

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' ANSWER AND AFFIRMATIVE DEFENSES TO
DEFENDANTS' INDUSTRIAL HEAT, LLC
AND IPH INTERNATIONAL, B.V.'S COUNTERCLAIM**

For their Answer and Affirmative Defenses to Defendants Industrial Heat, LLC. (“IH”) and IPH International, B.V.’s (“IPH”) Third Amended Answer, Affirmative Defenses, Counterclaim and Third Party Claims (“Counterclaim”), Plaintiffs, Andrea Rossi (“Rossi”) and Leonardo Corporation (“Leonardo”) (collectively “Plaintiffs”), state as follows:

INTRODUCTION

1. Plaintiffs lack sufficient knowledge or information to admit or deny the allegations in Paragraph 1 of the Counterclaim and therefore deny the same and demand strict proof thereof.

2. Plaintiffs admit the allegations contained in Paragraph 2 related to the Plaintiffs’ development of the E-Cat device and E-Cat Fuel and the fact that Industrial Heat entered into the License Agreement with Plaintiffs in October 2012. Plaintiffs lack sufficient knowledge to admit or deny remainder of the allegations contained in Paragraph 2 and therefore deny the same.

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3. Plaintiffs state that the License Agreement and amendments thereto speak for themselves. Plaintiffs deny the allegations contained in Paragraph 3 to the extent that they are inconsistent with the terms of the License Agreement.

4. Plaintiffs admit that Defendant IH made the first payment due under the License Agreement to Leonardo in October 2012 and that the payment was in the amount of \$1.5 million. Plaintiff admits that validation was achieved according to the terms of the License Agreement and amendments thereto from April 30 to May 1, 2013 and that upon completion of the validation, payment was received in the amount of \$10 million from Defendants. While Plaintiffs admit that a COP in excess of 10 was achieved during the validation test, Plaintiffs deny any inference that the measurement of the COP was made by the Plaintiffs. To the contrary, the COP measurements were made by the agreed upon third party Expert Responsible for Validation (“ERV”) and the measurement of a COP greater than 10 was reported by the ERV. The remainder of the allegations contained in Paragraph 4 are denied to the extent they contradict the express terms of the License Agreement and amendments thereto. The License Agreements and amendments thereto speak for themselves.

5. Plaintiffs deny the allegations contained within Paragraph 5 of the Counterclaim to the extent they contradict the terms of the License Agreement and amendments thereto. The License Agreements and amendments thereto speak for themselves.

6. Plaintiffs admit that the Guaranteed Performance test did “commence immediately following the delivery of the Plant to Industrial Heat, but deny that it was required to. The Plaintiffs deny the remaining allegations contained in Paragraph 6 of the Counterclaim.

7. Plaintiffs deny the allegations contained in Paragraph 7 of the Counterclaim.

8. Plaintiffs deny the allegations contained in Paragraph 8 of the Counterclaim.

9. Plaintiffs lack sufficient knowledge to admit or deny the allegations contained in Paragraph 9 that Defendants continued to undertake any efforts to replicate the results of the Validation test and therefore deny the same and demand strict proof thereof. Plaintiffs affirmatively state that these allegations directly contradict Defendants sworn statements contained in their WIPO Patent Application number WO 2015/127263 A2 filed on August 27, 2015. The remainder of the allegations contained in Paragraph 9 of the Counterclaim are denied.

10. Plaintiffs deny the allegations contained in Paragraph 10 of the Counterclaim.

11. Plaintiffs deny the allegations contained in Paragraph 11 of the Counterclaim.

THE PARTIES

12. Plaintiffs admit the allegations contained in Paragraph 12 of the Counterclaim.

13. Plaintiffs lacks sufficient knowledge to admit or deny the allegations contained in Paragraph 13 of the Counterclaim therefore deny the same and demand strict proof thereof.

14. Plaintiffs admit the allegations contained in Paragraph 14 of the Counterclaim.

15. Plaintiffs admit the allegations contained in Paragraph 15 of the Counterclaim.

16. Plaintiffs admit the allegations contained in Paragraph 16 of the Counterclaim.

17. Plaintiffs lacks sufficient knowledge to admit or deny the allegations contained in Paragraph 17 of the Counterclaim therefore deny the same and demand strict proof thereof.

18. Plaintiffs lacks sufficient knowledge to admit or deny the allegations contained in Paragraph 18 of the Counterclaim therefore deny the same and demand strict proof thereof.

19. Plaintiffs lacks sufficient knowledge to admit or deny the allegations contained in Paragraph 19 of the Counterclaim therefore deny the same and demand strict proof thereof.

20. Plaintiffs lacks sufficient knowledge to admit or deny the allegations contained in Paragraph 20 of the Counterclaim therefore deny the same and demand strict proof thereof.

21. Plaintiffs lacks sufficient knowledge to admit or deny the allegations contained in Paragraph 21 of the Counterclaim therefore deny the same and demand strict proof thereof.

JURISDICTION & VENUE

22. Plaintiffs admit the allegations contained in Paragraph 22 of the Counterclaim.

23. Plaintiffs admit the allegations contained in Paragraph 23 of the Counterclaim.

24. Plaintiffs admit the allegations contained in Paragraph 24 of the Counterclaim.

25. Plaintiffs lack sufficient knowledge to admit or deny the allegations contained in Paragraph 25 of the Counterclaim therefore deny the same and demand strict proof thereof.

