UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

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

ANDREA ROSSI and LEONARDO CORPORATION,

Plaintiffs,

v.

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

Defendants. /

PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS

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TABLE OF CONTENTS

PAGE(S)

TABLE OF AUTHORITIES

CASES

Page(s)

PERLMAN, BAJANDAS, YEVOLI & ALBRIGHT, P.L.
200 South Andrews Avenue, Suite 600, Fort Lauderdale, Florida 33301 • (954) 566-7117
283 Catalonia Avenue, Suite 200, Coral Gables, Florida 33134 • (305) 377-0086

TABLE OF AUTHORITIES

CASES CONTINUED

Page(s)

OTHER AUTHORITIES

Page(s)

PERLMAN, BAJANDAS, YEVOLI & ALBRIGHT, P.L.
200 South Andrews Avenue, Suite 600, Fort Lauderdale, Florida 33301 • (954) 566-7117
283 Catalonia Avenue, Suite 200, Coral Gables, Florida 33134 • (305) 377-0086

Plaintiffs, Andrea Rossi ("Rossi") and Leonardo Corporation ("Leonardo") (collectively, "Plaintiffs"), hereby respond in opposition to Defendants' Motion for Judgment on the Pleadings as to Count I of the Complaint [DE:43], and as grounds therefore, state:

Factual Background:

On October 26, 2012, Plaintiffs entered into a License Agreement with IH and the then licensee, Ampenergo, Inc., for the E-Cat IP (hereafter "License Agreement"). [DE:1, ¶44]. The License Agreement granted Industrial Heat LLC (hereafter "IH") a license to use the E-Cat IP within a specific limited geographic territory in exchange for payment in the amount of One Hundred Million Five Hundred Thousand Dollars ($100,500,000.00). [DE:1, ¶¶45, 46]. Pursuant to the License Agreement, the final installment payment of Eighty Nine Million Dollars ($89,000,000.00) was due after the successful completion of a three hundred fifty (350) day long test referred to as the "Guaranteed Performance Test." [DE:1, ¶46]. Plaintiffs and IH selected Dr. Fabio Penon as the Expert Responsible for Validation (hereafter "ERV") for both the Validation Test and the subsequent Guaranteed Performance Test described in the License Agreement. [DE:1, ¶56]. The License Agreement provided that the Validation Test and the Guaranteed Performance Test were to be conducted using the "Plant" which is defined as "a 1 MW E-CAT Unit, or at the election of the Company, a 'Hot Cat' Unit." [DE:1, Ex. "B", §1.2; §5]. The License Agreement further provided that "[t]he ERV[1]…will be engaged to confirm in writing the Guaranteed Performance." [DE:1, Ex. "B", §5].

After the successful completion of the Validation Test on May 2, 2013, as confirmed by the ERV, IH and/or IPH[2] paid to Leonardo the second payment of Ten Million Dollars ($10,000,000.00). [DE:1, ¶58]. Thereafter, in October 2013, Plaintiffs and IH executed a Second Amendment to License Agreement ("Second Amendment") which amended the terms of the License Agreement relating to the Guaranteed Performance Test. [DE:1, ¶62]. Specifically, the Second Amendment changed the Guaranteed Performance Test from using a "1MW E-Cat" to using a "six cylinder Hot Cat unit reasonably acceptable to the Company." [DE:1, Ex. "D"]. Notwithstanding the above, on January 28, 2015, the ERV prepared and submitted to Plaintiffs and Defendants, IH and IPH International B.V. (hereafter "IPH"), a proposed test protocol and

[1] Expert Responsible for Validation *See §4, License Agreement.* [DE:1, Ex. "B"].
[2] The License Agreement was purportedly assigned by IH to IPH on April 29, 2013, yet upon information and belief, the Ten Million Dollar payment was made by IH.

