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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	92061257
Party	Defendant Heartland Energy Group, Ltd.
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Date	03/17/2016
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
TRADEMARK TRIAL AND APPEAL BOARD**

FLUID ENERGY GROUP, LTD.,

Petitioner,

v.

**Cancellation No. 92061257
Registration No. 4224628**

HEARTLAND ENERGY GROUP, LTD.

Registrant.

_____ /

**NOTICE OF STATUS OF ARBITRATION PROCEEDINGS
AND FILING OF PARTIAL ARBITRATION AWARD
AS TO PHASE ONE AND MOTION TO FURTHER SUSPEND PROCEEDINGS**

COMES NOW, Registrant, HEARTLAND ENERGY GROUP, LTD., by and through its undersigned attorney and hereby advises the Trademark Trial and Appeal Board that the parties received a Partial Arbitration Award on Phase One Issues on March 11, 2016. A copy of the Partial Arbitration Award on Phase One Issues is attached hereto as Exhibit A.

The parties expect to commence proceedings relating to Phase Two of the arbitration proceedings shortly. At issue in Phase Two is Registrant, HEARTLAND ENERGY GROUP, LTD.'s Counterclaims (attached hereto as Exhibit B) against Petitioner, FLUID ENERGY GROUP, LTD., which include a claim for trademark infringement of the ENVIRO-SYN mark under 15 U.S.C. §1114. In addition, there is prior pending civil litigation involving the same parties in the Court of Queen's Bench of Alberta, Court File Number: 1401-09170.

As such, Registrant, HEARTLAND ENERGY GROUP, LTD. respectfully requests this matter continue to be stayed until such time as Phase Two of the Arbitration between the parties

herein is concluded, at which time the proceeding will resume and all dates will be reset. The pending arbitration and the civil litigation proceeding involve many of the same issues as well as trademark infringement for the same trademark as the one at issue in the above-referenced cancellation proceeding, namely, ENVIRO-SYN. Petitioner has filed a Petition for Cancellation of Registration No. 4,224,628 for the mark, ENVIRO-SYN. As stated above, HEG has filed counterclaims in the pending ICC Action for infringement of the same ENVIRO-SYN trademark, which is the subject of Fluid's Petition for Cancellation.

The outcome of the ICC Action will, among other issues to be decided, determine whether Registrant is the true and rightful owner of the mark and whether Petitioner has infringed the mark sought to be cancelled, and thus will have a direct bearing on the issues involved in the cancellation proceeding before the Board.

Under 37 CFR §2.117(a), whenever it shall come to the attention of the Trademark Trial and Appeal Board that a party or parties to a pending case are engaged in a civil action or another Board proceeding which may have a bearing on the case, proceedings before the Board may be suspended until termination of the civil action or other Board proceeding. Furthermore, under 37 CFR §2.117(c), proceedings may also be suspended, for good cause, upon motion approved by the Board. The Board has discretion to suspend a proceeding when a civil action is pending between the parties. TBMP, § 510.02(a). *See also, Argo & Company, Inc. v. Carpetsheen Manufacturing, Inc.*, 1975 WL 21260, 187 U.S.P.Q. 366 (TTAB 1975).

WHEREFORE, Registrant, Heartland Energy Group, Ltd. respectfully requests suspension of the subject Cancellation Proceeding No. 92061257 until a decision is rendered in

Phase Two of the Arbitration Proceeding.

DATED this 17th day of March, 2016.

Respectfully Submitted,

BEUSSE WOLTER SANKS & MAIRE, PLLC
390 North Orange Avenue, Suite 2500
Orlando, FL 32801
Telephone: (407) 926-7700
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Attorneys for Registrant

By: /s/ Amber N. Davis
Amber N. Davis
Florida Bar No.: 026628
Kevin W. Wimberly
Florida Bar No.: 057977

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been mailed via U.S. Mail and Electronic mail this 17th day of March, 2016 to: Benjamin Natter, Esquire, NATTER & NATTER, 501 Fifth Avenue, Suite 808, New York, New York 10017.

/s/ Amber N. Davis
Attorney

EXHIBIT “A”

IN THE MATTER OF THE
ARBITRATION BETWEEN

----- X
:
1. FLUID ENERGY GROUP LTD. :
2. FLUID LUX S.A.R.L., :
3. CLAY PURDY, :
4. DARREN THATCHER :
:
Claimants and :
Counterclaim respondents, :
:
-against- :
:
HEARTLAND ENERGY GROUP, LTD., :
:
Respondent and :
Counterclaimant :
----- X

**PARTIAL ARBITRATION AWARD
ON PHASE ONE ISSUES**

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**PARTIAL AWARD
ON PHASE ONE ISSUES**

I. INTRODUCTION

A. The Parties and Their Representatives

1. The parties to the arbitration and their representatives are as follows:

2. The First Claimant is Fluid Energy Group Ltd. (“Fluid Energy”), a corporation formed under the laws of Alberta, Canada. Fluid Energy’s address is

214 11th Avenue SE
Calgary, Alberta Canada T2G 0X8

3. The Second Claimant is Fluid Lux S.A.R.L. (“Fluid Lux”), a limited liability company formed under the laws of Luxembourg. Fluid Lux and Fluid Energy are referred to collectively herein as “Fluid.” Fluid Lux’s address is

73 Cote d’Eich
L-1450 Luxembourg

4. The Third Claimant (who has not asserted claims in this arbitration but has been named as an additional counterclaim respondent) is Clay Purdy, an individual. Mr. Purdy’s address is

c/o Torys, LLP
1114 Avenue of the Americas, 23rd Floor
New York, New York 10036-7703
USA

5. The Fourth Claimant (who has not asserted claims in this arbitration but has been named as an additional counterclaim respondent) is Darren Thatcher, an individual. Mr. Thatcher’s address is

c/o Torys, LLP
1114 Avenue of the Americas, 23rd Floor
New York, New York 10036-7703
USA

6. The Respondent/Counterclaimant is Heartland Energy Group, Ltd. (“HEG”), a company formed under the laws of the Republic of Seychelles. HEG’s address is

Suite 15, 1st Floor Oliaji Trade Center
Francis Street
Victoria, Mahe
Seychelles

7. The Claimants / Counterclaim Respondents are represented by:

David Wawro
Jaclyn Leader
TORYS LLP
1114 Avenue of the Americas, 23rd Floor
New York, New York 10036
Telephone: (212) 880-6288
Facsimile: (212) 682-0200
dwawro@torys.com
jleader@torys.com

8. The Respondent / Counterclaimant is represented by:

Amber N. Davis
Kevin W. Wimberly
BEUSSE WOLTER SANKS & MAIRE, P.A.
390 North Orange Avenue, Suite 2500
Orlando, Florida 32801
Telephone: (407) 926-7700
Facsimile: (407) 926-7720
adavis@iplawfl.com
kwimberly@iplawfl.com

B. The Arbitration Agreements, Place of Arbitration, and Applicable Substantive Law

9. This arbitration has been brought under identical arbitration clauses contained in (a) a Manufacturing Agreement dated October 12, 2012 and amended and restated June 18, 2013

between Fluid Energy and HEG (the “Fluid Energy-HEG Manufacturing Agreement”); (b) two licensing agreements dated October 10, 2012 and amended and restated June 18, 2013 between Fluid Energy and HEG (the “Fluid Energy-HEG 231B1 License Agreement” and the “Fluid Energy-HEG 1021B1 License Agreement”, respectively); (c) a Manufacturing Agreement dated October 10, 2012 and amended and restated June 18, 2013 between Fluid Lux and HEG (the “Fluid Lux-HEG Manufacturing Agreement”); and (d) two licensing agreements dated October 10, 2012 and amended and restated June 18, 2013 between Fluid Lux and HEG (the “Fluid Lux-HEG 231B1 License Agreement” and the “Fluid Lux-HEG 1021B1 License Agreement”, respectively) (all of the foregoing being referred to collectively as the “Agreements”). The arbitration clauses of each of the Agreements (in particular, § 16.1 of the Fluid Energy-HEG Manufacturing Agreement, § 21 of the Fluid Energy-HEG 231B1 License Agreement, § 21 of the Fluid Energy-HEG 1021B1 License Agreement, § 16.1 of the Fluid Lux-HEG Manufacturing Agreement, § 21 of the Fluid Lux-HEG 231B1 License Agreement, and § 21 of the Fluid Lux-HEG 1021B1 License Agreement) provide as follows:

All disputes arising out of or in connection with this Agreement shall be finally settled under the Rules of Conciliation and Arbitration of the International Chamber of Commerce (“ICC”) by three arbitrators appointed in accordance with said Rules. Any arbitration administered by the ICC shall be held in the ICC’s Florida, USA office, unless otherwise agreed by the Parties hereto. The award of the arbitrators shall be final and binding and may be confirmed and entered in any court, state or federal, having jurisdiction. The arbitration shall be conducted in the English language.

10. Accordingly, this arbitration is conducted under the ICC Rules of Arbitration (2012).

11. By emails dated July 14, 2014, Claimants Fluid Energy and Fluid Lux, and Respondent, confirmed to the ICC Secretariat that the place of arbitration is Orlando, Florida. On

September 17, 2014, the Third and Fourth Claimants consented to Orlando, Florida as the place of arbitration without prejudice to their position on the issue of joinder.

12. Section 16.3 of the Fluid Energy-HEG Manufacturing Agreement, § 20 of the Fluid Energy-HEG 231B1 License Agreement, § 20 of the Fluid Energy-HEG 1021B1 License Agreement, § 16.3 of the Fluid Lux-HEG Manufacturing Agreement, § 20 of the Fluid Lux-HEG 231B1 License Agreement, and § 20 of the Fluid Lux-HEG 1021B1 License Agreement each provide that “This Agreement shall for all purposes be governed by and construed in accordance with the laws of the State of Florida.” In addition, § 7.6 of the Fluid Energy-HEG Manufacturing Agreement and § 7.6 of the Fluid Lux-HEG Manufacturing Agreement both provide that “Notwithstanding any other term or condition of this Agreement, the United Nations Convention on Contracts for the International Sale of Goods shall not apply to this Agreement.” Through their agreement to the Terms of Reference, the parties confirmed their agreement (in paragraph 163 of that document) that “all claims raised in this arbitration shall be governed by the substantive laws of the State of Florida (or, where applicable, United States federal statutory law, excluding the Convention on Contracts for the International Sale of Goods) without reference to the conflict of laws principles of that jurisdiction.”