26. Plaintiffs lack sufficient knowledge to admit or deny the allegations contained in Paragraph 26 of the Counterclaim therefore deny the same and demand strict proof thereof.

27. Plaintiffs lack sufficient knowledge to admit or deny the allegations contained in Paragraph 27 of the Counterclaim therefore deny the same and demand strict proof thereof.

28. Plaintiffs lack sufficient knowledge to admit or deny the allegations contained in Paragraph 28 of the Counterclaim therefore deny the same and demand strict proof thereof.

29. Plaintiffs lack sufficient knowledge to admit or deny the allegations contained in Paragraph 29 of the Counterclaim therefore deny the same and demand strict proof thereof.

30. Plaintiffs lack sufficient knowledge to admit or deny the allegations contained in Paragraph 30 of the Counterclaim therefore deny the same and demand strict proof thereof.

31. Plaintiffs admits that the venue is proper in this judicial district as to the allegations against the Plaintiffs. The Plaintiffs lack sufficient knowledge to admit or deny the allegations contained in Paragraph 31 of the Counterclaim therefore deny the same and demand strict proof thereof.

FACTUAL BACKGROUND

32. Plaintiffs lack sufficient knowledge to admit or deny the allegations contained in Paragraph 32 of the Counterclaim therefore deny the same and demand strict proof thereof.

33. Plaintiffs admit the allegations contained in Paragraph 33 of the Counterclaim.

34. Plaintiffs admit the allegations contained in Paragraph 34 of the Counterclaim as they relate to the development of the E-Cat, but deny that any representations were made regarding “byproducts normally associated with nuclear reactions.”

35. Plaintiffs admit the allegations contained in Paragraph 35 of the Counterclaim.

The License Agreement between Industrial Heat, Leonardo, Rossi, [sic] and AEG

36. Plaintiffs admit that they entered into the License Agreement with AEG and IH. Plaintiffs lack sufficient knowledge to admit or deny that the License Agreement attached as Exhibit “B” to the Complaint is incomplete therefore deny the same and demand strict proof thereof.

37. Plaintiffs state that the License Agreement and amendments thereto speak for themselves. Plaintiffs deny the allegations contained in Paragraph 37 to the extent that they are inconsistent with the terms of the License Agreement.

38. Plaintiffs state that the License Agreement and amendments thereto speak for themselves. Plaintiffs deny the allegations contained in Paragraph 38 to the extent that they are inconsistent with the terms of the License Agreement.

39. Plaintiffs state that the License Agreement and amendments thereto speak for themselves. Plaintiffs deny the allegations contained in Paragraph 39 to the extent that they are inconsistent with the terms of the License Agreement.

40. Plaintiffs state that the License Agreement and amendments thereto speak for themselves. Plaintiffs deny the allegations contained in Paragraph 40 to the extent that they are inconsistent with the terms of the License Agreement.

41. Plaintiffs state that the License Agreement and amendments thereto speak for themselves. Plaintiffs deny the allegations contained in Paragraph 41 to the extent that they are inconsistent with the terms of the License Agreement.

42. Plaintiffs state that the License Agreement and amendments thereto speak for themselves. Plaintiffs deny the allegations contained in Paragraph 42 to the extent that they are inconsistent with the terms of the License Agreement.

43. Plaintiffs state that the License Agreement and amendments thereto speak for themselves. Plaintiffs deny the allegations contained in Paragraph 43 to the extent that they are inconsistent with the terms of the License Agreement.

44. Plaintiffs state that the License Agreement and amendments thereto speak for themselves. Plaintiffs deny the allegations contained in Paragraph 44 to the extent that they are inconsistent with the terms of the License Agreement.

45. Plaintiffs deny the allegations contained in Paragraph 45 of the Counterclaim.

46. Plaintiffs state that the License Agreement and amendments thereto speak for themselves. Plaintiffs deny the allegations contained in Paragraph 46 to the extent that they are inconsistent with the terms of the License Agreement.

First Amendment to the License Agreement and assignment of Industrial Heat's rights to IPH

47. Plaintiffs admit the allegations contained in Paragraph 47 of the Counterclaim.

48. Plaintiffs lack sufficient knowledge to admit or deny the allegations contained in Paragraph 48 of the Counterclaim therefore deny the same and demand strict proof thereof.

49. Plaintiffs admit that at or about the time of the Validation testing, a payment was tendered to the escrow agent. Plaintiffs lack sufficient knowledge to admit or deny that such payment was made by Industrial Heat therefore deny the same and demand strict proof thereof. As to the remaining allegations contained in Paragraph 49, Plaintiffs state that the License Agreement and amendments thereto speak for themselves. Accordingly, Plaintiffs deny the remaining allegations contained in Paragraph 49 to the extent that they are inconsistent with the terms of the License Agreement.

50. Plaintiffs deny the allegations contained in Paragraph 50 of the Counterclaim and demand strict proof thereof.

51. Plaintiffs admit that the Validation test was originally supposed to be performed on the Plant over the course of 24 hours. Plaintiffs deny that any actions were taken to manipulate the Validation test as alleged in Paragraph 51 of the Counterclaim and demand strict proof thereof. Plaintiff admits that he sent the e-mail attached as Exhibit 9 to the Counterclaim, and the e-mail speaks for itself.

52. Plaintiffs deny the allegations contained in Paragraph 52 of the Counterclaim and demand strict proof thereof.

53. Plaintiffs deny the allegations contained in Paragraph 53 of the Counterclaim and demand strict proof thereof.

54. Plaintiffs state that the License Agreement and amendments thereto speak for themselves. Plaintiffs deny the allegations contained in Paragraph 54 to the extent that they are inconsistent with the terms of the License Agreement or amendments thereto and demand strict proof thereof.

55. Plaintiffs deny the allegations contained in Paragraph 55 of the Counterclaim and demand strict proof thereof.

56. Plaintiffs deny the allegations contained in Paragraph 56 of the Counterclaim and demand strict proof thereof.

57. Plaintiffs admit that the Validation testing occurred from April 30 through May 1, 2013 of 18 reactors as agreed upon by the parties prior to the commencement of the Validation test. Plaintiffs state that all of the testing protocol were followed and/or waived by Defendants. Plaintiffs admit that the ERV reported that the E-Cats produced a COP of 10.85. Plaintiff lacks sufficient facts to admit or deny the remaining allegations contained in Paragraph 57 pertaining to longevity of the Validation test as the test was over three years ago and the Counterclaim represents the first time anyone has alleged an unapproved variation from the test protocol.

58. Plaintiffs admit that they provided Defendants a copy of the Ferrara Report, but lack sufficient knowledge to admit or deny the allegations contained in Paragraph 58 relating to when that report was provided to Defendants. Plaintiffs state that the document referenced as the Ferrara Report speaks for itself. Accordingly, Plaintiffs deny the allegations contained in Paragraph 58 inconsistent with the Ferrara Report. Plaintiffs lack sufficient knowledge to admit or deny the allegations alleged in footnote 6 to Paragraph 58 and therefore deny the same and demand strict proof thereof.

59. Plaintiffs admit that on or about April 30, 2013 payment was tendered to the designated escrow agent payment in the amount of \$10 million. Plaintiffs lack sufficient knowledge to admit or deny the allegations in Paragraph 59 of the Counterclaim as to which entity made such payment. As to the remaining allegations contained in Paragraph 59, Plaintiffs

state that the License Agreement speaks for itself. Plaintiffs deny the remaining allegations to the extent they are inconsistent with the terms of the License Agreement.

60. Plaintiffs admit the allegations contained in Paragraph 60 of the Counterclaim as to the process by which the E-Cat IP was transferred to Defendants. To the extent Defendants infer that Plaintiffs (1) did not transfer al E-Cat IP to Defendants and (2) made any representation on June 9, 2013 relating to the COP attainable with the formula for the E-Cat fuel, such allegations are denied and strict proof is demanded thereof.

61. Plaintiffs admit that the Plant was delivered by Plaintiffs to IH's facility in North Carolina in or around August 2013. Plaintiffs deny the remaining allegations contained in Paragraph 61 and state that the parties agreed to the delayed delivery in order for the E-Cat Plant to be certified by a European certifying agency. Industrial Heat specifically waived the requirement that the Plant be delivered to IH within 30 days of the Validation test.

62. Plaintiffs lack sufficient knowledge to admit or deny the allegations contained in Paragraph 62 of the Counterclaim therefore deny the same and demand strict proof thereof.

63. Plaintiffs lack sufficient knowledge to admit or deny the allegations contained in Paragraph 63 of the Counterclaim therefore deny the same and demand strict proof thereof.

64. Plaintiffs deny the allegations contained in Paragraph 64 of the Counterclaim. Specifically, the Second Amendment to the License Agreement modified the time period in which the Guaranteed Performance test was to begin. Pursuant to the Second Amendment to the License Agreement, the Guaranteed Performance test was to commence at a mutually agreeable time. Notwithstanding the Second Amendment to the License Agreement, the Guaranteed Performance Test was not commenced sooner because Defendants failed to locate an adequate facility for the Guaranteed Performance test as well as the requisite governmental approvals in

North Carolina. Moreover, Defendants waived any requirement that the Guaranteed Performance test be completed within a specific period of time and expressly consented to the Guaranteed Performance test which was conducted between February 2015 and February 2016 in Doral, Florida. Plaintiffs admit that for much of the year in 2013 he worked with Defendants to develop and test new versions of the E-Cat and to further develop the technology. The remaining allegations contained in Paragraph 64 are denied and strict proof is demanded thereof.

65. Plaintiffs lack sufficient knowledge to admit or deny the allegations contained in Paragraph 65 of the Counterclaim therefore deny the same and demand strict proof thereof.

66. Plaintiffs state that the E-mails attached to the Counterclaim as Exhibit 12 and Exhibit 13 speaks for itself. Plaintiffs deny any remaining allegation contained in Paragraph 66 of the Counterclaim and demand strict proof thereof.

67. Plaintiffs lack sufficient knowledge to admit or deny the allegations contained in Paragraph 67 of the Counterclaim therefore deny the same and demand strict proof thereof. Plaintiffs admit that Rossi would periodically visit the North Carolina facility to assist Defendants' subject matter expert, Mr. Thomas Barker Dameron, amongst others, with their work on the E-Cat technology.

68. Plaintiffs admit that the Swedish Royal Academy of Sciences performed tests on a single E-Cat reactor constructed by Defendants at their North Carolina facility and that such scientists concluded that the reactor produced a positive COP. Plaintiffs further state that the "Lugano Report" speak for itself. Plaintiffs deny the remaining allegations contained in Paragraph 68 of the Counterclaim to the extent they are inconsistent with the Lugano Report. Plaintiffs lack sufficient knowledge to admit or deny the allegations contained in Paragraph 68 of

the report pertaining to other “publications” and therefore deny the same and demand strict proof thereof.

Plant Moves to Miami to Service a Fake “Customer”

69. Plaintiffs deny the allegations contained in Paragraph 69 of the Counterclaim and demand strict proof thereof.

70. Plaintiffs deny the allegations contained in Paragraph 70 of the Counterclaim as to any role allegedly played by Rossi and/or Leonardo. Plaintiff lacks sufficient knowledge to admit or deny the allegations contained in Paragraph 70 pertaining to the incorporation of J.M. Products, Inc.

71. Plaintiffs admit that Rossi send the July 5, 2014 e-mail attached to the Counterclaim as Exhibit 16. Plaintiffs further state that the July 5, 2014 e-mail speaks for itself. Plaintiffs deny the allegations contained in Paragraph 71 to the extent they are inconsistent with the July 5, 2014 e-mail and demand strict proof thereof.

72. Plaintiffs state that the July 5, 2014 e-mail speaks for itself. Plaintiffs deny the allegations contained in Paragraph 72 to the extent they are inconsistent with the July 5, 2014 e-mail and demand strict proof thereof.

73. Plaintiffs deny the allegations contained in Paragraph 73 of the Counterclaim and demand strict proof thereof.

74. Plaintiffs deny the allegations contained in Paragraph 74 of the Counterclaim and demand strict proof thereof. Plaintiff further states that Complaint Exhibit “B” speaks for itself.

75. Plaintiffs admit that IH, JMP and Leonardo entered into agreement to deliver the Plant to the facility of JMP and that such agreement was memorialized in a “Term Sheet” on or

about August 13, 2014 attached as Counterclaim Exhibit 17. Plaintiffs deny the remaining allegations contained in Paragraph 75 of the Counterclaim.

76. Plaintiffs lack sufficient knowledge to admit or deny the allegations contained in Paragraph 76 of the Counterclaim therefore deny the same and demand strict proof thereof.

77. Plaintiffs deny the allegations contained in Paragraph 77 of the Counterclaim and demand strict proof thereof.

78. Plaintiffs deny the allegations contained in Paragraph 78 of the Counterclaim and demand strict proof thereof.

79. Plaintiffs admit that Mr. James Bass met with IH at JMP's Doral facility and that a copy of Mr. Bass' business card is attached to the Counterclaim. Plaintiff denies the remaining allegations contained in Paragraph 79 of the Counterclaim and demands strict proof thereof.

80. Plaintiffs lack sufficient knowledge to admit or deny the allegations contained in Paragraph 80 of the Counterclaim therefore deny the same and demand strict proof thereof.

81. Plaintiffs admit that certain visitors were permitted access to the E-Cat Plant in Doral, Florida at the request of Defendants, including several investors, who, on information and belief, made multi-million dollar investments into Industrial Heat based on representations made by Darden and Vaughn as to the efficacy of the E-Cat technology. Plaintiffs further admit that Mr. Joseph Murray was denied access to the plant on one occasion in 2015 because it appeared that Mr. Murray had improper motives, including but not limited obtaining information to be passed on to a competitor for Leonardo, for wanting to visit the Plant. Plaintiffs deny the remaining allegations contained in Paragraph 81 of the Counterclaim and demand strict proof thereof.

82. Plaintiffs lack sufficient knowledge to admit or deny the allegations contained in Paragraph 82 of the Counterclaim therefore deny the same and demand strict proof thereof.

83. Plaintiffs deny the allegations contained in Paragraph 83 of the Counterclaim and demand strict proof thereof.

84. Plaintiffs deny the allegations contained in Paragraph 84 of the Counterclaim and demand strict proof thereof.

85. Plaintiffs lack sufficient knowledge to admit or deny the allegations contained in Paragraph 85 of the Counterclaim therefore deny the same and demand strict proof thereof.

86. Plaintiffs lack sufficient knowledge to admit or deny the allegations contained in Paragraph 86 of the Counterclaim therefore deny the same and demand strict proof thereof.

87. Plaintiffs lack sufficient knowledge to admit or deny the allegations contained in Paragraph 87 of the Counterclaim therefore deny the same and demand strict proof thereof.

88. Plaintiffs lack sufficient knowledge to admit or deny the allegations contained in Paragraph 88 of the Counterclaim therefore deny the same and demand strict proof thereof.

89. Plaintiffs admit that Johnson is listed as the President of Leonardo. Plaintiffs lack sufficient knowledge to admit or deny the remaining allegations contained in Paragraph 89 of the Counterclaim therefore deny the same and demand strict proof thereof.

90. Plaintiffs deny the allegations contained in Paragraph 90 of the Counterclaim and demand strict proof thereof.

91. Plaintiffs deny the allegations contained in Paragraph 91 of the Counterclaim and demand strict proof thereof.

92. Plaintiffs deny the allegations contained in Paragraph 92 of the Counterclaim to the extend they infer that the Guaranteed Performance Test reports were false and/or improper.

Plaintiffs lack sufficient knowledge to admit or deny the remaining allegations contained in Paragraph 92 of the Counterclaim.

COUNT I: BREACH OF CONTRACT

93. In response to Paragraph 93, Plaintiffs re-allege its responses to Paragraphs 1-92 as if fully set forth herein.

94. Plaintiffs state that the License Agreement and amendments thereto speak for themselves. Plaintiffs deny the allegations contained in Paragraph 94 to the extent that they are inconsistent with the terms of the License Agreement and demand strict proof thereof.

95. Plaintiffs admit the allegations contained in Paragraph 95 of the Counterclaim.

96. Plaintiffs admit that they transferred and delivered all E-Cat IP to Defendants on or about June 9, 2013. Plaintiffs deny the remaining allegations contained in Paragraph 96 of the Counterclaim and demand strict proof thereof.

97. Plaintiffs deny the allegations contained in Paragraph 97 of the Counterclaim and demand strict proof thereof.

98. Plaintiffs deny the allegations contained in Paragraph 98 of the Counterclaim and demand strict proof thereof.

99. Plaintiffs deny the allegations contained in Paragraph 99 of the Counterclaim and demand strict proof thereof.

COUNT II: BREACH OF CONTRACT

100. In response to Paragraph 100, Plaintiffs re-allege its responses to Paragraphs 1-99 as if fully set forth herein.

Confidentiality

101. Plaintiffs state that the License Agreement and amendments thereto speak for themselves. Plaintiffs deny the allegations contained in Paragraph 101 to the extent that they are inconsistent with the terms of the License Agreement and demand strict proof thereof.

102. Plaintiffs state that the License Agreement and amendments thereto speak for themselves. Plaintiffs deny the allegations contained in Paragraph 102 to the extent that they are inconsistent with the terms of the License Agreement and demand strict proof thereof.

103. Plaintiffs state that the License Agreement and amendments thereto speak for themselves. Plaintiffs deny the allegations contained in Paragraph 103 to the extent that they are inconsistent with the terms of the License Agreement and demand strict proof thereof.

104. Plaintiffs deny the allegations contained in Paragraph 104 of the Counterclaim and demand strict proof thereof.

105. Plaintiffs admits that on a few occasions Rossi disclosed information relating to the Guaranteed Performance test, but denies that this was in violation of the License Agreement. Specifically, such disclosures were made with the knowledge and consent of the Defendants. In fact, Defendants hired APCO Worldwide, a public relations firm, to specifically provide “mantras” for Rossi to use in response to questions posed by him including questions relating to his relationship with Defendants.

106. Plaintiffs admit that they filed their Complaint in the above styled matter, but deny that such filing was in any way a violation of the terms of the License Agreement. Specifically, Defendants had already breached the terms of the License Agreement excusing any future performance by Rossi with respect to this provision. Moreover, such filing does not violate the plain terms of the License Agreement.

107. Plaintiffs deny the allegations contained in Paragraph 107 of the Counterclaim and demand strict proof thereof.

108. Plaintiffs deny the allegations contained in paragraph 108 of the Counterclaim to the extent the claim infers that Plaintiffs were not permitted to disclose the fuel sample. Specifically, any disclosure of information was made with the express consent of Defendants as required under the License Agreement. Plaintiffs deny the remaining allegations contained in Paragraph 108 and demand strict proof thereof.

109. Plaintiffs deny the allegations contained in Paragraph 109 of the Counterclaim and demand strict proof thereof.

110. Plaintiffs deny the allegations contained in Paragraph 110 of the Counterclaim and demand strict proof thereof.

Failure to Assign Licensed Patents

111. Plaintiffs state that the License Agreement and amendments thereto speak for themselves. Plaintiffs deny the allegations contained in Paragraph 111 to the extent that they are inconsistent with the terms of the License Agreement and demand strict proof thereof.

112. Plaintiffs admit that IPH demanded that Plaintiffs “assign to IPH the Licensed Patents” and that IPH provided Plaintiffs the documents marked as Exhibit 23 to the Counterclaim. Plaintiffs deny that IPH provided Plaintiffs “an appropriate assignment form by which to assign the Licensed patents.” Plaintiffs affirmatively state that Defendants’ claim to possess the E-Cat IP is in conflict with Defendants’ allegations that the E-Cat technology either does not work, cannot be replicated, or is nothing but part of a larger scheme to defraud Defendants.

113. Plaintiffs deny the allegations contained in Paragraph 113 of the Counterclaim and demand strict proof thereof.

114. Plaintiffs deny the allegations contained in Paragraph 114 of the Counterclaim and demand strict proof thereof.

Failure to Inform/Consult on Patent Applications

115. Plaintiffs state that the License Agreement and amendments thereto speak for themselves. Plaintiffs deny the allegations contained in Paragraph 115 to the extent that they are inconsistent with the terms of the License Agreement and demand strict proof thereof.

116. Plaintiffs state that the License Agreement and amendments thereto speak for themselves. Plaintiffs deny the allegations contained in Paragraph 116 to the extent that they are inconsistent with the terms of the License Agreement and demand strict proof thereof.

117. Plaintiffs deny the allegations contained in Paragraph 117 of the Counterclaim and demand strict proof thereof.

118. Plaintiffs deny the allegations contained in Paragraph 118 of the Counterclaim and demand strict proof thereof.

119. Plaintiffs admit that certain fees were charged to Defendants which were associated with preparing, filing and prosecuting patent applications and that some fees were paid by Defendants. Plaintiffs lack sufficient knowledge to admit or deny whether such payment was made by IPH or another Defendant.

120. Plaintiffs deny the allegations contained in Paragraph 120 of the Counterclaim and demand strict proof thereof.

Covenant Not to Compete

121. Plaintiffs state that the License Agreement and amendments thereto speak for themselves. Plaintiffs deny the allegations contained in Paragraph 121 to the extent that they are inconsistent with the terms of the License Agreement and demand strict proof thereof.

122. Plaintiffs deny the allegations contained in Paragraph 122 as stated. Plaintiffs further state that Exhibits 24 and Exhibit 25 speak for themselves. Accordingly, Plaintiffs deny the allegations contained in Paragraph 122 of the Counterclaim to the extent they are inconsistent with Exhibits 24 and Exhibit 25 to the Counterclaim.

123. Plaintiffs deny the allegations contained in Paragraph 123 of the Counterclaim and demand strict proof thereof.

124. Plaintiffs deny the allegations contained in Paragraph 124 of the Counterclaim and demand strict proof thereof.

125. Plaintiffs deny the allegations contained in Paragraph 125 of the Counterclaim and demand strict proof thereof.

Failure to Pay Taxes

126. Plaintiffs admit that Rossi had “tax issues” in Italy more than twenty years ago. Plaintiffs deny that such issues were “well known” and Plaintiffs specifically state that Rossi was acquitted of any wrongdoing by the Italian courts.

127. Plaintiffs admit that the License Agreement has certain provisions relating to the payment of taxes. Plaintiffs deny the remaining allegations contained in Paragraph 127 of the Counterclaim.

128. Plaintiffs state that the License Agreement and amendments thereto speak for themselves. Plaintiffs deny the allegations contained in Paragraph 128 to the extent that they are inconsistent with the terms of the License Agreement and demand strict proof thereof.

129. Plaintiffs state that the License Agreement and amendments thereto speak for themselves. Plaintiffs deny the allegations contained in Paragraph 129 to the extent that they are inconsistent with the terms of the License Agreement and demand strict proof thereof.

130. Plaintiffs state that the License Agreement and amendments thereto speak for themselves. Plaintiffs deny the allegations contained in Paragraph 130 to the extent that they are inconsistent with the terms of the License Agreement and demand strict proof thereof.

131. Plaintiffs deny the allegations contained in Paragraph 131 of the Counterclaim and demand strict proof thereof. Plaintiffs further state that the Certificate attached to the Counterclaim as Exhibit “8” speaks for itself. Plaintiffs deny the remainder of Paragraph 131 to the extent it is inconsistent with the terms of the Certificate attached to the Counterclaim as Exhibit 8.

132. Plaintiffs deny the allegations contained in Paragraph 132 of the Counterclaim and demand strict proof thereof.

133. Plaintiffs deny the allegations contained in Paragraph 133 of the Counterclaim and demand strict proof thereof.

COUNT III: FRAUDULENT INDUCEMENT

134. In response to Paragraph 134, Plaintiffs re-allege its responses to Paragraphs 1-133 as if fully set forth herein.

135. Plaintiffs deny the allegations contained in Paragraph 135 of the Counterclaim and demand strict proof thereof.

136. Plaintiffs deny the allegations contained in Paragraph 136 of the Counterclaim and demand strict proof thereof.

137. Plaintiffs deny the allegations contained in Paragraph 137 of the Counterclaim and demand strict proof thereof.

138. Plaintiffs deny the allegations contained in Paragraph 138 of the Counterclaim and demand strict proof thereof.

139. Plaintiffs deny the allegations contained in Paragraph 139 of the Counterclaim and demand strict proof thereof.

COUNT IV: FLA. DECEPTIVE & UNFAIR TRADE PRACTICES ACT

140. In response to Paragraph 140, Plaintiffs re-allege its responses to Paragraphs 1-139 as if fully set forth herein.

141. Plaintiffs deny the allegations contained in Paragraph 141 of the Counterclaim and demand strict proof thereof.

142. Plaintiffs deny the allegations contained in Paragraph 142 of the Counterclaim and demand strict proof thereof.

143. Plaintiffs deny the allegations contained in Paragraph 143 of the Counterclaim and demand strict proof thereof.

144. Plaintiffs deny the allegations contained in Paragraph 144 of the Counterclaim and demand strict proof thereof.

145. Plaintiffs deny the allegations contained in Paragraph 145 of the Counterclaim and demand strict proof thereof.

146. Plaintiffs deny the allegations contained in Paragraph 146 of the Counterclaim and demand strict proof thereof.

147. Plaintiffs deny the allegations contained in Paragraph 147 of the Counterclaim and demand strict proof thereof.

148. Plaintiffs deny the allegations contained in Paragraph 148 of the Counterclaim and demand strict proof thereof.

COUNT V: BREACH OF CONTRACT

149. In light of the fact that Plaintiffs are not a parties to Count V of the Counterclaim, no response to this allegation by Plaintiff is required. To the extent any response by Plaintiffs is required, Plaintiffs deny this allegation.

150. In light of the fact that Plaintiffs are not a parties to Count V of the Counterclaim, no response to this allegation by Plaintiff is required. To the extent any response by Plaintiffs is required, Plaintiffs deny this allegation.

151. In light of the fact that Plaintiffs are not a parties to Count V of the Counterclaim, no response to this allegation by Plaintiff is required. To the extent any response by Plaintiffs is required, Plaintiffs deny this allegation.

152. In light of the fact that Plaintiffs are not a parties to Count V of the Counterclaim, no response to this allegation by Plaintiff is required. To the extent any response by Plaintiffs is required, Plaintiffs deny this allegation.

153. In light of the fact that Plaintiffs are not a parties to Count V of the Counterclaim, no response to this allegation by Plaintiff is required. To the extent any response by Plaintiffs is required, Plaintiffs deny this allegation.

154. In light of the fact that Plaintiffs are not a parties to Count V of the Counterclaim, no response to this allegation by Plaintiff is required. To the extent any response by Plaintiffs is required, Plaintiffs deny this allegation.

155. In light of the fact that Plaintiffs are not a parties to Count V of the Counterclaim, no response to this allegation by Plaintiff is required. To the extent any response by Plaintiffs is required, Plaintiffs deny this allegation.

156. In light of the fact that Plaintiffs are not a parties to Count V of the Counterclaim, no response to this allegation by Plaintiff is required. To the extent any response by Plaintiffs is required, Plaintiffs deny this allegation.

DEFENDANTS PRAYER FOR RELIEF

Plaintiffs deny that Defendants are entitled to any relief on the Counterclaim. Plaintiffs request this Honorable Court award Plaintiffs their reasonable attorneys' fees and costs incurred in the defense of the Counterclaim.

AFFIRMATIVE DEFENSES

Affirmative Defense No. 1: Voluntary Payment

Defendants' claims against Plaintiffs are barred by the voluntary payment doctrine. "Where one makes a payment of any sum under a claim of right with knowledge of the facts, such a payment is voluntary and cannot be recovered." *Ruiz v. Brink's Home Sec, Inc.*, 777 [So. 2d 1062, 1064 \(Fla. 2d DCA 2001\)](#) (quoting *City of Miami v. Keton*, [115 So. 2d 547, 551 \(Fla. 1959\)](#)); *see also Sanchez v. Time Warner, Inc.*, 1998 U.S. Dist. LEXIS 22011, 1998 WL 834345, at *2 (M.D. Fla. 1998) ("It is a well-recognized rule that money voluntarily paid under a claim of right to the payment, and with knowledge of the facts by the person making the payment, cannot be recovered back, and this is true even though the claim thus paid was illegal. . . .") (quoting *McMullen v. Inland Realty Corp.*, [113 Fla. 476, 152 So. 740 \(Fla. 1933\)](#)). *Sundance Apts. I, Inc. v. Gen. Elec. Capital Corp.*, 581 F. Supp. 2d 1215, 1224, 2008 U.S. Dist. LEXIS 99459, *21, 21 Fla. L. Weekly Fed. D 261 (S.D. Fla. 2008). Here, Counter-Plaintiffs

paid Counter-Defendants over \$11 million dollars while having full knowledge of all relevant facts with respect to the E-Cat IP, the testing protocol and results, as well as the nature of the relationships between the other parties to this lawsuit.

Affirmative Defense No. 2:

Counter-Plaintiffs' claims are barred, in whole or in part, by the doctrines of estoppel, waiver and laches. Counter-Plaintiffs and the Defendants engaged in a scheme to deceive the Counter-Defendants by, *inter alia*, fraudulently inducing Counter-Defendants to enter into the License Agreement with an entity that was without the financial means to make payment on its obligations. Counter-Plaintiffs never had the means, nor the intention, to honor their payment obligations. See Complaint ¶¶ 38-46. Further, Counter-Plaintiffs participated in, had full knowledge of, and even encouraged Counter-Defendants to take many of the actions that Counter-Plaintiffs now complain of. For example, Counter-Plaintiffs assert that Plaintiffs wrongfully provided or disclosed, without prior consent and without a non-disclosure agreement, E-Cat fuel samples or information to scientists for study and publication. (DE 78, ¶¶107-08).

On February 5, 2015, Rossi emailed Defendants Darden, Vaughn, and other IH and/or IPH representatives informing them that Professor Cook wanted to publish a report on the theoretical underpinnings of the E-Cat, and that the paper would form part of Defendants' intellectual property. Rossi confirmed to Defendants that they would have the opportunity to review the article before its publication. Again, on March 17, 2015, Rossi emailed Defendants Darden, Vaughn, and other IH and/or IPH representatives the final version of the Cook report which incorporated edits that IH had itself required Rossi to make. Defendants had the opportunity to, and did, review the Cook Report's contents before its publication. Defendants

approved the contents of the Cook Report, and knew that it was going to be published – with their consent – in the Journal of Physics.

In addition, on April 9, 2015, Daniel Pike, an affiliate of IH and IPH informed Rossi and Darden that the Cook Report had been translated to Chinese. Darden actually congratulated Rossi on the translation, exclaiming: “This is very exciting to think about. Now about 1.5 billion more people can read your paper. What a great world it is.”

Finally, Counter-Defendants at all times had the opportunity to, and did if fact participate in, the establishment of test protocols, the selection of independent third party evaluators, as well as the selection of the location for the Guaranteed Performance Test. Counter-Defendants at all times knew that the Guaranteed Performance Test would take approximately one year to perform at a substantial commitment of time, expense and effort on the part of many persons, including Plaintiff Rossi. Further, despite having their own subject matter expert, engineer T. Barker Dameron, review the testing protocols, measurements and results during the course of the year-long test, Mr. Dameron was instructed by Defendant Darden not to discuss any perceived problems or deficiencies with Dr. Rossi.

Affirmative Defense No.3:

Counter-Plaintiffs’ equitable claims are barred, in whole or in part, by reason of Counter-Plaintiffs’ unclean hands. Counter-Plaintiffs and the Defendants engaged in a scheme to deceive the Counter-Defendants by, *inter alia*, fraudulently inducing Counter-Defendants to enter into the License Agreement with an entity that was without the financial means to make payment on its obligations. Counter-Plaintiffs never had the means, nor the intention, to honor its payment obligations. See Complaint at ¶ 38-46.

Affirmative Defense No. 4:

Counter-Plaintiffs' claims are barred by the doctrine of ratification. Counter-Plaintiffs, prior to the selection of Fabio Penon as the ERV, and prior to agreeing to the Term Sheet, had knowledge as to the facts and circumstances to which they now complain. (DE 78: ¶ 8, 69 -71, 73-75). Despite having this knowledge Counter-Plaintiffs' allowed Counter-Defendants to continue to conduct a year-long test of the E-Cat technology, knowing all along they were going to use these same facts as an excuse not to fulfill their own contractual obligations.

Affirmative Defense No. 5:

Counter-Plaintiffs' claims are barred by their antecedent breach. Counter-Plaintiffs' demands for the turnover of the E-Cat licenses came after Counter-Plaintiffs failed to make the final payment pursuant to the License Agreement.

Affirmative Defense No. 6:

Counter-Plaintiffs' claims are barred due to their violation of Fla. Stat. § 607.1502(1) as they are foreign corporations that transacted business in this state without a certificate of authority.

Affirmative Defense No. 7:

Counter-Plaintiffs' claims are barred by their acquiescence. See, *inter alia*, affirmative defense No. 2 hereinabove.

Affirmative Defense No. 8:

Counter-Plaintiffs' claims against Leonardo Corporation for breach of contract are barred the doctrine of judicial estoppel. Specifically Counter-Plaintiffs have claimed that Leonardo Corporation lacks standing due to its not being a party to the License Agreement. Yet, Counter-

Plaintiffs have sued Leonardo Corporation for breach of the very same agreement. These two positions are legally inconsistent.

Affirmative Defense No. 9:

Counter-Plaintiff Industrial Heat, LLC's claims are barred by their lack of capacity. Industrial Heat, as it has assigned its relevant rights to IPH.

Affirmative Defense No. 10:

Counter-Plaintiffs' fraudulent inducement claims are barred by the doctrine of merger and integration. Specifically the Term Sheet contains contractually, such as the names of the parties to the agreement, which had previously been discussed and now form the basis for their claims.

Affirmative Defense No. 11:

Counter-Plaintiffs' claims are barred by their failure to mitigate their damages. Counter-Plaintiffs claim that they "already knew well before February 15, 2016 that Rossi and Leonardo could not achieve Guaranteed Performance under the License Agreement." Yet Counter-Plaintiffs failed to take any action or communicate such knowledge (which Plaintiffs dispute) at any point in time prior to February 15, 2016.

Affirmative Defense No. 12:

Counter-Plaintiffs' claims should be reduced or eliminated due to the doctrines of recoupment and set off. Specifically, Counter-Plaintiffs' prior breaches of the License Agreement, and the amendments thereto, should reduce or eliminate Counter-Plaintiffs' damages, if any.

Affirmative Defense No. 13:

Counter-Plaintiffs' claims are barred by doctrine of modification. The parties engaged in

subsequent conduct and/or oral agreements with respect to the methodology and actual equipment to be tested. The parties acted in accordance by conducting a year-long test of the equipment pursuant to an agreed upon protocol, upon which Counter-Plaintiffs now seek to base their claims of both non-performance and breach.

Affirmative Defense No. 14:

Counter-Plaintiffs' claims are barred by the doctrine of promissory estoppel. Counter-Plaintiffs made promises with respect to (a) their ability to make payment to Plaintiffs, (b) their willingness to allow Plaintiffs to perform the Guaranteed Performance Test in Florida, (c) their acceptance of the test protocols for the Guaranteed Performance Test, (d) their acceptance of Fabio Penon as the ERV for the Guaranteed Performance Test, etc. Counter-Plaintiffs should have reasonably expected that their promises would induce action or forbearance of a definite and substantial nature. Injustice can only be avoided by enforcement of those promises.

Dated: December 14, 2016.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on December 14, 2016, I electronically filed the foregoing with the Clerk of the Court using CM/ECF. Copies of the foregoing document will be served upon interested counsel either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

/s/ John W. Annesser
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