specifications for the Guaranteed Performance Test which was ultimately revised and agreed to by Thomas Darden on behalf of IH and/or IPH. [DE:1, ¶65]. In accordance therewith, the Guaranteed Performance Test commenced on or about February 19, 2015 wherein IH and/or IPH had two representatives working full time to monitor, maintain, take part in and report on the operation of the E-Cat Unit being tested. [DE:1, ¶¶66, 67]. On February 15, 2016, the Guaranteed Performance test was successfully concluded and on March 29, 2016, the ERV rendered his report certifying the success of the Guaranteed Performance Test. [DE:1, ¶¶71, 72]. Despite satisfying or exceeding each and every performance requirement specified for the Guaranteed Performance Test, Defendants IH and IPH refuse to pay Plaintiffs the remaining Eighty-Nine Million Dollars due under License Agreement. [DE:1, ¶74].

Procedural History:

On April 5, 2016, Plaintiffs filed their Complaint in the above styled matter against IH, IPH, Thomas Darden, John T. Vaughn and Cherokee Investment Partners, LLC (collectively "Defendants"). [DE:1]. In the Complaint, Plaintiffs allege, *inter alia,* that "on February 15, 2016, the Guaranteed Performance test was successfully concluded." [DE:1, ¶71]. In response, on June 2, 2016, Defendants filed their Motion to Dismiss which argued, in relevant part, that the "Complaint and its Exhibits demonstrate that Plaintiffs have failed to fulfill their obligation regarding Guaranteed Performance" in that, *inter alia,* Plaintiffs' have not pled that the Guaranteed Performance Test was conducted using a "Six Cylinder Unit." [DE:17, at 6]. On July 19, 2016, this Court denied Defendants' Motion to Dismiss as to Count I specifically stating that "[r]egarding Defendants' 'six-cylinder' argument, there is insufficient information in the record to determine whether the six-cylinder is simply another name for the E-Cat Unit" and that "the Court will allow discovery to proceed on this matter before ruling." [DE:24, at 8].

Thereafter, on August 5, 2015, Defendants field their Answer, Affirmative Defenses, Counterclaim and Third-Party Claims against third parties, J.M. Products, Inc., Henry Johnson, Fulvio Fabiani, United States Quantum Leap, LLC. and Fabio Penon (collectively "Third-Party Defendants"). [DE:29]. Six days later, Defendants filed their Amended Answer, Affirmative Defenses, Counterclaim and Third-Party Claims to include an additional Third-Party Defendant "John Doe" a/k/a "James A. Bass". [DE:30]. On September 1, 2016, Plaintiffs filed their Motion to Dismiss Defendants' Amended Counterclaim which is now pending before the Court. [DE:41].

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As of the time of filing this response, Third-Party Defendants' responses to Defendants' Third-Party Complaint has yet to even become due.

Memorandum of Law:

I. Standard of Review

"Under Federal Rule of Civil Procedure 12(c) any party may move for judgment on the pleadings so long as the pleadings are closed and the motion will not delay the trial. *Matthews v. Whitewater W. Industries, Ltd.*, 11-24424-CIV, 2012 WL 12865243, at *2 (S.D. Fla. Aug. 28, 2012) (internal quotations omitted). Judgment on the pleadings is appropriate where there are no material facts in dispute and the moving party is entitled to judgment as a matter of law. *Id. (citing Palmer & Cay, Inc. v. Marsh & Prudential Ins. Co.*, 307 F.3d 1297, 1303 (11th Cir. 2005)). The standard of review for a motion for judgment on the pleadings is almost identical to that used to decide motions to dismiss" in that the court must find the non-movant "can plead no facts that would support the claim for relief". *Id.; see also Doe v. Bd. of County Comm'rs, Palm Beach Cnty, Fla.*, 815 F. Supp. 1448, 1449-50 (S.D. Fla. 1992)). In ruling on a motion for judgment on the pleadings, "[a]ll facts alleged in the complaint must be accepted as true and viewed in the light most favorable to the nonmoving party." *Scott v. Taylor*, 405 F.3d 1251, 1253 (11th Cir. 2005); *see also Horsley v. Feldt*, 304 F. 3d 1125, 1131 (11th Cir. 2002).