II. PROCEDURAL HISTORY

A. Commencement, Claims, and Motions

13. This arbitration was commenced by Claimants Fluid Energy and Fluid Lux filing a Request for Arbitration with the ICC International Court of Arbitration (“ICC Court”) on 28 May 2014.

14. By letter dated 5 June 2014, the Secretariat of the ICC Court notified the Respondent of its receipt of the Request for Arbitration and sent a copy of the Request for

Arbitration to the Respondent.

15. On 23 July 2014, the Respondent submitted its Answer, Affirmative Defenses and Counterclaim.

16. The Request for Arbitration originally named two additional respondents, John MacDonald and Stephen Rowley. On 23 July 2014, counsel for Respondents also filed a Motion to Dismiss the arbitration with respect to Messrs. MacDonald and Rowley.

17. On 8 August 2014, the Respondent submitted its Amended Counterclaim.

18. On 13 August 2014, the Respondent also submitted a Request for Joinder of Messrs. Purdy and Thatcher.

19. On 19 August 2014, the Respondent submitted an Amended Request for Joinder of Messrs. Purdy and Thatcher.

20. On 28 August 2014, Claimants Fluid Energy and Fluid Lux submitted a Response and Affirmative Defenses to the Amended Counterclaims, “on behalf of themselves and purported Respondents Purdy and Thatcher.”

21. Also on 28 August 2014, Claimants Fluid Energy and Fluid Lux consented to the dismissal of Messrs. MacDonald and Rowley from the arbitration, without prejudice to any claims in any other forums.

22. On 29 August 2014, Claimants submitted an Opposition to the Respondent’s 13 August 2014 Request for Joinder. The opposition raised matters pursuant to Article 6(3) of the ICC Arbitration Rules, which were then referred to the ICC Court for resolution pursuant to Article 6(4).

23. On 5 September 2014, Respondent submitted a Reply to the Affirmative Defenses submitted by Claimants.

24. On 18 September 2014, the Secretariat notified the parties, inter alia, that the ICC Court had determined, pursuant to Article 6(4) of the ICC Arbitration Rules, that the arbitration would proceed with respect to Messrs. Purdy and Thatcher, and had confirmed Michael B. Chavies and James V. Etscorn as co-arbitrators.

25. On 27 October 2014, the Secretariat notified the parties that the ICC Court had appointed C. Ryan Reetz as president of the arbitral tribunal.

26. On 28 October 2014, Respondent submitted a Verified Motion for Interim Measures Pursuant to Rule 28 Barring Counterclaim Respondents from Pursuing Canadian Proceeding in Contravention of Agreements.

27. On 17 November 2014, Claimant submitted an Opposition to [Respondent's] Motion for Interim Measures.

28. On 10 December 2014, Respondent submitted a Supplemental Memorandum pertaining to the applicability of Chapter 684, *Fla. Stat.*

29. On 15 December 2014, Claimants submitted an Amended Request for Arbitration, a corrected version of which was submitted by agreement on January 15, 2015.

30. On 23 December 2014, Claimants filed their Supplemental Memorandum pertaining to the applicability of Chapter 684, *Fla. Stat.*

31. On 31 December 2014, Respondent filed its Answer and Affirmative Defenses to Fluid's Amended Request for Arbitration.

32. On 31 December 2014, Respondent filed a Motion to Dismiss Claims II and III of Fluid's Amended Request for Arbitration.

33. On January 19, 2015, Claimants submitted their Opposition to Respondent's Motion to Dismiss.

34. On January 20, 2015, Respondent submitted its Amended Answer and Affirmative Defenses to Claimants' Amended and Corrected Request for Arbitration.

35. On April 3, 2015, Respondent/Counterclaimant submitted a Request for an Order from the Tribunal Compelling the Production of Documents ("Motion to Compel Production").

B. Confirmation of the Arbitrators

36. On 18 September 2014, the ICC Court confirmed the appointment of Michael B. Chavies as co-arbitrator upon Claimants' joint nomination, and confirmed the appointment of James V. Etscorn as co-arbitrator upon Respondent's nomination.

37. Pursuant to the parties' agreement, the co-arbitrators were granted 30 days from the date of their confirmation to jointly nominate the President of the Arbitral Tribunal. As the co-arbitrators were not able to jointly nominate a President of the Arbitral Tribunal within the time limit granted, the parties were informed that the ICC Court would appoint the President pursuant to Article 12(5) of the Rules. By letter of 27 October 2014, the Secretariat of the ICC informed the parties that the ICC Court had appointed C. Ryan Reetz as President of the Arbitral Tribunal upon the United States National Committee's proposal (per Article 13(3) of the Rules).

38. The business addresses of the Tribunal in this case are:

Michael B. Chavies
Akerman LLP
One Southeast Third Avenue, 25th Floor
Miami, FL 33131 USA

James V. Etscorn
BakerHostetler
SunTrust Center, Suite 2300
200 South Orange Avenue
Orlando, FL 32801-3432 USA

C. Ryan Reetz
BRYAN CAVE LLP

200 S. Biscayne Blvd., Suite 400
Miami, FL 33131 USA

C. Terms of Reference, Procedural Orders, and Preparation for Final Hearing on Phase One Issues

39. On December 8, 2014, the arbitral tribunal held a case management conference with the parties in Orlando, Florida pursuant to Article 24(1) of the ICC Rules of Arbitration.

40. Following further discussion with and input from the parties, the arbitral tribunal finalized the Terms of Reference, which were signed by the parties and by the members of the arbitral tribunal by February 17, 2015, and original exemplars of which were forwarded to the ICC on March 2, 2015.

41. On February 4, 2015, the arbitral tribunal issued Procedural Order No. 1 (dated as of February 2, 2015), containing the provisional timetable for the matter pursuant to Article 24(2) of the ICC Rules of Arbitration, the material terms of which had been agreed to by the parties. At the joint request of the parties, Procedural Order No. 1 provided for the bifurcation of proceedings in this matter as follows:

Phase One will consist of hearings and an award on Claimants' claims for rescission and damages (Claims I – III) and Respondent's defenses thereto if and to the extent the Claims II and III are not dismissed by the Tribunal. Phase Two will consist of hearings and an award on Respondent's counterclaims and Claimants' defenses thereto, which include additional Claims for patent invalidity (Claims IV-VI) if and to the extent any or all of the claims/counterclaims are not precluded by the award in Phase One.

(Procedural Order No. 1, ¶ 8).

42. On February 12, 2015, the arbitral tribunal issued an Order on Counter-Claimant's Verified Motion for Interim Measures, resolving the October 28, 2014 motion.

43. On February 26, 2015, the International Court of Arbitration fixed October 30, 2015

as the time limit for rendering the arbitral award.

44. On March 11, 2015, the arbitral tribunal issued an Order on Counter-Claimant's Motion to Dismiss Claims II and III of Claimants' Amended Request for Arbitration, which denied the motion, without prejudice to any future motions.

45. On April 13, 2015, following a telephonic hearing on that date, the arbitral tribunal communicated to the parties its decision on Respondent's Motion to Compel Production, which decision was further memorialized in an Order on Counter-Claimant's Request for an Order from the Tribunal Compelling the Production of Documents, dated April 15, 2015.

46. On April 30, 2015, the parties exchanged their initial pre-hearing submissions on Phase One issues, and on May 15, 2015, the parties exchanged their second pre-hearing submissions on Phase One issues. On June 19, 2015, the parties jointly submitted an agreed chronology, agreed list of witnesses, agreed statement of facts, agreed statement of issues, and a joint core bundle of documents.

47. On July 13, 2015, the parties submitted an updated list of exhibits, including updated copies of certain specified exhibits.

D. Final Hearing on Phase One Issues and Post-Hearing Proceedings

48. The final hearing with respect to Phase One issues took place from July 20-24, 2015 at Florida A&M University College of Law, 201 Beggs Avenue, Orlando, Florida USA 32801. The parties' counsel and additional representatives (Messrs. MacDonald, Rowley, Purdy, and Thatcher) attended the hearing.

49. The following witnesses testified during the hearing, either in person or via videoconference: Clay Purdy, Frank Hornsby, Jon Garner, Darren Thatcher, Stephen Rowley, Dean Webster, Lucille Marie Drenth, Kevin O'Donoghue, John MacDonald, William Tandy

Grubbs, Marshall Sklar, and Richard D. Connor, Jr.

50. On August 24, 2015, both sides made post-hearing submissions consisting of findings of fact and conclusions of law.

51. By e-mail dated September 2, 2015, Respondent requested that the arbitral tribunal receive and consider additional evidence consisting of materials that had been sent by Fluid Energy to its shareholders (the “Supplemental Materials”).

52. By letter dated September 8, 2015, Claimants opposed Respondent’s request and requested that the arbitral tribunal decline to receive the Supplemental Materials.

53. By letter dated September 10, 2015, Respondent submitted further argument in support of its request that the Supplemental Materials be received and considered.

54. The arbitral tribunal has determined to consider the Supplemental Materials in connection with the Phase One issues, although consideration of those materials has not proved dispositive on any of the issues before the tribunal.

55. On October 8, 2015, the International Court of Arbitration extended the time limit for rendering the award until November 30, 2015.

56. On October 23, 2015, the arbitral tribunal declared the proceedings to be closed with respect to the Phase One issues, and informed the parties and the ICC that it expected to submit its draft award by November 30, 2015.

57. On November 5, 2015, the International Court of Arbitration extended the time limit for rendering the award until December 31, 2015.

58. On December 3, 2015, the International Court of Arbitration extended the time limit for rendering the award until January 29, 2016.

59. On December 13, 2015, the arbitral tribunal informed the parties and the ICC that it

expected to submit its draft award by January 10, 2016.

60. On January 7, 2016, the International Court of Arbitration extended the time limit for rendering the award until February 29, 2016.

61. On February 4, 2016, the International Court of Arbitration extended the time limit for rendering the award until March 31, 2016.

III. THE PARTIES' LEGAL CLAIMS AND RELIEF SOUGHT

62. As is noted below in connection with Procedural Order No. 1, Claimants' Claims IV through VI (relating to patent invalidity and to non-infringement) and Respondent's claims (which include claims for breach of contract, for patent infringement, for trademark infringement and for unfair competition), have not been addressed by the parties or the tribunal in connection with Phase One of the arbitration.

63. The claims at issue in Phase One are Claimants' Claims I through III. In their first claim, Claimants seek rescission of the Agreements based on asserted misrepresentations in connection with the products that were the subject of the parties' Agreements. (Amended Request for Arbitration ¶¶ 39-44).

64. In their second claim, Claimants seek rescission of the 231B1 License Agreements and related Manufacturing agreements for failure of consideration, on the ground that HEG provided no consideration for the 231B1 Licenses or the related Manufacturing Agreements. (Amended Request for Arbitration ¶¶ 45-48).

65. In their third claim, Claimants seek rescission of the 102B1 License Agreements and related Manufacturing Agreements for failure of consideration, on the ground that Respondent failed to license to Claimants certain specified patents (the '971 Patent, the '047 Patent, and the '573 Patent), thus failing to grant sufficient rights to permit full exploitation of the technology that

was the subject of the 102B1 patent. (Amended Request for Arbitration ¶¶ 49-57).

66. In addition to denying each of the three claims at issue here, Respondent asserts twenty-three “affirmative defenses” to them, as follows: (1) failure to state a claim upon which relief may be granted, (2) failure to mitigate damages, (3) Claimants were aware of the products’ corrosiveness, thus negating reliance on the alleged misrepresentations, (4) Florida’s economic loss rule, (5) estoppel, (6) laches, (7) unclean hands, (8) failure to plead fraud with particularity as required by Florida Rule of Civil Procedure 1.120(b), (9) set off of damages due to Claimants’ own breaches, (10) the parol evidence rule, (11) Claimants’ prevention of Respondent’s performance, (12) Claimants’ alteration of the licensed products caused any non-conformance, (13) any damages were due to unrelated, pre-existing or subsequent conditions unrelated to Respondent’s conduct, (14) unavailability of attorneys’ fees, (15) unavailability of punitive damages, (16) lack of reliance by Claimants on any alleged fraudulent statements, (17) no damages resulted from products’ alleged corrosiveness, (18) no damages resulted where any supposed misrepresentations with respect to regulated status for transportation purposes were unrelated to Claimants’ use of the licensed products “downhole” at drilling sites, (19) no damages resulted where end users perform their own testing and have never refused to use the license products based upon corrosiveness test results, (20) waiver, (21) failure to properly provide notice of non-conformity of the goods as required by Fla.Stat. 672.607, (22) consideration for the Agreements was provided because the exhibits in question were provided to and signed by the Claimants, and (23) consideration for the 102B1 License Agreements and related Manufacturing Agreements was provided because the relevant license agreements do cover the ‘971 Patent, the ‘047 Patent, and the ‘573 Patent. (Amended Answer and Affirmative Defenses to Amended and Corrected Request for Arbitration, pp. 11-14, ¶¶ 1-23).

67. In addition to rescission of the Agreements, Claimants also seek (based upon the same claims and solely as additional remedies in connection with those same claims) restitution of certain sums paid pursuant to the Agreements (C\$1,032,302 less a set-off credit of US\$222,560, as detailed in ¶¶ 94-97 of Claimants' August 24, 2015 Proposed Findings of Fact and Conclusions of Law), plus punitive damages, attorneys' fees, and arbitration costs. Respondent seeks the denial of Claimants' claims for relief, plus an award of attorneys' fees, and arbitration costs.

IV. FACTS OF THE CASE

68. The following recitation of the facts is intended to give a general outline of the parties' dispute as it concerns the Phase One issues, and does not purport to be a comprehensive restatement of all of the evidence received, or credited, by the arbitral tribunal. The arbitral tribunal's specific findings with respect to contested facts, as they are material to the parties' claims and defenses, are discussed below in connection with the relevant aspects of the specific claims to which they pertain.

A. Background and Initial Exposure to the Products

69. The parties' dispute relates to two types of HEG products, referred to as acid and caustic replacements, and their use in the oil and gas industry. (*E.g.*, Terms of Reference ("TOR") ¶¶ 47-53, Exhibits X-107 to X-112).

70. HEG's President, John MacDonald, owns a chemical manufacturing company called Environmental Manufacturing Solutions, LLC ("EMS"). Mr. MacDonald also serves as the President of EMS. (Parties' Agreed Statement of Facts (Phase I) ("ASF") ¶¶ 7-8).

71. Before HEG's formation, Steve Rowley (now HEG's Vice President) owned a business called Heartland Solutions, Inc. ("HSI"), which distributed EMS's products to the concrete and oil and gas industries. HSI sold EMS's Barracuda 10K product and Elevate products

to the oil and gas industry, and renamed the products as Oil Safe® and Mud Safe®, respectively. (ASF ¶¶ 6, 9).

72. Fluid Energy's President and Chief Operating Officer, Darren Thatcher, was employed by Mud Master Drilling Fluid Services ("Mud Master") before joining Fluid Energy. Mr. Thatcher served as Mud Master's Vice President of Operations and Technology. (ASF ¶¶ 4-5).

73. Mr. Thatcher learned about Oil Safe and Mud Safe when he worked for Mud Master, which was a sub-distributor for HIS in Canada. (ASF ¶ 10).

74. While working for Mud Master, Mr. Thatcher learned about the Oil Safe and Mud Safe products, and received various marketing and technical information about those products from Messrs. Rowley and/or MacDonald. (ASF ¶¶ 10-11).

75. In October 2011, Messrs. Thatcher and Rowley worked together on a hydraulic fracturing job for Mud Master in Turner Valley, Alberta, Canada, and used Oil Safe at that job. Although the parties dispute exactly what occurred in Turner Valley, Messrs. Thatcher and Rowley observed pitting or other damage to metal indicating that, at least under certain conditions, Oil Safe could be corrosive to that type of metal. The parties disagree on whether the metal in question was steel or aluminum. (ASF ¶ 12; Hearing Transcript ("Tr.") at 309-13, 417-20; Witness Statement of Dean Webster ("Webster WS") ¶¶ 17-25; first witness statement of Stephen Rowley (I Rowley WS") ¶¶ 17-19).

B. Discussions, Negotiations, and Initial Contracts

76. In December 2011, Fluid began discussions with Mr. Rowley regarding Fluid's distributing Mr. MacDonald's acid and caustic replacement products to the oil and gas industry. (ASF ¶ 13).

77. In January 2012, Messrs. Thatcher and Purdy met with Messrs. MacDonald and Rowley in Melbourne, Florida to discuss entering into a relationship in which Fluid would distribute Mr. MacDonald's products. (ASF ¶ 14).

78. The initial relationship by which Fluid distributed Mr. MacDonald's products was documented in a February 21, 2012 agreement between Fluid Energy and CCE Technologies, Inc. ("CCE"), a company owned and operated by Mr. Rowley. (ASF ¶ 15).

79. Fluid proceeded to market the acid and caustic replacement products using the names "Enviro-Syn HCR" (for the Oil Safe hydrochloric acid replacement) and "Enviro-Syn CSR" (for the Mud Safe caustic replacement). (ASF ¶ 16).

80. Fluid's labels for Enviro-Syn HCR included a warning not to use aluminum fittings in connection with the product. (ASF ¶ 17).

81. The Fluid Energy agreement with CCE was superseded by a May 4, 2012 agreement between Fluid Energy and a Bahamas corporation named Heartland Energy Group, Ltd. (HEG Bahamas). (ASF ¶ 17).

C. Fluid Contracts with HEG

82. HEG became the ultimate entity that was used to contract with Fluid concerning the acid and caustic replacement products. (ASF ¶ 19).

83. In October 2012, Fluid Energy and Fluid Lux entered into a set of manufacturing and licensing agreements with HEG concerning the products. (Agreed Chronology p. 2; TOR ¶¶ 9, 47-48).

84. In June 2013, the parties entered into the Agreements, which amended and restated the previous agreements from October 2012. (ASF ¶ 33; Exhibits X-107 through X-112). While the Agreements themselves define the scope of the licenses without respect to particular product

names (e.g., Exhibit A to X-107 and to X-112), the particular products that were the focus of the parties' Agreements and that became the focus of the parties' disputes are the Oil Safe AR/Enviro-Syn HCR and the Mud Safe CR/Enviro-Syn CSR products (e.g., ASF ¶¶13-16, 18-19) (referred to herein as the "Licensed Products").

85. Claimants contend that the Agreements, and their predecessor agreements, were induced by factual misrepresentations made by Respondent concerning the degree of corrosiveness of the licensed products and concerning whether the Licensed Products were regulated for U.S., Canadian, and international transportation purposes. Respondent contends that no such misrepresentations were made, and that the other elements of Claimants' misrepresentation allegations similarly did not occur. (TOR ¶¶ 62-66, 89-97). The arbitral tribunal's specific findings with regard to this factual dispute are discussed below.

86. Claimants also contend that the Agreements lack consideration because (a) the contracts relating to the technology identified by the parties as the "231B1 Technology" did not license any meaningful rights to Claimants as there were actually no patents for the underlying technology, and (b) the contracts relating to the technology identified by the parties as the "102B1 Technology" failed to license to Claimants certain specified patents necessary to permit full exploitation of the technology. Respondent contends that (a) the 231B1 Technology included technology and know-how related to the caustic products that was actually licensed to Claimants, (b) the contracts with respect to the 102B1 Technology did, in fact, license the specified patents in question, and (c) Respondent provided substantial additional consideration in connection with each of the Agreements, including product training and set-up assistance. (E.g., TOR ¶¶ 67-75, 98-103, 131-32). The arbitral tribunal's findings with regard to this factual dispute are also discussed below.

D. The Parties' Dispute Over Corrosiveness and Regulated Status Arises

87. In December 2013, a customer notified Claimants that one of its service providers, Baker Hughes, had found Enviro-Syn HCR to be corrosive to aluminum at room temperatures. (ASF ¶ 36).

88. Claimants notified Respondent of the Baker Hughes test results, and the parties began to discuss the Licensed Products' properties and their implications on the Licensed Products' regulatory status. (E.g., Witness Statement of Darren Thatcher ("Thatcher WS") ¶¶ 11-13; X-146).

89. The parties' discussions continued for several months, during which they continued to do business with one another. (E.g., Witness Statement of Clay Purdy ("Purdy WS") ¶¶ 28-46; Tr. at 231-34).

90. On April 11, 2014, after additional testing by Claimants and further discussions among the parties, Claimants sent a notice to Respondent demanding, *inter alia*, to rescind the Agreements based upon asserted misrepresentations by Respondent. (Thatcher WS ¶¶ 14-16; Purdy WS ¶¶ 35; X-208; ASF ¶ 40).

91. On May 6, 2014, Respondent responded that it rejected Claimants' purported rescission of the Agreements. (X-213).

92. On June 12, 2014, Respondent sent a notice to Claimants that Respondent was terminating the Agreements based upon asserted breaches by Claimants of the Agreements. (ASF ¶ 50; X-217).

V. ISSUES TO BE DETERMINED

93. As reflected in paragraph 8 of Procedural Order no. 1, which established the provisional timetable for this matter, the parties and the arbitral tribunal agreed that in Phase One

the tribunal would determine Claimants' claims for rescission and damages (Claims I-III of the Amended Request for Arbitration) and Respondent's defenses thereto. All other claims, including without limitation any claims with respect to Claimants 3 and 4 (who have not asserted any claims but against whom claims have been asserted under Article 6 of the ICC Rules), have been reserved to a subsequent phase of this arbitration.

94. In their June 19, 2015 Agreed Statement of Issues to be Determined by the Tribunal (Phase I), the parties jointly submitted the following list of issues for determination:

1. Is Heartland Energy Group Ltd., ("HEG") liable to Fluid Energy Group, Ltd. ("Fluid Energy") and Fluid Lux, S.A.R.L. ("Fluid Lux") for fraudulent inducement of the Agreements?
2. Are the Agreements void or voidable for lack of consideration?
3. May Fluid Energy and Fluid Lux pursue their claim for rescission on a theory of mutual mistake?
4. In the event that HEG is liable to Fluid Energy and Fluid Lux on the grounds [of] fraudulent inducement, lack of consideration, or mutual mistake (assuming Fluid may argue that theory), what is the appropriate relief to be granted?
5. Whether and to what extent HEG's defenses raised in its Answer, Affirmative Defenses and Counterclaim as well as paragraphs 123-155 of its First Pre-Hearing Submissions apply in the instant case.

95. The arbitral tribunal addresses these issues under separate headings below. The legal points and case authorities discussed below have been addressed by both parties, or by one party with sufficient notice to the other (and opportunity to present its views), in their respective submissions.

A. Fraudulent Inducement

96. To establish their claim of fraudulent inducement (subject to any defenses that Respondent might establish), Claimants must show: (1) that Mr. MacDonald and/or Mr. Rowley

made one or more false statements of fact on behalf of Respondent; (2) with knowledge of the statement's falsity; (3) with the intent that Claimants rely upon the statement(s); (4) that Claimants did rely upon the statement(s) in entering into the Agreements; and (5) that Claimants were damaged thereby. *Lou Bachrodt Chevrolet, Inc. v. Savage*, 570 So.2d 406 (Fla. 4th DCA 1990); *Forbes v. Auerbach*, 56 SDo.2d 895 (Fla. 1952). While there is no express requirement that Claimants' reliance have been justifiable, a party asserting a fraudulent misrepresentation is precluded from relying upon the misrepresentation if its falsity is known or obvious. *Besett v. Basnett*, 389 So.2d 995 (Fla 1980).

97. With respect to the first element of the fraudulent inducement claim, the arbitral tribunal concludes that Mr. MacDonald and Mr. Rowley made a series of factual representations to Claimants to the effect that the Licensed Products were not regulated for U.S., Canadian, and international transportation purposes and had corrosion rates with respect to steel and aluminum well below the regulatory threshold of 6.25 millimeters per year (mmpy). These representations included, for example the provision of test reports, referred to as the "NASA" and "Del Tech" test reports, to Mr. Thatcher when Mr. Thatcher worked for Mud Master (Thatcher WS ¶ 3); a discussion between Mr. MacDonald and Mr. Purdy on the topic during January 2012 (Purdy WS ¶ 13); Mr. Rowley's emailing to Mr. Thatcher on February 12, 2012 a powerpoint presentation showing corrosion rates on steel and aluminum below 6.25 mmpy (Purdy WS ¶ 14; X-38); and Mr. MacDonald's emailing to Mr. Purdy and Mr. Thatcher a copy of the Del Tech test report on October 16, 2012 (X-62). In addition, on October 24, 2012 Mr. Rowley and Mr. MacDonald received a powerpoint presentation by Mr. Thatcher quoting the NASA report data (X-67), and made no suggestion that the data should not be relied upon. (Tr. at 491-92; 629-30).

98. While a number of the representations were made before Respondent was formed as

a company (and thus, as to those representations, Claimants contend that they properly relied on the acts of Respondent's predecessors and agents), those representations were made in the context of the parties' principals working toward the development of a business relationship. (Purdy WS ¶¶ 12-16; Rebuttal Witness Statement of Clay Purdy ("Purdy RWS") ¶ 2). Predecessor entities CCE and HEG (Bahamas) were used as corporate "placeholders" during the development of the relationship, and the finalized contracts were ultimately entered into by Respondent. (I Rowley WS ¶ 31; Witness Statement of John T. MacDonald ("I MacDonald WS") ¶¶ 36, 50; Tr. at 465; X-107 through X-112). Because Respondent accepted the contracts and business relationship that resulted from the parties' discussions, continued to itself publish the relevant test results, and failed to take any steps to correct Claimants' understanding with respect to their subject matter, the arbitral tribunal concludes that Respondent ratified and is bound by the representations. *See Meyer v. Nator*, 102 Fla. 689 (1931) (ratification of acts of promoter by corporation, once formed, may be express or implied); *Luria v. Bank of Coral Gables*, 106 Fla. 175 (1932) (where a corporation takes and retains the benefits of an unauthorized act on its behalf, it ratifies and becomes bound by such act); *Ramel v. Chasebrook Constr. Co.*, 135 So.2d 876 (Fla. 2d DCA 1961) (a corporation is vicariously liable for fraud and misrepresentation practiced by its directors or agents within the scope of their employment).

99. The arbitral tribunal further concludes that these representations were false, in that both of the Licensed Products have corrosion rates with respect to at least aluminum at a rate above the regulatory threshold, and that the products are in fact regulated for Canadian transportation purposes. (Expert Report of W. Tandy Grubbs ("Grubbs Report") at 6-9; X-164; Canadian Transportation of Dangerous Good Regulation ("TDG Reg.") 2.42(2)(c)). As for the NASA and Del Tech test reports, there is no evidence suggesting that they represent the results of any testing

that was actually conducted (and their corrosion results are inconsistent with those of the later, actual tests (Grubbs Report at 6-9)). Although Respondent had stated in its Amended Counterclaim (¶ 36) that it would call the director of both laboratories, a Ms. Alicea, to testify to those tests, no such testimony was ever provided. Moreover, Claimants' expert witness Marshall A. Sklar testified that the signatures on both purported reports are identical to signatures on unrelated documents found on Internet websites, including the signature of a former Mayor of Pittsburgh (with a name different from the supposed laboratory tester) and a signature captured from a "how-to-get-signature" page at howtoveryeasy.blogspot.com. (Witness Statement of Marshall A. Sklar ("Sklar WS") ¶¶ 32-33 & Exhs. 3-4, 10-12). While denying that he played any role in the falsification, Mr. MacDonald states in his first Witness Statement that "the tests may in fact be falsified." (¶ 165).

100. With respect to the second element, the arbitral tribunal concludes that Respondent, and in particular Mr. MacDonald, were aware of the falsity of the representations. Based upon the totality of the evidence, including Mr. MacDonald's inconsistent testimony concerning the circumstances of his meeting with the testing company representative (Tr. at 638-41) and Respondent's inability to produce supporting documentation showing communications, transmittals of product, or payment to the laboratories that supposedly conducted the testing (Tr. at 643-91), as well as the additional facts described in this paragraph, the arbitral tribunal does not credit Mr. MacDonald's testimony that he arranged in good faith for testing by the NASA and Del Tech labs and received the test reports, only to lose confidence in them after the parties' dispute arose. Indeed, Claimants' expert Marshall Sklar provided testimony, with a detailed explanation, in his witness statement that in his opinion both test reports were "likely created by John MacDonald" himself. (Sklar WS ¶¶ 3-4, 32-41). In addition, the arbitral tribunal finds Mr.

MacDonald sent to Claimants an incomplete and misleading copy of the Canadian TDG transportation regulation in an effort to persuade them, after the test results were questioned, that there were no issues with the Licensed Products' regulatory status. (Purdy WS ¶¶ 33-34; X-152; X-154; X-8; Tr. at 244-48). Moreover, Respondent sought to rely in this case upon an email dated February 3, 2012, from Mr. MacDonald to Mr. Purdy, in which Mr. MacDonald purportedly warns Claimants not to rely upon the corrosion information that Mr. Thatcher "brought with him" from Mud Master. (Exhibit X-39). However, the supposed warning language of that email, which was not produced in native format or with other indicia that could confirm its authenticity, and which Mr. Sklar opines (with a detailed explanation) is inauthentic, (Sklar WS ¶¶ 2, 18-31), does not appear in earlier or later copies of the relevant email chain, where it should appear if it were an authentic message. (*Id.*) On cross-examination, Mr. MacDonald admitted that he deleted the original e-mail in question while this arbitration was pending and after Fluid had requested it. (Tr. at 671-84). Accordingly, the tribunal finds that Exhibit X-39 is not an authentic document. In light of all of the foregoing facts, the arbitral tribunal concludes that Mr. MacDonald was aware of the falsity of the representations in question and actively sought to conceal that falsity from Claimants.

101. With respect to the third element, the arbitral tribunal finds that the representations were made with the intent to induce Claimants to rely upon them. Messrs. MacDonald and Rowley used the Licensed Products' test results and claimed regulatory status as a "selling point" by referring to these attributes as advantages in the context of promoting the products to Messrs. Purdy and Thatcher in anticipation of the parties' relationship and for eventual use by end-users. (Purdy WS ¶¶ 12-14, 24; Purdy RWS ¶ 2; Tr. at 56-58). Indeed, Mr. MacDonald had the Del Tech test result report updated to include the new product name, and even to include Fluid Energy's

name as the customer. (Purdy WS ¶ 24; X-62). The obvious purpose (and indeed Respondent has offered no other purpose) for discussing the Licensed Products' corrosion rates and non-regulated status - and doing so repeatedly and in the context of marketing materials and formal purported test results - was to induce Claimants to act based on the belief that these representations were correct.

102. However, with respect to the fourth element, a majority of the arbitral tribunal finds that Claimants did not in fact rely upon the representations in entering into the Agreements. The incident involving the Oil Safe product in Turner Valley, while it occurred at elevated temperatures beyond those used for standard corrosion testing, resulted in corrosion damage to metal that was sufficiently unexpected to capture the attention of Messrs. Thatcher and Rowley. (ASF ¶ 12; TR. at 309-24, 517-20; Webster WS ¶¶ 17-25; I Rowley WS ¶¶ 17-19). Claimants' continued pursuit of agreements to manufacture and distribute the Licensed Products after this incident occurred (ASF ¶ 13) undercuts their claims of reliance on representations with respect to the products' non-corrosive nature. When Claimants subsequently began marketing the Licensed Products, they included warnings stating that aluminum fittings should not be used in connection with the product. (ASF ¶ 17; X-7). Significantly, although the parties' six Agreements are lengthy and detailed, none of them includes corrosion rates or regulatory status of the Licensed Products as an express term, even though the Agreements contain integration clauses. (X-107 through X-112; for integration clauses, see, e.g., X-107 & X-110, § 18.4; X-108, X-109, X-111 & X-112, § 26). After the parties' dispute over corrosiveness and regulatory status arose in later 2013, Mr. Thatcher admitted in an internal email that, even if Enviro-Syn HCR (and, by fair implication given the context, Enviro-Syn CSR) exceeded regulatory threshold and had to be labeled as regulated, he did not "see this as hurting us in any way though, as it is still non-hazardous to handle physically." (X-

156). Finally, although Claimants assert that they first learned of the Licensed Products' corrosive status in December 2013 and did not definitively confirm the associated regulatory status until later, they continued doing business with Respondent and did not raise claims of fraud or purport to rescind the Agreements until April 2014. (ASF ¶ 48; Tr. at 231-35, 255-57). A majority of the arbitral tribunal considers that these facts show by a preponderance of the evidence (*i.e.*, that according to the evidence presented it is more likely than not) that Claimants did *not* rely upon Respondent's representations, notwithstanding the testimony of Claimants' witnesses that they did so rely (which testimony was largely conclusory in nature). The dissenting arbitrator considers the testimony of Claimants' witnesses concerning their reliance to be credible, and does not consider the foregoing facts, in light of all the evidence concerning them and the context in which they occurred, to be relevant (as a factual matter) to the question of Claimants' reliance upon the representations.

103. Because a majority of the arbitral tribunal finds that Claimants did not rely upon the misrepresentation, it follows that the final element of the fraudulent misrepresentation claim, *i.e.*, damage due to such reliance, is similarly not established.

104. Claimants have also argued that an alternative legal theory applied to the factual basis of their misrepresentation claim, that of an "innocent" misrepresentation of fact, would support relief for the Claimants even if they should fail to establish a knowing misrepresentation by Respondent. Respondent objects to consideration of this legal theory on the ground that it constitutes a new claim in the proceedings, asserted after the Terms of Reference and without authorization by the arbitral tribunal. Respondent further contends that Claimants have not established a basis for rescission based upon an innocent misrepresentation. Because the essence of Claimants' First Claim is for rescission based upon misrepresentation, the arbitral tribunal

considers it appropriate to consider Claimants' argument that the Agreements should be rescinded under this alternative legal theory, which does not involve proof or consideration of any facts extraneous to the claim as already asserted by Claimant. While the arbitral tribunal believes that it is arguable whether Claimants' assertion of an additional legal ground in support of the existing request for rescission, and based upon the same underlying facts, constitutes an additional claim at all, in an abundance of caution the arbitral tribunal has determined to treat Claimants' innocent misrepresentation argument as an additional claim and to permit its assertion pursuant to Article 23(4) of the ICC Rules, given that (1) this alternative legal theory does not involve proof or consideration of any facts extraneous to the claim as already asserted by Claimant; (2) there is great overlap in the law and the legal authorities that are applicable to the two legal theories; (3) the two claims may thus be most efficiently presented and resolved in a single proceeding; (4) Respondent has had a full opportunity to evaluate and respond to the innocent misrepresentation claim; and (5) Respondent will not suffer any prejudice by reason of the arbitral tribunal's consideration of the claim under these circumstances.

105. In order to rescind a contract based upon an innocent misrepresentation, the party seeking rescission must establish, *inter alia*, that it relied to its detriment upon the misrepresentation. *Sutton v. Cast-Creet Corp. of Fla.*, 197 So.2d 556, 558 (Fla. 2d DCA 1967), quoting *Langley v. Irons Land & Development Co.*, 114 So. 769, 771 (1927). As a majority of the arbitral tribunal has found that Claimants have not established their reliance upon the misrepresentations in question, Claimants have not established any right to relief based upon a theory of innocent misrepresentation.

B. Lack of Consideration

106. Under Florida law, rescission of a contract is available where a covenant is breached that

goes to the whole consideration of the contract; where it is such an essential part of the bargain that the failure of it must be considered as destroying the entire contract; or where it is such an indispensable part of what both parties intended that the contract would not have been made with the covenant omitted. Black on Rescission and Cancellation, 2nd ed., Vol. I, pp. 555, 601. A breach of such a covenant amounts to a breach of the entire contract; it gives to the injured party the right to sue at law for damages, or courts of equity may grant rescission in such instances if the remedy at law will not be full and adequate. *Savage v. Horne*, 159 Fla. 301, 31 So.2d 477; 6 Pomeroy, Eq. Juris., Sec. 685.

Steak House v. Barnett, 65 So.2d 736, 738 (Fla. 1953).

107. With respect to Claimants' second claim, involving the 231B1 Technology, while Respondent has admitted that it did not have a patent on that technology at the time the Agreements were entered into, the arbitral tribunal finds that the essence of the licenses granted pursuant to the Agreements was licensing of technology, not merely licensing of specific patents. (X-108, § 1; X-111, § 1). Indeed, the recitals of the relevant license agreements confirm that this overall grant, rather than a specific patent license, served as the consideration for Claimants' promises in the contracts. (X-108, p. 1; X-111, p. 1 (both providing that "the Licensee wishes to acquire the EXCLUSIVE right and license to manufacture, have manufactured, sell, offer to sell and use apparatuses or processes embodying, employing, or otherwise covered by the Patents and the Technology throughout the Territory.")). The Agreements licensing the 231B1 Technology licensed to Claimants the use of technology, know-how, and trademarks relating to Respondent's caustic products. (X-108, § 1; X-111, § 1; X-107 §§ 2.1, 11.1, 11.2; X-110 §§ 2.1, 11.1, 11.2). As a result of this license, Claimants were able to, and did, become distributors of those products. (See ASF ¶ 16). Thus, consideration existed for the Agreements relating to the 213B1 Technology.

108. With respect to Claimants' third claim, involving the 102B1 Technology, the overall consideration for Claimants' promises, as with the 231B1 Technology, was the general licensing of that technology rather than a single specific patent license. (See, e.g., X-109, p.1; X-112, p.1 (both providing, in their respective recitals, that "the Licensee wishes to acquire the EXCLUSIVE right and license to manufacture, have manufactured, sell, offer to sell and use apparatuses or processes embodying, employing, or otherwise covered by the Patents and the Technology throughout the Territory.")). The License Agreements concerning the 102B1 Technology grant "the EXCLUSIVE right and license to manufacture, have manufactured, sell, offer to sell and use apparatuses or processes embodying, employing, or otherwise covered by the Patents and the Technology ... throughout the Territory." (X-109, § 1; X-112, § 1). In fact, the parties agreed to "further assurances" clauses requiring the execution of "any and all other papers which may be required to effectuate the purpose and intent" of each agreement, as well as "any and all papers, documents, or other instruments which may be found necessary or desirable to effect the exclusive right and license granted to the Licensee hereunder." (X-109, § 11; X-112, § 11). Respondent agreed to indemnify Claimants against any third-party claims "incurred because of actual or alleged infringement or misappropriation by (i) the Products, (ii) the Technology, or (iii) the use of the apparatuses and methods claimed in the Patents" of third-party rights. (X-109, § 8.A; X-112, § 8-A). Indeed, during the arbitration, Respondent confirmed in writing that the License Agreements in question include a grant by Respondent of rights for use of the specified patents identified by Claimants as necessary for use of the Technology¹ – a written confirmation on which Claimants are entitled to rely with respect to the scope of the licenses. Thus, the arbitral

¹ Respondent's January 20, 2015 Amended Answer and Affirmative Defenses to Claimants' Amended and Corrected Request for Arbitration, ¶ 49.

tribunal finds that Claimants did receive licenses that granted sufficient rights to permit full exploitation of the technology that was the subject of the 102B1 patent, and thus that consideration existed for the Agreements relating to the 102B1 Technology.

109. Accordingly, the arbitral tribunal finds that Claimants have not established their claims to rescind the agreements for lack of consideration, as set forth in Claims II and III.

C. Mutual Mistake

110. Claimants also argued, in their April 30, 2015 First Pre-Hearing Submission, that the Agreements should be rescinded based upon mutual mistake. In its May 15, 2015 Second Pre-Hearing Submission, Respondent objected to the Claimants' mutual-mistake argument as asserting a new claim in the proceedings, after the Terms of Reference and without authorization by the arbitral tribunal. The parties agreed to list, as one of the issues in their June 19, 2015 Agreed Statement of Issues to be Determined by the Tribunal (Phase I), whether Claimants may pursue their claim for rescission on a theory of mutual mistake.

111. Due to the degree of overlap between Claimants' rescission-for-mutual-mistake claim and the rescission-for-misrepresentation claim that was already asserted by the Claimants, and because the parties presented, in their pre-hearing submissions and at the Phase One hearing, evidence covering all aspects of the mutual-mistake claim (and thus there was no meaningful prejudice to Respondent), the arbitral tribunal has determined to admit and decide the mutual-mistake claim as an additional claim pursuant to Article 23(4) of the ICC Rules together with the other, related issues.

112. To establish a mutual mistake sufficient to support rescission of a contract, the party seeking rescission must show, *inter alia*, that both parties were mistaken as to a basic assumption of the contract and "that such mistake did not result solely from the want of such care and diligence

of his part as are exercised by persons of reasonable prudence under like circumstances.” *Rood Co. v. Board of Public Instruction*, 102 So.2d 138, 141-42 (Fla. 1958). In essence, this test requires a higher standard of diligence of the party seeking rescission than the mere reliance required of a party seeking rescission for fraudulent inducement. For the same reasons discussed with respect to the question of reliance in connection with Claimants’ fraudulent-inducement claim (see paragraph 102 above), a majority of the arbitral tribunal concludes that Claimants were not mistaken as to a basic assumption of the contract, and that any relevant gaps in Claimants’ knowledge with respect to corrosiveness and regulatory status were due to Claimants’ failure to exercise such care and diligence as reasonable prudence would require under the circumstances (*i.e.*, reasonable contemporaneous investigation of the facts that were known by Claimants, and of the facts that were readily ascertainable by Claimants, with respect to corrosiveness and regulatory status, matters that Claimants contend were basic assumptions of the contract, which reasonable investigation would have prevented the asserted “mistake”).

D. Defenses and Relief to be Granted

113. Because Claimants have not established all of the required elements of any of their claims, it is unnecessary to consider whether the defenses raised by HEG would have barred those claims had their elements been established.

114. Similarly, because Claimants have not established all of the required elements of any of their claims (which elements are set forth above in paragraphs 96 (fraudulent inducement), 105 (innocent misrepresentation), 106 (lack of consideration), and 112 (mutual mistake), and with respect to which the elements not established are identified in paragraphs 102 (fraudulent inducement), 105 (innocent misrepresentation), 107-108 (lack of consideration), and 112 (mutual mistake)), Claimants are not entitled to relief on those claims, and it is unnecessary to consider the

appropriate relief that should have been granted in the event that a claim has been established. This includes both the principal relief sought by Claimants in the nature of rescission of the contracts, as well as Claimants' ancillary claims for relief in connection with Claims I-III in the form of restitution and punitive damages.

115. Although both sides have requested that they be awarded their costs (including, without limitation, attorneys' fees) in connection with these Phase One proceedings, neither side has submitted a specific amount of attorneys' fees or other costs for which recovery is presently sought. Taking into account the bifurcated nature of these proceedings, the relationship of the parties' various claims and defenses, and the totality of the circumstances of the arbitration thus far, the Arbitral Tribunal has determined to defer any decision on the allocation of costs (including attorneys' fees) to future proceedings. See ICC Rules Art. 37(3).

116. This partial award is a determination of the claims asserted by Claimants 1 and 2 for (a) fraudulent inducement (First Claim), (b) rescission based on failure of consideration due to the absence of 231B1 technology (Second Claim), (c) rescission based on failure of consideration due to the absence of necessary licenses for the 102B1 patents (Third Claim), (d) innocent misrepresentation (admitted pursuant to ICC Rules Art. 23(4)), and (e) mutual mistake (admitted pursuant to ICC Rules Art. 23(4)), and of no other claims or counterclaims in this matter. The Arbitral Tribunal will convene a case management conference shortly with respect to those issues that remain to be decided.

VI. AWARD AND RELIEF GRANTED

117. It is, therefore, the award of the Arbitral Tribunal in this proceeding, by majority decision with respect to the Phase One issues, that:

118. The following claims of Claimants 1 and 2 against Respondent have not been established and are thus dismissed:

- a. The claim for fraudulent inducement (Claimant 1 and 2's First Claim).
- b. The claim for rescission based on failure of consideration due to the absence of 231B1 technology (Claimant 1 and 2's Second Claim).
- c. The claim for rescission based on failure of consideration due to the absence of necessary licenses for the 102B1 patents (Claimant 1 and 2's Third Claim).
- d. Claimant 1 and 2's claim for innocent misrepresentation (admitted pursuant to ICC Rules Art. 23(4)).
- e. Claimant 1 and 2's claim for mutual mistake (which was admitted pursuant to ICC Rules Art. 23(4)).

119. All other matters and claims are reserved for a further award.

Dated: March 4, 2016

Place of arbitration: Orlando, Florida (U.S.A.)


MICHAEL B. CHAVIES
Co-arbitrator


JAMES V. ETSCORN
Co-arbitrator


C. RYAN REETZ
President of the Arbitral Tribunal

EXHIBIT “B”

**IN THE MATTER OF THE
ARBITRATION BETWEEN:**

FLUID ENERGY GROUP LTD. and FLUID)
LUX S.A.R.L.,)
)
Claimants,)
v.)
)
HEARTLAND ENERGY GROUP, LTD,)
JOHN MACDONALD)
and STEPHEN ROWLEY)
)
Respondents.)
)

ICC Case No. 20282/RD

HEARTLAND ENERGY GROUP, LTD.)
)
Counter-Claimant,)
)
v.)
)
FLUID ENERGY GROUP, LTD., FLUID LUX)
S.A.R.L., DARREN THATCHER and)
CLAY PURDY)
)
Counterclaim Respondents.)
)

RESPONDENT HEARTLAND ENERGY GROUP, LTD'S
AMENDED COUNTERCLAIM

Respondent/Counter-Claimant, HEARTLAND ENERGY GROUP, LTD. (“HEG” or “Respondent” or “Counterclaimant”), by and through its undersigned counsel, hereby files this Amended Counterclaim against Claimants/Counter-Respondents, FLUID ENERGY GROUP, LTD. (“FLUID ENERGY”). FLUID LUX S.A.R.L. (“FLUID LUX”), CLAY PURDY (“Mr.

Purdy”) and DARREN THATCHER (“Mr. Thatcher”) (collective referred to as “Claimants”) and state the following as grounds:

THE PARTIES

1. HEARTLAND ENERGY GROUP, LTD. is a corporation formed under the laws of the Republic of Seychelles with an office located at Suite 15, 1st Floor Oliaji Trade Center, Francis Street, Victoria, Mahe, Seychelles.

2. FLUID ENERGY GROUP, LTD. is a corporation formed under the laws of Alberta, Canada with an office located at 214 11th Avenue SE, Calgary, Canada T2G 0X8.

3. FLUID LUX S.A.R.L. is a limited liability company formed under the laws of Luxembourg with an office located at 73 Cote d’Eich, L-1450 Luxembourg.

4. CLAY PURDY (“Mr. Purdy”) is an individual and officer of FLUID ENERGY and FLUID LUX who personally participated in, induced, directed, controlled and financially benefitted from the unlawful conduct alleged herein.

5. DARREN THATCHER (“Mr. Thatcher”) is an individual and officer of FLUID ENERGY and FLUID LUX who personally participated in, induced, directed, controlled and financially benefitted from the unlawful conduct alleged herein.

FORUM AND GOVERNING LAW

6. HEG and FLUID ENERGY were parties to a Manufacturing Agreement which was originally dated October 12, 2012 and was then amended and restated on June 18, 2013 (“Fluid Energy Manufacturing Agreement”). *See* Exhibit A to Request for Arbitration.

7. The Fluid Energy Manufacturing Agreement includes an arbitration clause which calls for arbitration with the International Chamber of Commerce (“ICC”) to be held in ICC’s Florida, USA office. *See* Exhibit A to Request for Arbitration at §16.1.

8. HEG and FLUID ENERGY were also parties to two license agreements originally dated October 10, 2012¹ and then amended and restated on June 18, 2013 (“Fluid Energy License Agreements”). *See* Exhibits B and C to Request for Arbitration.

9. The Fluid Energy License Agreements likewise contain an arbitration and governing law clause identical to the clause in the Fluid Energy Manufacturing Agreement².

10. HEG and FLUID LUX were also parties to a similar manufacturing agreement dated October 10, 2012 and amended and restated on June 18, 2013 (“Fluid Lux Manufacturing Agreement”). *See* Exhibit D to Request for Arbitration.

11. HEG and FLUID LUX were also parties to two license agreements originally dated October 10, 2012³ and then amended and restated on June 18, 2013 (“Fluid Lux license Agreements”). *See* Exhibit E and F to Request for Arbitration.

12. The Fluid Lux Manufacturing and License Agreements all contain an arbitration and governing law clause identical to the clauses in the Fluid Energy Manufacturing and License Agreements. For ease of reference, the license and manufacturing agreements between HEG and

¹ Although Exhibit B has a date of October 10, 2013, this was a typographical error. The original agreement was entered into on October 10, 2012.

² *See* Exhibit A to Request for Arbitration at §16.1; Exhibit B to Request for Arbitration at §§20-21; and Exhibit C to Request for Arbitration at §§20-21.

³ Although Exhibit E has a date of October 10, 2013, this was a typographical error. The original agreement was entered into on October 10, 2012.

FLUID ENERGY on the one hand and HEG and FLUID LUX on the other hand will be referred to as “the Agreements” throughout unless referencing a specific agreement.

13. This case also arises, in part, under the Patent Laws of the United States, 35 U.S.C. § 1 *et seq.*, including 35 U.S.C. §§ 154(d), 271, 281, 283, 284, 285 and 294 and under the Lanham Act, 15 U.S.C. § 1051 *et seq.*, including 15 U.S.C. §§ 1116, 1117, and 1125(a).

14. This Court has subject matter jurisdiction over both the patent infringement and trademark infringement claims in this case in that they both arise out of the Agreements entered into between the parties.

15. Mr. Purdy and Mr. Thatcher are proper Counterclaim Respondents⁴ to HEG’s Counterclaims for patent and trademark infringement in that Mr. Purdy and Mr. Thatcher both personally participated in, directed, controlled and financially benefitted from the unlawful infringement of HEG’s patents and trademarks as discussed herein.

FACTUAL BACKGROUND

16. This case and the relationship between the parties goes back long before HEG and FLUID ENERGY and/or FLUID LUX entered into the Agreements referenced above.

⁴ Note that unlike Claimants’ contract claim against Mr. MacDonald and Mr. Rowley individually, Respondent HEG’s counterclaims for patent and trademark infringement properly include Mr. Thatcher and Mr. Purdy in their individual capacities. This is due to the nature of such intellectual property claims. *See, e.g., Mayo Clinic Jacksonville v. Alzheimer’s Inst. of Am., Inc.*, 683 F. Supp. 2d 1292, 1299 (M.D. Fla. 2009) (citing *Orthokinetics, Inc. v. Safety Travel Chairs, Inc.*, 806 F.2d 1565, 1578-79 (Fed. Cir. 1986) for the proposition that it is not necessary to pierce the corporate veil before holding a corporate officer personally liable for patent infringement); *Chanel, Inc. v. Italian Activewear of Fla., Inc.*, 931 F.2d 1472, 1477-78 (11th Cir. 1991) (stating that “[n]atural persons, as well as corporations, may be liable for trademark infringement under the Lanham Act” and finding corporate defendant’s CEO personally liable for corporate defendant’s infringement).

17. Before HEG was incorporated, there was a company with the name Heartland Solutions, Inc. (“HSI”). Respondent Stephen Rowley (“Mr. Rowley”) was the owner of HSI, and HSI had a Distributor Agreement with Environmental Manufacturing Solutions, LLC (“EMS”) pertaining to a number of different products relevant to the concrete industry.

18. EMS is a chemical company based out of Melbourne, Florida that specializes in providing safe solutions to replace harsh and dangerous acids, solvents and caustics used so prevalently across many different industries. Respondent John MacDonald (“Mr. MacDonald”) is the owner of EMS.

19. Beginning in 2009, in addition to targeting the concrete industry, HSI also began targeting the Oil & Gas industry with EMS’s Barracuda 10K product. HSI, with the knowledge and permission of EMS, re-branded and re-labeled the products as Oil Safe Ar®.

20. Around the same time, Mr. MacDonald incorporated Environmental Manufacturing Solutions Oil and Gas Exploration Products, LLC for the purpose of promoting its products to the Oil & Gas industry. At this time, since HSI was utilizing the name Oil Safe Ar®, Mr. MacDonald decided to come up with a new name to brand his patented synthetic replacements for acids, which is where the name ENVIRO-SYN® came from.

21. Mr. MacDonald and other EMS agents came up with the name at EMS’s offices in Melbourne, Florida. The ENVIRO-SYN® name is a combination of Environmental Manufacturing Solutions’ name and their other trademark registration, SYNTECH®. A true and correct copy of the Trademark Registrations for ENVIRO-SYN® and SYNTECH® are attached hereto as Exhibits “A” and “B” respectively.

22. HEG was incorporated on June 21, 2012 for the purpose of manufacturing, distributing and licensing its ENVIRO-SYN® and Oil Safe Ar® products around the world. HEG is the owner of the entire right, title and interest of United States Trademark Registration No. 4,224,628 on the Principal Register for the mark ENVIRO-SYN® for “synthetic replacement for acids, namely, hydrochloric, phosphoric, hydrofluoric, sulfuric, acetic, and formic acids used in dissolving and removing mineral deposits” in Class 001. *See* Exhibit “A” attached hereto and incorporated herein by reference.

23. Although the ENVIRO-SYN® trademark registration indicates a first use in commerce date of December 2, 2011 in the trademark registration, HEG shipped its first shipment of ENVIRO-SYN® across state lines in November of 2010 and has been using the trademark ever since. In any event, HEG’s first use of the mark, as well as HEG’s trademark application filing date for the mark, pre-date the Agreements at issue.

24. As part of testing the Barracuda 10K formula (re-labeled as Oil Safe Ar® and ENVIRO-SYN®) for use in the Oil & Gas industry, Mr. MacDonald and Mr. Rowley determined that the formula was not strong enough and that it had certain chelating agents that needed to be removed to increase the effectiveness of the product downhole.

25. During this same time, Mr. Thatcher, the current President and COO of FLUID ENERGY and FLUID LUX, was the V.P. of Operations and Technology for the Optifrac Division of Mud Master Drilling Fluid Service (“Mud Master”).

26. Mud Master was a distributor for HSI wherein HSI sold to Mud Master Oil Safe Ar®, and Mud Master, as a distributor, then sold the product to end users.

27. Mr. Rowley, the owner of HSI at the time, and Mr. Thatcher, the V.P. of Mud Master, worked together on a large “frac” job in Turner Valley, Alberta Canada in October of 2011 utilizing the Oil Safe Ar® product for the job.

28. At the frac site there was a hot oiler truck that heats and transfers the frac fluids on site. Mr. Thatcher and Mr. Rowley transferred the Oil Safe Ar® into the hot oiler truck and began to notice the aluminum fittings fail due to corrosion. Mr. Thatcher began to panic. Mr. Thatcher and Mr. Rowley immediately contacted Mr. MacDonald, and Mr. MacDonald instructed Mr. Thatcher and Mr. Rowley that chemical doubling takes place with heating and also reminded them that the new version of Oil Safe Ar®, which was created at Mr. Thatcher’s continued request, was far more active than the original rebranded Barracuda 10K and that they needed to switch out the fittings to stainless steel and/or to stop using the hot oiler truck and finish the job.

29. Mr. Thatcher and Mr. Rowley chose to complete the job with a vacuum truck that was equipped with stainless fittings. The job was completed without error, pumping in excess of 125,000 gallons of Oil Safe AR®.

30. Mr. Thatcher had first-hand knowledge and experience with the fact that Oil Safe Ar®, which was also branded ENVIRO-SYN®, would corrode aluminum and soft steel back in October of 2011, one year prior to entering into the Agreements referenced herein and prior to FLUID ENERGY and FLUID LUX’s incorporation.

31. FLUID ENERGY and FLUID LUX, through Mr. Thatcher, were readily aware that ENVIRO-SYN® would corrode aluminum and soft steel when they first opened their doors because Mr. Thatcher went to those companies armed with this knowledge he acquired through

his experience at Mud Master/Optifrac. Additional proof that FLUID was aware of corrosive effect on aluminum and soft steel from the very beginning is as follows:

- i. FLUID's own ENVIRO-SYN label wherein it clearly states "WARNING! When pumping this product it is strongly recommended to use manufacturer approved hose couplings and fittings. DO NOT USE ALUMINUM FITTINGS. See Exhibit "C" attached hereto.
- ii. A PowerPoint presentation prepared by Darren Thatcher, along with the email correspondence from Mr. Thatcher on October 24, 2012 including a statement at page 7 of the presentation that certain precautions need to take place when pumping the product because the product will react with certain soft metals such as Aluminum and Magnesium. See Exhibit "D" attached hereto.
- iii. Email correspondence between Kevin O 'Donoghue and John MacDonald from June of 2013 pertaining to labels for ENVIRO-SYN CSR and ENVIRO-SYN HCR, created by FLUID, which include a WARNING regarding Aluminum. See Exhibit "E" attached hereto.

32. More importantly, Claimants claim that Respondents fraudulently induced Claimants into the Agreements by repeatedly assuring Claimants that the patented technology was non-corrosive on steel and aluminum is not only false, but is a complete fabrication on the part of Claimants solely done to try and rescind the Agreements.

33. Although it is true that the Licensed Products are non-DOT regulated, this is only relevant in the United States and has absolutely nothing to do with any of the Countries for which Claimants were licensed to sell the Licensed Products.

34. Moreover, each piece of literature attached to the Request for Arbitration as Exhibits H-K are documents that were either falsified by Claimants (Exhibit H) or documents pertaining to Oil Safe Ar® that were never provided to FLUID by any of the Respondents (Exhibits I-K) as alleged by Claimants.

35. In fact, such documents were never reviewed, discussed or even mentioned during any negotiations between Claimants and Respondents and in fact are only being used by Claimants as a way to rescind the Agreements.

36. Claimants also claim in their Request for Arbitration that the two testing reports attached as Exhibits L and M are fraudulent. As seen in the Mutual Confidentiality and Non-Disclosure Agreement, which is attached hereto as Exhibit "F," EMS did in fact hire Del Tech Laboratory Services to perform the tests as well as NASA Support Labs, which will also be proven through the testimony of Ms. Alicea, the Director of both labs.

37. Furthermore, any claims about ENVIRO-SYN® being corrosive are the direct result of Claimants' own actions in increasing the levels of HCL from the prescribed 20 baume to 22 baume without HEG's knowledge and consent. True and correct email correspondence wherein Mr. Thatcher admits to adding in HCL, which would increase the corrosiveness of the products are attached hereto as Exhibit "G."

38. Upon information and belief the inhibitor that Claimants are adding to the Licensed Products without HEG's authorization is identified as NALCO® ASP560. A true and correct copy of the Material Safety Data Sheet ("MSDS") for NALCO® ASP560 is attached hereto as Exhibit "H."

39. As seen in Exhibit "H" under Section 10, NALCO® ASP560 should not be combined or come into contact with products that contain strong alkalies like "ammonia and its solutions." Claimants should be well aware of the fact that the urea that is in the Licensed Products is high in ammonia.

40. Likewise, under Section 14 of the MSDS it states that NALCO® ASP560 is DOT corrosive for transportation purposes. Therefore, any concern on the part of Counterclaim Respondents that its products are now DOT corrosive is a result of their own deliberate actions, not the actions of HEG, Mr. MacDonald or Mr. Rowley. *See* Exhibit “H.”

41. Upon information and belief, the only reason the alleged third party tests referenced at paragraph 14 of the Request for Arbitration came back with a mmpy higher than 6.25 is because Claimants are adding products like NALCO® ASP560 to the Licensed Products without the authorization of HEG and are therefore increasing the corrosive nature of the product as well as causing the product to be DOT corrosive and DOT regulated.

42. Mr. MacDonald expressed his concerns about the changes being made by FLUID LUX and FLUID ENERGY and the corrosive effect of such changes and also made it very clear that HEG would not accept any legal liability for their actions. A true and correct copy of such email correspondence is attached hereto as Exhibit “I.”

43. At the beginning of the relationship between the parties, HEG would manufacture the Licensed Products and provide such products to FLUID LUX and FLUID ENERGY for sale.

44. The Licensed Products as sold to Claimants by Respondent HEG were always considered Non-DOT regulated and below 6.25 mmpy. Therefore, any issues as it relates to an increase in corrosiveness of the product being DOT regulated are a direct result of Claimants’ actions, not Respondents’.

45. From December 10, 2012 through December 12, 2012, Mr. MacDonald and Mr. Rowley, as officers of HEG, trained Mr. Purdy and Mr. Thatcher on how to create their own manufacturing facility, what reactors they needed to purchase, what pumps they needed to

purchase and exactly how to formulate the Licensed Products using methods that are covered by HEG's patented technology and the Agreements. All such training occurred at HEG's manufacturing facility in Grain Valley, MO, and no FLUID employees other than Mr. Purdy and Mr. Thatcher were present.

46. From February 17, 2013 through February 19, 2013, Mr. Purdy and Mr. Thatcher visited HEG's manufacturing facility to learn the ins and outs of the process by which the Licensed Products are manufactured and in particular how to react batches.

47. From April 1, 2013 through April 4, 2013, Mr. Rowley and Mr. Stan Lucas (HEG's Operations Manager) flew to Calgary, Canada to assist Counterclaim Respondents with the set up and installation of their tanks and reactors. Mr. Rowley and Mr. Lucas worked closely with Mr. Thatcher and Mr. Purdy throughout the process.

48. From April 14, 2013 through April 17, 2013, Mr. Rowley and Mr. Lucas returned to Calgary, Canada to finalize the installation of the system and to complete the oversight of Counterclaim Respondents' first batch of Licensed Product produced at their facility. This was done to ensure that Counterclaim Respondents knew exactly how to produce the batches as per the methods contained in HEG's patents and the Agreements between the parties.

49. From August 18, 2013 through August 20, 2013, Mr. Rowley and Mr. MacDonald visited FLUID ENERGY to inspect the facility to ensure that everything was being done as instructed.

50. Over the past year, Claimants have committed numerous violations of the Agreements as well as committed other actions, such as investor fraud and breach of fiduciary duty, which are not part of this proceeding, but are relevant nonetheless. Claimants are now

attempting to claim fraud in the inducement as a way to avoid having to pay all that is owed to HEG and as a way to save face with their shareholders and investors.

51. As seen in the Audit Report dated January 22, 2014 and attached hereto as Exhibit “J” FLUID has continually violated the Agreements by (1) failing to provide statements within fifteen (15) days after the last day of each month⁵; making late payments and underpayment throughout the 2013 calendar year⁶; failing to meet the minimum production levels for any quarter in the year 2013⁷; and by improperly selling competing goods (Matrix 100⁸).

52. Additional violations include, but are not limited to:

(a) Falsely stating “**worldwide**” rights on the www.fluidenergy.com website, when the Agreements between the parties were only for specified territories, not worldwide. *See* Exhibit “K.”

(b) Falsely stating that FLUID had rights to the patented technology in the **United States** when no such rights existed. *See* Exhibit “L.”

(c) Failing to pay past due invoices in the amount of \$222,650.00 USD. *See* Exhibit “M.”

(d) Offering for sale and selling the ENVIRO-SYN® patented products outside their territory to ENOVO and North American Chemical, companies in the U.S. *See* Exhibit “N.”

(e) Falsely labeling the Licensed Products as DfE approved when the labels were never approved and FLUID never asked HEG to obtain approvals on the labels. *See* Exhibit “O.”

(f) Falsely inducing investors to invest in FLUID for an amount close to or around \$10 million dollars under the guise of an exclusive worldwide license with HEG for the patented ENVIRO-SYN® products when no such worldwide license existed⁹;

(g) Failing to pay HEG royalties in the amount of \$648,810.00 USD ;

⁵ *See* Paragraph 6(a) of the License Agreements.

⁶ *See* Paragraphs 6.3 and 6.5 of the Manufacturing Agreement.

⁷ *See* Paragraphs 5.1 and 5.2 of the Manufacturing Agreements.

⁸ *See* Paragraph 3.2 of the Manufacturing Agreements.

⁹ Upon information and belief, Clay Purdy blatantly misrepresented to investors that FLUID had worldwide rights to the patented HEG technology in order to obtain investments in FLUID.

(h) Falsely stating in a post on the www.globalpetroleum.com website that the ENVIRO-SYN® products were “**developed and patented by Fluid Energy Group**” when the ENVIRO-SYN® products were developed and patented by HEG. *See* Exhibit “P.”

(i) Admitting in email correspondence that the technology is HEG’s and acknowledging that FLUID needed to get permission to send out news releases, but then falsely stating in the proposed news release that FLUID has “**exclusive oil & gas industry manufacturing and distribution rights**” in an attempt to garner more investors under false pretenses. *See* Composite Exhibit “Q¹⁰.”

(j) Falsely stating on Todnem’s website that “Enviro-Syn is the trade name of a line of environmentally and HSE friendly acid and caustic replacements **developed and patented by Fluid Energy Group.**” *See* Exhibit “R.”

53. The FLUID Claimants sent Respondents a letter attempting to rescind the Agreements on April 11, 2014 on an allegation on fraud in the inducement. A true and correct copy of the letter is attached hereto as Exhibit “S.”

54. Respondent, through the undersigned, responded to the letter refuting the allegations of fraud in the inducement and alleging many of the violations addressed above. A true and correct copy of the letter is attached hereto as Exhibit “T.”

55. Claimants are trying to pull the wool over this Panel’s eyes by falsely claiming fraud in the inducement because it is the only way Claimants can get out of the Agreements that they have repeatedly violated.

56. After trying to resolve the serious breaches by Claimants to no avail, and after receiving a copy of the Request for Arbitration, on June 12, 2014, Respondents through the undersigned attorney served a Notice of Termination on counsel for Claimants. A true and correct copy of the Notice of Termination is attached hereto as Exhibit “U.”

¹⁰ It should be noted that John MacDonald never authorized FLUID to send out this news release.

57. As per paragraphs 4(c) and 4(d) of the License Agreements and paragraph 14.2(c) of the Manufacturing Agreements, the termination is effective 30 days from June 12, 2014 if Claimants failed to cure such breach.

58. Claimants failed to respond to the Termination Letter or cure any of the breaches addressed in the letter.

59. As per paragraphs 4(b) and 22 of the License Agreements, any manufacture, sale or offer for sale of the Licensed Products after July 12, 2014 is not only considered patent infringement, but is breach of the covenant not to compete, which includes a two year non-compete provision. To the extent that the manufacture and sale also includes the ENVIRO-SYN® mark, it is also trademark infringement.

60. As admitted to by Claimants and as seen in the Agreements, Respondent HEG agreed to license certain patented technology known as the “231B1” and “102B1” technologies.

61. The “231B1” and “102B1” technologies refer to several patents either owned or exclusively licensed by HEG.

62. The patents are relevant to this case in that they were licensed to Claimants and, since the termination of the Agreements, are currently being infringed by Claimants, Mr. Purdy and Mr. Thatcher through use, sales and offers for sale in the United States. These patents include, but are not limited to, U.S. Patent Nos. 8,580,047, 8,430,971 and 8,784,573.

63. HEG is the exclusive licensee to U.S. Patent No. 8,850,047 (“the ‘047 Patent”) titled “Methods for using improved urea hydrochloride compositions.” A true and correct copy of the exclusive license and the ‘047 Patent are attached hereto and incorporated herein as Exhibits “V” and “W” respectively.

64. HEG is the exclusive licensee to U.S. