and then
9 in conjunction with counsel.

10 Q. Who is that, a staff member?

11 A. Well, there are a couple of people that
12 worked on patents. I'm missing Donna's last name
13 but there's a -- oh, I just lost it. Donna -- I
14 can't help you. Yes, I'm not trying to get you to
15 help me.

16 Q. I couldn't help you if I wanted to
17 because I still don't have the answer.

18 A. Yes. One of two people. But I think it
19 was likely to be Donna and then with the
20 assistance of counsel.

21 Q. Okay. And do you know how she prepared
22 this?

23 MR. BELL: Objection to form.

24 THE WITNESS: I don't. I did not
25 oversee that work.

1 BY MR. CHAIKEN:

2 Q. And how do you know that Dr. Rossi did
3 not provide notice of these filings prior to them
4 being made?

5 MR. BELL: Objection to form.

6 THE WITNESS: I think that's been in the
7 filings already that these were filed and then we
8 were informed of the filings after the fact.

9 BY MR. CHAIKEN:

10 Q. And whose testimony was that?

11 A. I don't recall exactly. It might have
12 been JT's.

13 Q. Do you know if these were provisional
14 patent filings or full patent applications?

15 A. I do not do an analysis for that.

16 Q. Do you know if IPH incurred expenses
17 related to any of these patents?

18 A. No, I can't speak to every one of these.

19 Q. Can you speak to any one of them?

20 A. Not sitting here today, no.

21 Q. Okay.

22 A. The records would be with the company.

23 Q. Okay. How has IPH been harmed as a
24 result of Plaintiffs' failure to inform ahead of
25 time of these filings?

1 A. In the same way they were harmed by the
2 other breaches that you talked about today. A
3 breach of contract is a breach and there's harm in
4 that. You want a monetary --

5 Q. Well, I beg to differ. I don't think
6 every breach is the same and I think there are
7 different harms that are incurred by different
8 breaches. So I'm trying to understand how IPH was
9 harmed as a result of -- if proven true, being
10 told after the fact about these patent
11 applications?

12 A. I think my understanding is the point of
13 having notice and having an interaction with the
14 company before they're being filed, is to allow
15 the company to participate in the decision to
16 file.

17 Q. Okay. So they are harmed as a result of
18 not having the ability to participate in the
19 decision-making process?

20 A. There's a breach of contract. You and I
21 have a different view of breach of contract. I
22 think you implied you can pick and choose what you
23 want to breach. I don't look at it that way. I
24 think you follow the contract.

25 Q. I was making no such implication, but,

1 okay, if that's the harm. Has IPH attempted to
2 quantify its damages as it relates to failure to
3 inform or consult on patent applications?

4 A. Not to this level, no.

5 Q. Now, is there evidence that you've seen
6 which shows that after these patents were filed,
7 that Dr. Rossi provided IPH with notice of the
8 filings?

9 A. It's my understanding -- I think I
10 understand your question -- that he filed the
11 patents and then he informed us.

12 Q. Right.

13 A. Is that what --

14 Q. Correct.

15 A. That's my understanding.

16 Q. Okay. Is that your understanding with
17 respect to all these patents?

18 A. I don't know if he informed us of all
19 the patents.

20 Q. Okay. Now, is it your understanding
21 that a provisional patent that is not followed up
22 with a full patent application within a year,
23 expires or is somehow -- well, expires, I'll use
24 that phrase.

25 A. That's my understanding.

1 Q. Is it your claim that despite having
2 knowledge of these provisional patent
3 applications, if they were allowed to expire,
4 you're now seeking damages he or seeking breach
5 for Dr. Rossi's allowing them to expire.

6 MR. BELL: Objection to form.

7 THE WITNESS: I think I understand you.
8 I think that's correct.

9 BY MR. CHAIKEN:

10 Q. Do you know if -- and I think that now
11 we're referring to what's in Exhibit A. So if we
12 go back to the interrogatories. And instead of
13 interrogatory six, we're talking about
14 interrogatory number five which is on page 9.

15 Interrogatory number five says: To the
16 extent that you claim that Leonardo, without prior
17 written consent from IPH, abandoned several patent
18 applications as alleged in paragraph 118 of your
19 counterclaims, please identify the patent
20 application number and filing date for each
21 abandoned patent. And if you go to page 10,
22 you'll see that IPH points us to Exhibit A to this
23 document which is another list of patents.

24 Would the same person who created
25 Exhibit B be the person who created Exhibit A?

1 MR. BELL: Objection to form.

2 THE WITNESS: I don't know that. I told
3 you I wasn't sure who did it. I made a guess at
4 who did it.

5 MR. BELL: Right.

6 MR. CHAIKEN: Fair enough.

7 BY MR. CHAIKEN:

8 Q. And would your answer be the same if I
9 asked you how Exhibit A was prepared?

10 A. Yes.

11 Q. Do you know if IPH was made aware of the
12 patents listed on Exhibit A prior to their
13 expiration?

14 A. I don't recall that.

15 Q. Is there any reason why IPH couldn't
16 have made full filings or prevented any of these
17 patent applications from being expired or
18 abandoned as claimed?

19 MR. BELL: Objection to form.

20 THE WITNESS: These are filings that
21 Dr. Rossi made.

22 MR. CHAIKEN: Okay.

23 THE WITNESS: That's my understanding.
24 And none of this was ever assigned to IPH. That's
25 also my understanding.

1 MR. CHAIKEN: Okay.

2 THE WITNESS: So it may be a legal
3 question that I don't know that I can answer.
4 That's my understanding.

5 BY MR. CHAIKEN:

6 Q. Do you know if IPH is seeking damages as
7 it relates to expenses for making any of the
8 patent filings for the patents listed on Exhibit
9 A?

10 A. I believe the cost of that would be
11 included in the number that I mentioned earlier.

12 Q. Okay. So Dr. Rossi would make patent
13 filings, he would give an invoice to IPH, IPH
14 would pay Dr. Rossi or reimburse Dr. Rossi for
15 those expenses?

16 A. He would submit the invoice to IH. IH
17 would pay and then charge through to IPH.

18 Q. Okay. Why would it go that way? Is
19 that just the way the service agreement was
20 written?

21 A. That's just the way it was written or
22 the way it was administered.

23 Q. Okay. What damages is IPH seeking as a
24 result of the alleged failure of Plaintiffs to
25 inform them of patents that had been abandoned?

1 A. I'm not aware of a damage number on
2 that, the abandonment.

3 Q. Okay. Going back to the fourth amended
4 counterclaim.

5 A. The damage for an abandoned patent is in
6 a category of to be determined. You just don't
7 know until something else might happen.

8 Q. Okay. Going back to your fourth amended
9 counterclaim, page 58. The next breach claimed by
10 IPH is covenant not to compete. What evidence
11 does IPH have to support its claim that plaintiffs
12 breached the covenant not to compete?

13 A. Sorry, Brian, I've got to catch up.
14 Fifty-eight is on page --

15 MR. BELL: I think it's the bottom.

16 THE WITNESS: Yes, I always look at the
17 bottom. I'm sorry. Page 50.

18 BY MR. CHAIKEN:

19 Q. Eight at the bottom.

20 A. Eight at the bottom. I'm sorry, you
21 asked me for the basis?

22 Q. Yes. What evidence do you have to
23 support your claim?

24 A. I believe this is information that is in
25 the filings related to Dr. Rossi's disclosures

1 about these activities, principally in his blogs
2 if I'm remembering.

3 Q. So the only evidence that IPH has to
4 support this claim is Dr. Rossi's blogs?

5 A. Dr. Rossi's statements.

6 MR. BELL: Objection to form.

7 BY MR. CHAIKEN:

8 Q. And is there any other evidence that IPH
9 has that, other than what Dr. Rossi said in the
10 blog, that he, in fact, has violated the covenant
11 not to compete in paragraph 13.3 as alleged in
12 your counterclaim?

13 A. At this point, I'd almost have to go
14 back to the filings and review the filings. I
15 recall it's all in there. All that we have is in
16 the filings at this point.

17 Q. Okay. And the only thing that I've seen
18 in the filings is what you just said, which is a
19 reference to his blog.

20 A. I'm just being careful. If there is
21 something else there, then I can't remember right
22 now.

23 Q. Okay.

24 A. I want to call your attention to that.

25 Q. Okay. Well, let me refer you to --

1 your answer?

2 MR. BELL: Is that a question?

3 MR. CHAIKEN: Yes, that's a question.

4 Exactly.

5 THE WITNESS: I gave you my answer.

6 BY MR. CHAIKEN:

7 Q. That's a legitimate concern of yours?

8 A. I gave you my answer.

9 MR. BELL: Cut the snark, all right, or
10 we'll shut it down.

11 MR. CHAIKEN: That's a ridiculous
12 response, Bernie.

13 MR. BELL: It's not ridiculous. The IRS
14 does this all the time. They go after property to
15 put liens on things. Come on. You don't have to
16 like it. You just have to get the answer and move
17 on.

18 MR. CHAIKEN: That's ridiculous.

19 MR. BELL: No. Cut the snark. Come on.

20 BY MR. CHAIKEN:

21 Q. Has IPH attempted to quantify its
22 damages as it relates to that?

23 A. Not to my knowledge.

24 Q. What has -- well, strike that.

25 Has IPH talked to any independent third

1 party tax experts as it relates to their claim
2 that my clients failed to pay taxes?

3 A. I don't recall that, no.

4 Q. Other than reviewing the tax returns of
5 my clients, what evidence does IPH have in support
6 of their claim that my clients failed to pay
7 taxes?

8 A. I don't recall other evidence. The tax
9 returns were reviewed. I actually saw those
10 myself and I didn't see the income in the tax
11 returns. And it's my understanding of the tax
12 system in the United States that taxes are paid
13 through the filing of tax returns. And so the
14 evidence is that the income is not reported in the
15 tax returns. That's how you pay taxes in this
16 country.

17 Q. You talked a little bit, when we started
18 talking about damages, about the fact that IPH is
19 seeking to recover the 5.5 million paid to AEG; do
20 you recall that?

21 A. Yes.

22 Q. Why doesn't IPH seek to recover the
23 5.5 million directly from AEG?

24 MR. BELL: Objection to form.

25 THE WITNESS: The payments are -- my

1 understanding of that matter is that the payments
2 are tied to the performance of Dr. Rossi's IP
3 under the agreement. The original agreement Dr.
4 Rossi had with AEG was simply bifurcated into two,
5 so they are tied together is my understanding.

6 BY MR. CHAIKEN:

7 Q. Okay. But the money is sitting with
8 AEG, not with my client, right?

9 A. Said another way -- okay. Forget that.

10 Q. Well, is it your understanding that that
11 5.5 million ended up with my client?

12 A. No, it didn't end up with your client;
13 your client is the cause of us to have lost value
14 for that five and a half million dollars.

15 Q. Did you make a request of AEG for that
16 money back?

17 A. I think there have been conversations to
18 that effect.

19 Q. And what did AEG say?

20 A. I was not in the conversation so I don't
21 know that.

22 Q. If that payment to AEG was contingent
23 upon validation and your statement now is that
24 validation didn't take place, wouldn't AEG be the
25 proper party to get the money back from?

1 A. I think that's, again, a legal question
2 and I'm not sure I know how to address that.

3 Q. Let's go back to the FDUTPA cause of
4 action in the complaint. Starts on page 62 at the
5 bottom. You said that IPH has made no attempt to
6 quantify its damages as it relates to this cause
7 of action; is that correct?

8 A. Yes, to allocate damage to this
9 particular allegation.

10 Q. Do you know if Industrial Heat has
11 attempted to allocate damages to this cause of
12 action?

13 A. I'm not aware of that.

14 MR. BELL: Objection to form.

15 MR. CHAIKEN: All right. Let's take a
16 quick break. I may be getting close to being
17 done.

18 THE VIDEOGRAPHER: Going off the record.
19 The time is 4:16 p.m.

20 (Recess taken from 4:16 p.m. to 4:30 p.m.)

21 THE VIDEOGRAPHER: Okay. We're back on
22 the record. The time is 4:30 p.m.

23 BY MR. CHAIKEN:

24 Q. Mr. Fogelman, before we took a break, we
25 were going over the various causes of action

1 brought by IPH against my clients and I forgot to
2 ask you some questions about those causes of
3 action.

4 So if we go back to the fourth amended
5 complaint, specifically the count two, breach of
6 contract, I'm just going to walk through really
7 quick, the breach of confidentiality is the first
8 one. When did IPH first discover that my client
9 breached confidentiality?

10 A. Confidentiality breaches relate to, I
11 believe, the blogs. I was not the guy tracking
12 the blogs, so I don't recall the date when those
13 first came to our attention. It wasn't last week.
14 I'm sure it was some time back.

15 Q. 2014/2015, that time frame?

16 A. I don't know. I'm sorry.

17 Q. Is there anything that would refresh
18 your recollection?

19 A. I can't remember if the blogs are dated.
20 I looked at them and I don't know if they are
21 dated.

22 Q. Did IPH view the breaches of the
23 confidentiality provision as material breaches?

24 MR. BELL: Objection to form.

25 THE WITNESS: Is that material as in a

1 legal sense?

2 BY MR. CHAIKEN:

3 Q. Well, material -- what does the word
4 "material" mean to you?

5 A. Material means -- in the financial
6 sense, material has -- it's a complicated meaning.

7 Q. Yes.

8 A. And so you have to define it. So could
9 it be anything more than, you know, two percent of
10 your net equity.

11 Q. Okay. Let's use the word "meaningful."
12 Do you understand what the word "meaningful"
13 means?

14 A. It seems like an adjective.

15 Q. Okay. Did IPH view the breaches of
16 confidentiality as being meaningful?

17 A. Yes.

18 Q. Okay. And did they inform Dr. Rossi
19 that they felt that he breached the
20 confidentiality provisions of the license
21 agreement?

22 A. It's my understanding there is -- it's
23 in the records that he was informed and asked not
24 to do that.

25 Q. And how was he informed?

1 A. I think it was a conversation to stop
2 doing that or please don't do that, something of
3 that nature, is what I remember reading.

4 Q. And who was the conversation between?
5 Dr. Rossi and who else?

6 A. I recall it being Tom Darden and JT and
7 there was a communications guy, a Brian
8 McLaughlin?

9 Q. McLaughlin.

10 A. McLaughlin. I think he was also
11 retained to help coach Dr. Rossi on
12 communications.

13 Q. And after discovery of the breach of the
14 confidentiality provision, did IPH terminate the
15 license agreement?

16 A. Did IPH terminate the license agreement?

17 Q. Uh-huh.

18 A. Not to my knowledge, no.

19 Q. Did they say, Dr. Rossi, you're in
20 breach of the confidentiality provision, we're
21 going to stop -- we're going to end this contract
22 and we're going to sue you for breach?

23 A. I don't recall that, no.

24 Q. Okay. Did IPH continue to perform under
25 the license agreement after learning of the breach

1 of confidentiality?

2 MR. BELL: Objection to form.

3 THE WITNESS: I'm not aware of
4 non-performance on the part of IPH, so -- I'm just
5 not aware of a non-performance so I'm not aware of
6 a stopping performance as you put it.

7 BY MR. CHAIKEN:

8 Q. Okay. Let's go to the next one which is
9 the breach of the failure to assign license
10 patents. When, in time, did that occur?

11 A. My understanding is it occurred over
12 time.

13 Q. Okay.

14 A. As filings were done where there was
15 no -- not informed and/or -- anyway.

16 Q. Well, let's be clear because you're
17 confusing two different claims. One is the
18 failure to assign and one's the failure to inform
19 and consult.

20 A. Yes. So I'm not on the same page with
21 you. Can you please get me on the same page?

22 Q. Absolutely. Page 56 at the bottom.

23 A. Okay.

24 Q. Top third of the page. Failure to
25 assign licensed patents.

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1 A. I don't know that -- I don't know what
2 that would be.

3 Q. Okay. And after having knowledge of
4 this breach, this alleged breach, did IPH put
5 Plaintiffs on notice that they felt that this was
6 a meaningful breach or a material breach?

7 A. I don't recall communications directly
8 between the parties about this. You're talking
9 about after the letter was sent by James Day?

10 Q. Yes.

11 A. Yes. I don't recall the communications.

12 Q. Okay. When did IPH -- and I'm going to
13 the next one now, starting at the bottom of page
14 56, failure to inform/consult on patent
15 applications. When did IPH first come to
16 understand that Plaintiffs briefed that provision
17 in the license agreement?

18 A. I don't recall the timing of -- after
19 reading this, I don't recall the timing.

20 Q. Now, if we go back and look at that
21 prior exhibit with the Schedules A and B on them,
22 which is Exhibit 28. In Exhibit B, which I think
23 is responsive to this one, on the first page of
24 Exhibit B, IPH is claiming that in October of
25 2012, there were patents filed that they weren't

1 informed or consulted on. Do you see that?

2 A. I do.

3 Q. Does that refresh your recollection as
4 to when IPH first learned of this violation?

5 A. And this is B as -- I'm sorry, Schedule
6 B is which list? It's not headed. It just says
7 Exhibit B.

8 Q. Yes. Well, I believe it's responsive to
9 interrogatory number six which is on page ten.

10 A. So these are the filings made by
11 Dr. Rossi without informing IPH.

12 Q. Right.

13 A. That's what we're talking about, right?

14 Q. Right.

15 A. And so I don't recall when we became
16 informed of each one of these filings that was
17 made.

18 Q. I'm not asking about each one; I'm
19 asking when was the first time you were informed
20 about the very first one. When in time?

21 A. Oh, gosh. I don't recall that date.

22 Q. Okay. Was it on or around October 2012,
23 or after that?

24 A. I don't recall the date.

25 Q. I'm not asking for a specific date; I'm

1 asking generally was it in 2012? 2013?

2 A. I don't have a general recollection of
3 the date.

4 Q. Okay. Is there anything that would
5 refresh your recollection?

6 A. There might be some records back at the
7 office. I don't --

8 Q. Did you talk to anyone at Industrial
9 Heat about when they discovered this breach?

10 A. No, we did not cover that specific
11 question.

12 Q. Do you know who discovered this breach?

13 A. I don't recall at this time.

14 Q. Do you know if after discovering this
15 breach, IPH informed Dr. Rossi that he was in
16 breach of the contract?

17 A. I seem to recall there were
18 communications about the issue about filing and
19 not informing.

20 Q. What communications do you recall
21 seeing?

22 A. Brian, it's been a long time, so I don't
23 recall who and exactly when it was, but I remember
24 the conversation around it being mentioned.

25 Q. Okay. Did the conversation include a

1 statement by IPH that my clients were in breach of
2 the contract as a result?

3 MR. BELL: Objection to form.

4 THE WITNESS: We knew that was the
5 issue. So including the obvious statement, I
6 don't recall. So if we're having a conversation
7 about the issue, then the issue is known. Does
8 that make sense?

9 MR. CHAIKEN: Not really.

10 THE WITNESS: Well, it did at the time.

11 BY MR. CHAIKEN:

12 Q. Did IPH, prior to filing its
13 counterclaim, ever inform Leonardo or Dr. Rossi
14 that it viewed the breach of this provision to be
15 a meaningful or material breach of contract?

16 MR. BELL: Objection to form.

17 THE WITNESS: It's very precise terms
18 you're using and I don't recall that in those very
19 precise terms.

20 BY MR. CHAIKEN:

21 Q. Did IPH seek to terminate the contract
22 after discovering this breach?

23 A. Not to my knowledge.

24 Q. Okay. Let's go to the next one. Next
25 one is -- well, let's talk about the abandonment

1 of the patents which, I guess, is Exhibit A.

2 So Exhibit A to Exhibit 28 is an alleged
3 list of patents that my client abandoned. And the
4 first one is dated September 16, 2010. When did
5 IPH first learn that plaintiffs abandoned patents
6 without informing them?

7 A. I don't recall the date that that was
8 first informed.

9 Q. Do you know if IPH ever communicated to
10 my clients that they were in breach of contract as
11 a result of allowing patents to become expired or
12 abandoned?

13 A. I don't recall that it was said in those
14 exact terms. I recall conversations around the
15 issue of abandoning patents without informing us.

16 Q. Okay. Did IPH seek to terminate the
17 contract as a result of this breach?

18 A. No, not to my knowledge.

19 Q. On page 58 of the counterclaim is the
20 covenant-not-to-compete section and we talked
21 about that prior to our last break, and I asked
22 you if you were aware of anything other than the
23 blog posts. And you said, look for your statement
24 of facts.

25 So I'm a man of my word. I've got your

1 posts.

2 A. Well, you had this, right? You gave
3 this to me.

4 Q. I was -- right. Is there anything else
5 that you're aware of?

6 A. This is what I'm aware of.

7 Q. Okay. Do you know what territories the
8 license agreement covers?

9 A. Yes, it's in the license agreement.

10 Q. Okay. And do you know if Leonardo
11 engaged in activities outside of those
12 territories?

13 A. I'm not aware of Leonardo's activities,
14 no.

15 Q. Well, you're claiming that he violated
16 the non-compete, right? And I'm just wondering if
17 any of the actions that you're complaining of took
18 place in territories outside of the license
19 agreement territories.

20 A. I'm not aware of Leonardo's activities,
21 though.

22 Q. Well, you're claiming that he breached
23 the covenant not to compete, correct? IPH is
24 making that claim, right?

25 A. Yes. Yes, based on Dr. Rossi's blogs,

1 yes.

2 Q. Right. And so my question then is, is
3 do you know if those blogs are for the territories
4 outside the scope of the license agreement?

5 A. I did not go through and determine each
6 one of those, no.

7 Q. Okay. Did anybody from IPH or IH go
8 through that?

9 A. I believe so, but I don't recall who it
10 was or when they did it.

11 Q. Okay. And did they provide any
12 information as to what territories that was
13 covered by those blog posts that you claim
14 evidence --

15 A. They didn't schedule it. Yes, I didn't
16 see a schedule of that, no.

17 Q. Okay. Is it possible that Dr. Rossi and
18 Leonardo competed or engaged in activities that
19 were outside of the territories set forth in the
20 license agreement?

21 A. I'd be speculating. I don't know how to
22 answer that.

23 Q. Okay. Do you know definitively whether
24 or not the blog posts refer to activities within
25 the territories covered by the license agreement?

1 A. I did not see a schedule prepared of the
2 geography of these.

3 Q. Okay. When did IPH first learn of
4 violations of the covenant not to compete?

5 A. We didn't discover the deposition until
6 the deposition so that doesn't work.

7 Q. Right.

8 A. But the blogs are dated and so I don't
9 know when we saw the blogs approximate to the date
10 of the blog. I don't have a schedule of that
11 either. But I would presume that following blogs,
12 whether it's timely or not, that's when you
13 discover it. And so I don't have a schedule of
14 when each one of these blogs was pulled.

15 Q. Okay. Did IPH put Dr. Rossi or Leonardo
16 on notice that they had breached the covenant not
17 to compete as a result of their blog posts?

18 A. My recollection was there were
19 communications about not disclosing, in the
20 confidentiality sense, information.

21 Q. Right. That's different. Disclosing
22 confidentiality is one thing, covenant not to
23 compete something else. So did IPH ever put
24 plaintiffs on notice that they breached the
25 covenant not to compete?

1 A. I don't recall that exact communication.

2 Q. Okay. Did IPH ever say, we're
3 terminating the contract because you breached the
4 covenant not to compete?

5 A. Not to my knowledge.

6 Q. Okay. Going back -- and if there's
7 anything else you want to use that for, I'll take
8 it back, get it out of your way.

9 A. Thank you.

10 Q. Turning back to the fourth amended
11 counterclaim, the cause of action for FDUTPA on
12 page 62. When did IPH first discover that
13 plaintiffs engaged in the schemes to deceive IPH?

14 MR. BELL: Objection to form.

15 THE WITNESS: Pardon?

16 MR. BELL: Objection to form.

17 THE WITNESS: Oh. I'll take that back.

18 I think that was hard to -- hard to
19 figure out. The testimony I reviewed -- I think
20 the testimony I reviewed did not indicate, you
21 know, an exact date of when that seemed more
22 apparent.

23 BY MR. CHAIKEN:

24 Q. Do you recall reviewing the testimony of
25 Tom Darden where he said that he knew in February

1 of 2015, that there was something wrong going on
2 down there?

3 MR. BELL: Objection to form. Lacks
4 foundation.

5 THE WITNESS: If that's the date he said
6 it then, yeah, if that's what he testified to.

7 BY MR. CHAIKEN:

8 Q. Do you know if, prior to filing this
9 counterclaim, IPH put Plaintiffs on notice that
10 they thought that there was something, there was
11 some deceptive acts were going on in Doral or in
12 Florida?

13 MR. BELL: Objection to form.

14 THE WITNESS: I don't recall a notice
15 being sent. There was some -- I recall some
16 discussions around that communication, how it
17 should happen, but I don't recall the timing.

18 BY MR. CHAIKEN:

19 Q. Now, during 2015, between February and
20 let's say May of 2015, IPH was in the process of
21 raising funds; is that correct?

22 MR. BELL: Objection to form.

23 THE WITNESS: Yes, we were in the
24 process.

25

1 BY MR. CHAIKEN:

2 Q. Okay. And, in fact, whether it be IPH
3 or IH acting on behalf of IPH, investors or
4 potential investors were brought to the Doral
5 facility; is that correct?

6 A. I know investors were brought to the
7 facility. I'm not recalling the dates, but it
8 sounds like it's in the right zip code.

9 Q. So why did IPH, or IH on behalf of IPH,
10 bring investors to the Doral facility?

11 A. I think those investors were previously
12 informed of the E-Cat technology. And I think
13 they might have -- somebody even requested to
14 visit. So it's on that -- I think it's on that
15 basis if I'm recalling.

16 Q. Okay. And did IPH, or IH on behalf of
17 IPH, tell any of these potential investors that
18 they thought that Plaintiffs had breached the
19 license agreement?

20 MR. BELL: Objection to form.

21 THE WITNESS: I don't recall that
22 communication.

23 BY MR. CHAIKEN:

24 Q. Did IPH, or IH on behalf of IPH, tell
25 any of these potential investors that they thought

1 that what was going on in the facility was not all
2 proper, that there was something funny going on
3 there?

4 A. I recall some conversations about
5 people's reactions after the visit or about the
6 visit. So I think people maybe -- my recollection
7 of the reactions was that people got that on their
8 own.

9 Q. Which people are we talking about?

10 A. I think I remember specifically
11 Lamacraft.

12 Q. And what did -- what do you know -- what
13 are you aware of that Lamacraft said or --

14 A. I wasn't there, Brian, so it was hearsay
15 or it was just conversation about his reaction
16 that I recall. And so I think he just didn't --
17 his reaction was something like pieces didn't fit
18 together or it didn't seem like there was a whole
19 picture here or something was going on. Not sure.

20 Q. Did IPH, or IH on behalf of IPH, ask
21 Dr. Rossi to speak to these investors?

22 A. I don't recall that.

23 MR. BELL: Objection to form.

24 BY MR. CHAIKEN:

25 Q. Now, isn't it true, and I think we've

1 already established that Woodford invested
2 \$50 million in May of 2015, correct?

3 A. Correct.

4 Q. Was Woodford informed, prior to that
5 investment, that IPH believed that Rossi or
6 Leonardo had breached the license agreement?

7 MR. BELL: Objection to form.

8 THE WITNESS: I think we read that
9 already that Darden and Lamacraft had that
10 communication.

11 BY MR. CHAIKEN:

12 Q. That was about whether or not the GPT
13 could be performed. Did anyone from IPH or IH say
14 to Lamacraft or Woodford that Leonardo was in
15 violation of the license agreement because it
16 breached the covenant not to compete?

17 A. No, I don't recall that.

18 Q. Or failure to assign licensed patents?

19 A. As I said, I don't recall that.

20 Q. Or any of the other breaches, same
21 answer?

22 A. Yes, I don't recall that specific
23 communication with Lamacraft.

24 Q. Okay. Is there a reason why those
25 communications wouldn't have taken place?

1 going on in the plant?

2 MR. BELL: Objection to form.

3 THE WITNESS: As I recall, Jim Bass was
4 Dr. Rossi's employee or contractor and was working
5 at Dr. Rossi's direction. So if Jim Bass spoke to
6 someone, I believe he was speaking at the
7 direction of Dr. Rossi.

8 BY MR. CHAIKEN:

9 Q. Do you know if Tom Darden or someone
10 else from IH or IPH asked Dr. Rossi to make Jim
11 Bass available to talk about the plant?

12 A. I don't know that detail.

13 Q. Did you ever ask Tom Darden about that
14 in your preparations for today's deposition?

15 A. Whether or not he asked Dr. Rossi to
16 make Jim Bass available?

17 Q. Right.

18 A. I did not ask him that detailed
19 question, no.

20 Q. Okay. While the one-megawatt plant was
21 in the facility in Florida, did IPH receive
22 reports from Fabio Penon?

23 A. I believe that is in the filings, yes.

24 Q. And did IPH ever respond to Penon and
25 say, why are you sending us these reports?

1 A. I don't recall that message going back
2 to Penon, no, what I've seen.

3 Q. Did IPH provide any response to Penon
4 after they received reports from him?

5 A. I think there were exchanges between the
6 parties whether it was IH on behalf of IPH, which
7 is probably what I remember more.

8 Q. And what were those exchanges about?

9 A. Well, I remember exchanges. I don't
10 remember the content of the exchanges and getting
11 into the details. If I remember correctly, it was
12 about data, measurement data, primarily.

13 Q. Did IPH pay for 50 percent of Penon's
14 services?

15 A. Geez. IPH paid for, through the
16 services agreement, paid for Penon. I don't know
17 that I remember the percentage of his invoices.

18 Q. Why did IPH pay for the services of
19 Penon?

20 A. I think there must have been a request
21 from Dr. Rossi. I don't know what led up to that.

22 Q. Was there some agreement that IPH had
23 been a part of that provided they were to pay for
24 Penon's services?

25 A. An agreement?

1 Q. Yes.

2 A. As in a contract with Penon?

3 Q. Whether it be a contract with Penon or a
4 contract with Leonardo or Dr. Rossi.

5 A. I remember contracts. I'm not
6 remembering one with Penon, no. Penon. I'm not
7 recalling that one.

8 Q. Do you know if the license agreement
9 provided for payments to be made 50/50 between
10 Leonardo and IH for Penon?

11 A. That's my recollection.

12 Q. Is there any other agreement that you're
13 aware of, other than that one, in which there was
14 a provision for Penon's services to be paid for by
15 IH or IPH?

16 A. I think I've told you there is -- I'm
17 not recalling the other agreement, but we
18 typically did things by agreement, so the fact
19 that I missed an agreement is possible.

20 Q. If there was some other agreement
21 between IH or IPH and Fabio Penon, it would have
22 been produced in this case, wouldn't it?

23 MR. BELL: Objection to form.

24 THE WITNESS: I don't know that. I
25 wasn't -- I don't know that.

1 BY MR. CHAIKEN:

2 Q. Mr. Fogelman, before I asked you about
3 the joint pretrial stip, your counsel asked you
4 about you seeking attorneys' fees. What is the
5 basis for which IPH is going to be seeking to
6 recover its attorneys' fees in this case?

7 MR. BELL: Objection to form.

8 THE WITNESS: Brian, we've discussed
9 that matter with counsel and that's as far as I've
10 gotten with it, frankly.

11 BY MR. CHAIKEN:

12 Q. Are you aware of any agreement between
13 the parties in this case, that provides for the
14 recovery of attorneys' fees for prevailing party?

15 A. We have not covered that yet.

16 (Whereupon, Exhibit 30 was marked for
17 identification.)

18 BY MR. CHAIKEN:

19 Q. Okay. I'm going to show you what's been
20 marked as Exhibit 30. It's a copy of the pretrial
21 stipulation filed in this case. Your counsel has
22 represented that this is the document that you
23 reviewed prior to or in preparation for this
24 deposition that speaks to the issue of damages; is
25 that correct?

1 A. I believe that's correct, Brian. When I
2 see what I reviewed, I'll let you know.

3 Q. Fair enough.

4 A. I think I found it.

5 Q. Okay. Can you tell us what page and
6 paragraph you're pointing to?

7 A. I'm on page 33.

8 Q. Okay. What paragraph are you pointing
9 to?

10 A. Oh, sorry. Ninety-eight.

11 Q. Okay.

12 A. Starting with 98 and following.

13 Q. So this is the section of the pretrial
14 stipulation with respect to contested facts; is
15 that correct? Statement of issues of facts which
16 remains -- un-litigated page 23 as part of that
17 list?

18 A. Statement of issues of fact which remain
19 -- un-litigated. Yes, I see that.

20 Q. Okay. So you're on page 33, paragraph
21 98. Are there other paragraphs that you are
22 referring to?

23 A. I'm sorry. My testimony was I reviewed
24 this.

25 Q. This entire document?

1 A. No, just this portion of the document.

2 Q. Okay. Are there other paragraphs, other
3 than paragraph 98 that you reviewed regarding the
4 issue of damages?

5 A. Yes, 98 through looks like 105, six,
6 through there. I'm down through 110. Down to
7 114. I'm not sure where we stopped, but I know we
8 started at 98.

9 Q. Okay. You can't tell by looking at this
10 document where you stopped?

11 A. It was a review. It was not an
12 item-by-item review. I just scanned through the
13 document to become familiar with what was in the
14 document. And so I'm not sure where -- which one
15 I actually lifted my eyes off the page and stopped
16 scanning.

17 Q. Okay. Well, let's refer to this
18 document. I'm looking at paragraphs 120 through
19 125. And they all speak to damages as it relates
20 to the FDUTPA plant; do you see that?

21 A. Yes.

22 Q. And I had asked you questions earlier
23 today and I asked you whether or not you could
24 tell us what the damages were for FDUTPA and your
25 response was you hadn't made an allocation for

1 cause of action. They're the same in each cause
2 of action. Read the document.

3 BY MR. CHAIKEN:

4 Q. Looking at paragraph 121, it states that
5 -- my understanding in reading paragraph 121 is
6 that IPH is seeking a \$1,000 in damages as it
7 relates to shipping the one-megawatt plant to
8 Florida; is that correct?

9 A. That's what it says.

10 Q. Okay. Has IPH provided any receipts
11 showing that it made this payment?

12 A. I haven't provided them, but I think the
13 accounting people have provided them.

14 Q. So you think they were provided in this
15 case?

16 A. Brian, I haven't seen the receipts. I'm
17 sorry.

18 Q. Okay. Paragraph 122 states or I believe
19 it identifies that IPH is seeking to recover
20 \$5,000 in damages paid to purchase the shipment
21 container for the one-megawatt plant. Do you see
22 that?

23 A. Yes.

24 Q. Have you provided receipts showing
25 payment of \$5,000?

1 A. I have not personally provided the
2 receipts.

3 Q. Okay. Paragraph 123 states that IPH is
4 seeking to recover \$302,567.00 paid to Rossi and
5 Leonardo after the one-megawatt plant was shipped
6 to Florida. Do you see that?

7 A. I do.

8 Q. How was that number computed?

9 A. I believe that is a -- there's a ledger
10 developed to support those costs.

11 Q. And where is that ledger?

12 A. Where is the ledger? It's in the
13 accounting records for the company.

14 Q. Was it produced in this case?

15 A. I don't recall that.

16 Q. Paragraph 124 states that IPH is seeking
17 to recover \$212,082.56 as relates to payments made
18 to Barry West. Do you see that?

19 A. Yes, 124, yes.

20 Q. Has IPH provided copies of canceled
21 checks or evidence of payments made to Barry West
22 in this case?

23 A. I have not seen those myself. I'm not
24 sure.

25 Q. Okay. Paragraph 125 states that --

IPH International, B.V. Corporate Representative
5/5/2017

1 A. I'm sorry, did you ask me about IPH?

2 Q. Yes. I'm asking -- all of these
3 questions are related to IPH.

4 A. Okay. IPH didn't write checks for any
5 of these things, so the checks would be at IH.
6 Let's make that clarification.

7 Q. So IH made these payments? Okay. I
8 appreciate that. Did IPH provide reimbursement to
9 IH for all these expenses?

10 A. Yes.

11 Q. And you've got evidence of those
12 payments?

13 A. Those are charges under the services
14 agreement.

15 Q. Okay. Was there a transfer of funds as
16 it relates to these expenses?

17 A. There have been transfers of funds, yes.

18 Q. Okay. Have you seen any evidence or has
19 canceled checks showing payments made by IH to
20 Barry West been provided in this case as far as
21 you know?

22 A. I don't know that. I haven't seen those
23 myself.

24 Q. Paragraph 125 provides for damages in
25 the amount of 225,440 for payments made to USQO

1 and/or Fulvio Fabiani. Is that the amount that
2 IPH is seeking with respect to paragraph 125?

3 A. My caution about any of the numbers, I
4 don't know exactly what date and time these
5 numbers were developed so they might have changed,
6 there might be additional expenses that have been
7 incurred by then, so that's my caution in this. I
8 don't know when this was filed, when these numbers
9 were developed in time.

10 Q. Do you know who developed these numbers?

11 A. I said I don't know that.

12 Q. Okay. Do you know if these numbers are
13 accurate?

14 A. I have no reason to believe they're not
15 accurate at that point in time that they were
16 developed.

17 Q. Okay. You don't know what point in time
18 they were developed?

19 A. I said that, yes. I don't know the
20 time.

21 Q. Okay. Let's go back to paragraph 102 on
22 page 33 states: Whether, as a result of the
23 plaintiffs' breach of contract, IH or IPH can
24 recover damages, as damages, the \$422,311.79 in
25 expenses paid to Rossi and Leonardo. Do you see

1 that?

2 A. I do see that.

3 Q. Do you know how that number was created?

4 A. I have a knowledge of the accounting
5 system and so to answer your question, yes, I
6 would know that it was developed out of the
7 accounting records for the company.

8 Q. Okay. And do you know who made that
9 computation?

10 A. No. Sitting here today, I don't know
11 who it is. I can speculate, but that's a
12 speculation.

13 Q. Okay. And do you know which breach of
14 contract -- which provision of the contract that
15 relates to?

16 A. It would refer back to the breach of
17 contract allegations that we made in the
18 documents. We can -- the only way I know to go do
19 that is read it.

20 Q. Okay. There's six different breaches of
21 contract allegations made in the complaint. Do
22 you know which one this applies to?

23 A. Not sitting here today, no, I can't.

24 Q. Is there anything that would help you
25 figure that out?

IPH International, B.V. Corporate Representative
5/5/2017

1 A. No. I mean, you're asking a question
2 about a number across six different -- that's
3 going to require some analysis.

4 Q. Well, we spent a lot of time today
5 walking through those counts and you told me you
6 didn't know, there was no allocation.

7 Now, I learn after your counsel asked
8 you a question, that there is an analysis and that
9 you actually reviewed it prior to coming here
10 today. But you didn't provide those responses
11 earlier today, so now I'm asking you now.

12 MR. BELL: That's not -- that's not --

13 MR. CHAIKEN: That's exactly what he
14 said, Bernie. Please stop interrupting the depo.

15 MR. BELL: We have a record. Stop
16 badgering him. Just ask your damn question.

17 MR. CHAIKEN: I've asked the question.

18 MR. BELL: Then skip the prologue.

19 BY MR. CHAIKEN:

20 Q. Which counts -- which breach of contract
21 count does that paragraph 102 apply to?

22 MR. BELL: How many times do you want
23 him to answer the same question?

24 BY MR. CHAIKEN:

25 Q. If the answer is I don't know, fine.

1 But if there is a count that it applies to, I need
2 to know what it is.

3 A. Sitting here today, I'm not aware of
4 which one of the counts that amount exactly
5 applies to.

6 Q. Okay. What about paragraph 103 for
7 \$25,511.60 paid to Penon.

8 A. No, I'm not prepared to answer that
9 question.

10 Q. Okay. Paragraph 104, which breach of
11 contract count does the \$251,094.21 paid to Barry
12 West apply to?

13 A. I'm not prepared to answer that
14 question.

15 Q. Okay. Paragraph 105, \$355,659.10 paid
16 to USQO Fulvio Fabiani. Which breach of contract
17 count does that apply to?

18 MR. BELL: Are you asking which of the
19 six elements, the confidentiality, et cetera, et
20 cetera?

21 MR. CHAIKEN: Correct.

22 MR. BELL: That he's told you ten times
23 haven't been allocated or 20 maybe?

24 MR. CHAIKEN: Yes, that's exactly what
25 I'm asking. That's correct.

1 MR. BELL: Okay. Good. Keep going.

2 How much time do we have left?

3 THE VIDEOGRAPHER: We are at seven --
4 just under six minutes. Six minutes.

5 THE WITNESS: I'm sorry. State the
6 question again, please.

7 BY MR. CHAIKEN:

8 Q. Sure. Paragraph 105 in the pretrial
9 stip provides for damages in the amount of
10 \$355,659.10 in payments made to USQO and/or Fulvio
11 Fabiani. Which breach of contract count do those
12 set of damages apply to?

13 A. I am not prepared today to make an
14 allocation to each of the breaches.

15 Q. Okay. Paragraph 110 says that IPH is
16 seeking \$256,151.59 in patent-related expenses
17 paid to Rossi or Leonardo. Do you see that?

18 A. Yes.

19 Q. What is incorporated in that number, if
20 you know?

21 A. I don't have that information with me
22 today.

23 Q. Do you know who compiled that number?

24 A. The same answer I've given you before.

25 Q. Okay. You don't know how that number

1 was compiled, do you?

2 A. I have a good understanding of the
3 accounting system, so I think I know, but I didn't
4 do the work and so I wouldn't answer your question
5 until I consulted the person that did the work and
6 give you a very accurate answer.

7 Q. And did you consult with that person
8 prior to coming here today?

9 A. No, I did not --

10 Q. Why not?

11 A. -- consult that person on this number.

12 Q. Okay. Why not?

13 A. I did not anticipate your question about
14 that number that I would need to know what you're
15 asking me. I did not anticipate that.

16 Q. You didn't anticipate that I was going
17 to ask you questions about the damages?

18 A. I did not anticipate the question you're
19 asking me now about the detail of what makes up
20 that, how it was developed, you know.

21 Q. Okay.

22 A. I knew you would ask me questions about
23 damages and I've answered those.

24 Q. Paragraph 114 provides for -- well, I
25 take that back. That's an IH question.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

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

ANDREA ROSSI, *et al.*,

Plaintiffs,

v.

THOMAS DARDEN, *et al.*,

Defendants.

**[PROPOSED] ORDER GRANTING PLAINTIFFS' MOTION FOR LEAVE TO FILE
SUPPLEMENT TO THEIR MOTION FOR PARTIAL SUMMARY JUDGMENT**

THIS CAUSE came before the Court on Plaintiffs' Motion for Leave to File Supplement to their Motion for Partial Summary Judgment. After considering the Motion and finding that good cause exists for granting the same, the Court is of the opinion that Plaintiffs' Motion for Leave should be GRANTED.

IT IS THEREFORE ORDERED that Plaintiffs shall file their Supplemental Motion for Partial Summary Judgment as a separate docket entry by _____.

DONE AND ORDERED in Miami, Florida this ____ day of May, 2017.

**CECILIA M. ALTONAGA
UNITED STATES DISTRICT JUDGE**

cc: counsel of record