II. Defendants' Motion Is Premature And Procedurally Barred At This Time

Courts may summarily deny vexatious motions pursuant to the global mandate under Rule 1 that the Federal Rules shall be construed, and applied, "to secure a just, speedy, and inexpensive determination of every action." *Rule 1, Fed. R. Civ. P.*; see also, *Carss v. Outboard Marine Corp.*, 252 F. 2d 690, 691 (5th Cir. 1958) (under the Federal Rules, civil cases are to be tried on proof rather than on the pleadings). Here, Defendants' procedurally improper and duplicative motion challenging the pleadings is clearly intended solely to increase the cost of litigation and otherwise harass the Plaintiffs. Because the motion is barred on its face, the Court may summarily deny Defendants' motion.

As stated above, and expressly set forth in Defendants' Motion for Judgment on the Pleadings as to Count I, "[a]fter the pleadings are closed – but early enough not to delay trial – a party may move for judgment on the pleadings." *See* [DE:43 at 5] (citing to Rule 12(c), *Fed. R. Civ. P.*). Notwithstanding, Defendants filed their Motion for Judgment on the Pleadings before the pleadings in this case have been closed. As discussed above, Defendants filed both Counterclaims

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200 South Andrews Avenue, Suite 600, Fort Lauderdale, Florida 33301 • (954) 566-7117
283 Catalonia Avenue, Suite 200, Coral Gables, Florida 33134 • (305) 377-0086

and Third-Party claims in which the responsive pleading are not yet due and/or the Respondent has moved to dismiss such claims. *See Amended Counterclaim* [DE:30], *see also Plaintiffs' Motion to Dismiss* [DE:41]. Accordingly, Defendants Motion for Judgment on the Pleadings is premature and should be summarily denied.

It is well settled that "the pleadings are closed [under Rule 7(a)] for the purposes of Rule 12(c) once a complaint and answer have been filed, assuming ... that no counterclaim or cross-claim is made." *Doe v. United States,* 419 F.3d 1058, 1061 (9th Cir.2005), adopted by *Perez v. Wells Fargo N.A.*, 774 F.3d 1329, 1336 (11th Cir. 2014); see also 5 Wright & Miller, § 1184 at 24 n. 1 (compiling case law that supports this proposition); *Arnold v. New Jersey*, CIV.03-3997 WHW, 2007 WL 1381757, at *2 (D.N.J. May 9, 2007) ("pleadings are "closed" after the complaint and answer are filed, along with any reply to additional claims asserted in the answer"); *Press Rentals Inc. v. Genesis Fluid Sols. Ltd.*, 5:11-CV-02579 EJD, 2012 WL 3791449, at *7–8 (N.D. Cal. Aug. 31, 2012) ("because the third-party defendants have not filed an answer to the third-party complaint brought by [defendants], the pleadings are not yet closed"). "Indeed, the name of Rule 12(c), which incorporates the plural of 'pleading'- 'Motion for Judgment on the ***Pleadings,***' Fed.R.Civ.P. 12(c) - along with the use of the plural "pleadings" as opposed to the singular 'pleading' throughout the rule, supports the idea that judgment on the pleadings is inappropriate when only a single pleading related to a claim (whether alleged in a complaint or counterclaim) has been filed. *Perez*, 774 F.3d at 1337. Accordingly, Defendants Motion must be summarily denied as premature by this Court.

Moreover, In complete disregard of the case law cited in Defendants' own motion, Defendants nonetheless attempt to reassert the exact same argument they made in their Motion to Dismiss under the guise of a motion for judgment on the pleadings. [DE:17 at 6]. Specifically, in their Motion to Dismiss, Defendants argued that, *inter alia,* Plaintiffs did not satisfy the conditions precedent to be entitled to the $89 million dollar payment because "Plaintiffs have not pled, and cannot plead, that they performed their "test"[3] from February 2015 to February 2016 using such a Six Cylinder Unit." [DE:17 at 6]. In ruling on such motion, this Court concluded that "there is insufficient information in the record to determine whether the six-cylinder unit is simply another name for the E-Cat Unit" and that "the Court will allow discovery to proceed on this matter before ruling." [DE:24 at 8]. Notwithstanding the above, now Defendants again assert that Plaintiffs failed

[3] Referencing the Guaranteed Performance Test

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200 South Andrews Avenue, Suite 600, Fort Lauderdale, Florida 33301 • (954) 566-7117
283 Catalonia Avenue, Suite 200, Coral Gables, Florida 33134 • (305) 377-0086

to achieve the Guaranteed Performance required by the License Agreement and amendments thereto by failing to test the "Six Cylinder Unit". [DE:43, at 6 and 7]. Defendants' improper and duplicative motion serves solely to multiply the proceedings in this case in an unreasonable and vexatious attempt to increase the cost of litigation. This manner of litigation is strongly discouraged as evidenced by the authority in which the court has been vested by *§28 U.S.C. 1927* to curtail such behavior in litigation.

III. Defendants' Motion Fails to Show Entitlement to the Relief Sought

Defendants have the burden of demonstrating that they are entitled to judgment on the pleadings under Fed. R. Civ. P. 12(c). To prevail, Defendants must "clearly establish that no material issue of fact remains unresolved and that [they are] entitled to judgment as a matter of law." *Thunderwave, Inc. v. Carnival Corp.*, 954 F. Supp. 1562, 1564 (S.D. Fla. 1997). For purposes of these motions, all of the allegations in a plaintiffs' complaint must be accepted as true. *Bryan Ashley Int'l, Inc. v. Shelby Williams Indus., Inc.*, 932 F. Supp. 290, 291 (S.D. Fla. 1996) (under Rule 12(c), ("the district court must view the facts presented in the pleadings, and all inferences drawn thereof; in the light most favorable to the non-moving party"). Federal district courts have applied a "fairly restrictive standard in ruling on motions for judgment on the pleadings." *Id.* (citing 5a Wright & Miller, Federal Practice and Procedure § 1368 (1990)). Accordingly, Defendants' motion must be denied unless it appears "beyond doubt" that plaintiffs can prove no set of facts in support of their claims that would entitle them to relief. *Conley v. Gibson*, 355 U.S. 41, 45-6 (1957).

A. Defendants Fail to Accept Plaintiffs' Allegations As True

The gravamen of Defendants' argument is that Plaintiffs failed to satisfy the conditions precedent to payment of the remaining Eighty-Nine Million Dollars ($89,000,000.00) under the License Agreement because Defendants allege that Plaintiffs failed to successfully complete the Guaranteed Performance Test on the "Six Cylinder Unit" identified in the Second Amendment to the License Agreement. *See* [DE:43, at 6]. Such claim flies in the face of the allegations in the Plaintiffs' Complaint, which must be accepted as true for the purpose of Defendants' Motion, that Defendants "agreed to the test protocol prior to the commencement of the Guaranteed Performance Test" and that the independent validation expert "confirmed that the E-Cat Unit had satisfied all of the performance requirements imposed by the License Agreement…". [DE:1, ¶¶65, 72]. "In ruling on a defendant's motion for a judgment on the pleadings all allegations in the complaint

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283 Catalonia Avenue, Suite 200, Coral Gables, Florida 33134 • (305) 377-0086

must be accepted as true and all allegations in the answer, which are automatically denied, must be accepted as false, the fundamental question again being whether a cause of action would be established by proving the plaintiff's allegations." *Robert L. Turchin, Inc. v. Gelfand Roofing, Inc.*, 450 So. 2d 554, 556 (Fla. 3d DCA 1984).

Defendants rely solely upon their denial of Plaintiffs' claim that the Guaranteed Performance Test was successfully completed to support their Motion for Judgment on the Pleadings. By explaining their denial of Plaintiffs' allegations, Defendants seek to undermine the factual allegations of the Complaint rather than accepting such allegations as true as they are required for the purpose of their motion. If nothing else, Defendants' denial and explanation only serves to create genuine issues of material fact which must be resolved before this Court can enter a summary disposition one way or another. "A complaint survives a motion for judgment on the pleadings if it contains sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. *Abaza v. Publix Supermarkets, Inc.*, 8:16-CV-386-T-23TBM, 2016 WL 3126731, at *1 (M.D. Fla. June 3, 2016). Accepting Plaintiffs' allegations in the Complaint as true, Count I of Plaintiffs' Complaint sufficiently sets forth a claim for relief that is plausible on its face by alleging, *inter alia,* that (a) the License Agreement provided for payment upon the successful completion of the Guaranteed Performance Test, (b) Plaintiffs successfully concluded the Guaranteed Performance Test in February 2016, and (c) the ERV verified that the Plaintiffs had "satisfied all of the performance requirements imposed by the License Agreement." Accordingly, Defendants' Motion for Judgment on the Pleadings as to Count I should be denied.

B. Defendants Reliance on "Six Cylinder" Argument Fails

Notwithstanding Defendants' failure to accept the well pled facts in the Plaintiffs' Complaint as true, Defendants' argument for summary disposition is fatally flawed. Defendants' take the erroneous position that if the Guaranteed Performance Test was not conducted using the "Six Cylinder Unit" that Plaintiffs failed to satisfy the conditions precedent to payment under the License Agreement and amendments thereto. *See* [DE:43]. Despite such argument, the License Agreement itself provides for the waiver and/or amendment of provisions of the License Agreement including, but not limited to, the model of the E-Cat device to be tested. *See License Agreement* [DE:1, Ex. "B", §16.9]. Even assuming, arguendo, that waiver/modification was not provided for in the License Agreement, the Defendants acquiescence and acceptance of the proposed test protocol [DE:1, ¶65], Defendants' full time participation in the year-long Guaranteed

PERLMAN, BAJANDAS, YEVOLI & ALBRIGHT, P.L.
200 South Andrews Avenue, Suite 600, Fort Lauderdale, Florida 33301 • (954) 566-7117
283 Catalonia Avenue, Suite 200, Coral Gables, Florida 33134 • (305) 377-0086

Performance Test [DE:1, ¶67], and Defendants' multiple visits to the Guaranteed Performance Test site with their investors [DE:1, ¶¶68-70,] precludes Defendants from now asserting that the Guaranteed Performance Test was not properly conducted pursuant to the common law and equitable doctrines of waiver, estoppel, and laches.

The License Agreement provides, in relevant part, that the License Agreement "may be amended, superseded, cancelled, renewed or extended, and the terms hereof may be waived, only by a written instrument signed by the Parties or, in the case of a waiver, by the Party waiving compliance." *License Agreement* [DE:1, Ex. "B", §16.9]. Plaintiffs have alleged that Defendants agreed to the Guaranteed Performance Test protocol, which set forth the specifics of the Guaranteed Performance Test including the model E-Cat Unit being tested, and that Defendants not only agreed to, but took part in the Guaranteed Performance Test. [DE:1, ¶65]. Even assuming the "Six Cylinder Unit" was not the model E-Cat that was ultimately used for the Guaranteed Performance Test, when Defendants approved the Guaranteed Performance Test protocol, they would have waived any provision of the License Agreement inconsistent therewith. Moreover, the Second Amendment to the License Agreement, upon which Defendants now rely for their "Six Cylinder Unit" argument, provides that Plaintiffs would test a unit that was "reasonably acceptable to the Company."[4] Clearly, Defendants' agreement and acquiescence to the specifications of the Guaranteed Performance Test, including the model E-Cat being tested, evidences the fact that Defendants found the unit tested to be "reasonably acceptable to the Company." Accordingly, irrespective of what E-Cat unit was tested as part of the Guaranteed Performance Test, any model E-Cat agreed upon by the parties in writing would satisfy the requirements of the License Agreement. As such, Defendants have failed to show, as they must, that Plaintiffs "can plead no facts that would support the claim for relief." *Matthews v. Whitewater W. Industries, Ltd.*, 11-24424-CIV, 2012 WL 12865243, at *2 (S.D. Fla. Aug. 28, 2012).

Furthermore, despite Defendants' claim that Plaintiffs failed to test the correct E-Cat device, Defendants are precluded by the doctrines of estoppel, waiver and laches from seeking any judgment predicated upon their claim that pursuant to the Second Amendment, the wrong device was tested. As set forth more fully above, Defendants approved the test protocol for the Guaranteed Performance Test, engaged its' agents to take part in the Guaranteed Performance Testing, and even brought investors to the testing facility to encourage investment into their company. [DE:1,

[4] The "Company" is defined in the License Agreement as Industrial Heat, LLC.

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200 South Andrews Avenue, Suite 600, Fort Lauderdale, Florida 33301 • (954) 566-7117
283 Catalonia Avenue, Suite 200, Coral Gables, Florida 33134 • (305) 377-0086

¶¶65-71]. By taking part in the creation of the test protocol and assenting to such written protocol, Defendants waived any right to now claim that such protocol was somehow deficient under the License Agreement. *Id.* Such behavior clearly demonstrates Defendants' assent and adoption of the written test protocol which waived and/or amended the provisions of the License Agreement which were inconsistent therewith.

In Defendants' Amended Answer and Additional Defenses, Counterclaim and Third-Party Claims (hereafter "AACT"), Defendants specifically deny that the Second Amendment to the License Agreement was valid to amend the License Agreement. *See* [DE:30, ¶62]. Yet now, amazingly, as their sole basis for their Motion for Judgment on the Pleadings, Defendants argue that the Guaranteed Performance test did not comply with the terms of the Second Amendment to the License Agreement. *See* [DE:43]. Logic dictates that if, as alleged by the Defendants, the Second Amendment was not valid to amend the terms of the License Agreement, the Plaintiffs testing of any device other than the "Six Cylinder Unit" would not be grounds for Defendants non-payment of the contractual license fee amount. "Equitable estoppel precludes a party from 'trying to have his cake and eat it too'- that is, using certain provisions of the contract to their benefit to help establish their claim while also attempting to avoid the burdens of the other provisions." *Gunson v. BMO Harris Bank, N.A.*, 43 F. Supp. 3d 1396, 1401 (S.D. Fla. 2014). Clearly, Defendants do not wish to be bound by the terms of the Second Amendment, yet they seek to enforce the terms of the Second Amendment when it suits their needs. This violates the most basic principles of fairness and equity. Here, the Defendants, although wrongly, continue to insist that the Second Amendment was not valid to amend the License Agreement. As such the doctrine of equitable estoppel precludes Defendants from seeking any relief, including a Judgment on the Pleadings, which would seek to enforce terms of the Second Amendment to the License Agreement which they argue is invalid.

Lastly, even if Defendants had not waived the "Six Cylinder Unit" provision of the Second Amendment (they did), such provisions were waved by Defendants' acquiescence, or failing at any time to object, to the proposed Guaranteed Performance test protocol before or any time during the year-long Guaranteed Performance Test. Plainly stated, Defendants' claim that they were excused from making the requisite $89 million dollar payment under the License Agreement as a result of Plaintiffs alleged prior breach the License Agreement resulting from Plaintiffs' testing an E-Cat Unit other than the "Six Cylinder Unit" as part of the Guaranteed Performance Test. It is

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200 South Andrews Avenue, Suite 600, Fort Lauderdale, Florida 33301 • (954) 566-7117
283 Catalonia Avenue, Suite 200, Coral Gables, Florida 33134 • (305) 377-0086

well settled that under Florida law, "a material breach excuses a party from performance of the contract, although the injured party may waive the breach." *MDS (Canada) Inc. v. Rad Source Techs., Inc.*, 720 F.3d 833, 852 (11th Cir. 2013). Post breach actions evidencing that the contract is still subsisting, if sufficiently clear, can make out a clear case of waiver. *Id.* Here, the facts alleged by Plaintiffs establish that Defendants both encouraged and participated in the year-long Guaranteed Performance test well after Defendants were aware that the "Six Cylinder Unit" was not being utilized. Clearly, any alleged breach relating to using an E-Cat model other than that "Six Cylinder Unit" for the Guaranteed Performance Test would have been known to Defendants on or before February 19, 2015, the first day of the Guaranteed Performance Test, yet Defendants never objected to the testing protocol or expressed any concern or displeasure with the Guaranteed Performance Test. [DE:1, ¶¶65-71]. It is hard to believe that any colorable argument could be made that Defendants did not waive the "Six Cylinder Unit" provision after Defendants agreed to the test protocol, had two full time representatives on site for the entirety of the Guaranteed Performance Test, and used the Guaranteed Performance testing as a basis to raise funds from investors. *Id.*

C. Genuine Issue Of Material Fact Precludes Judgment on the Pleadings

"[T]he district court must view the facts presented in the pleadings and all inferences drawn thereof, in the light most favorable to the non-moving party." *Mais v. Gulf Coast Collection Bureau, Inc.*, 11-61936-CIV, 2012 WL 12837288, at *1 (S.D. Fla. Jan. 31, 2012). If there is a material fact in dispute, the court must deny a motion for judgment on the pleadings. *Id.* In the instant case, as discussed more fully above, Plaintiffs have alleged that they successfully completed the Guaranteed Performance Test required by the contract and that the E-Cat Unit "satisfied all of the performance requirements imposed by the License Agreement" relating to the Guaranteed Performance Test. [DE:1, ¶72]. To the contrary, in their Amended Answer, Defendants have denied that the Guaranteed Performance Test had been successfully completed for a variety of reasons, or have alleged that such test was not the Guaranteed Performance Test required by the License Agreement at all. [DE:30, ¶72]. Clearly, numerous issues of material fact remain as to whether Guaranteed Performance was ever achieved pursuant to the terms of the License Agreement. Moreover, even if there were no genuine issue of material fact regarding whether the E-Cat unit tested satisfied the Guaranteed Performance provision of the Second Amendment to the License Agreement, a genuine issue of material fact remains with regard to whether Defendants

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waived any of the requirements set forth in the Second Amendment to the License Agreement. As this Court has already ruled, a genuine issue of material fact exists as to the Guaranteed Performance Test, and discovery should be permitted before the Court rules on such claims. Accordingly, Defendants have failed to establish the non existence of any genuine issues of material fact, and therefore, are not entitled to judgment on the pleadings in this case.

WHEREFORE, Plaintiffs respectfully request that this Court enter an Order denying Defendants' Motion for Judgment on the Pleadings as to Count I and granting Plaintiffs such other and further relief this Court deems just and proper.

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

To the extent this Response requests this Court to summarily deny, or otherwise strike, Defendant's Motion for Judgment on the Pleadings as to Count I due to the fact it is premature, the undersigned counsel hereby certifies that, in compliance with Rule 7.1(a)(3), Federal Rules of Civil Procedure, that undersigned counsel has attempted to confer with counsel for Defendants in a good faith effort to resolve by agreement the issues raised in this Motion. Specifically, the undersigned sent an e-mail on September 5, 2016 at 10:54 a.m. to counselors, Christopher Pace, Esq. and Christopher Lomax, Esq., informing them that the pleadings in this matter are still open and therefore, the Motion was premature. Thereafter, the undersigned attempted to call Christopher Pace, Esq. on the afternoon of September 6, 2016 but received no response. As of the time of this Response, no response has been received from Defendants' counsel.

/s/John W. Annesser
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Dated: September 9, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on September 9, 2016, I electronically filed the foregoing motion 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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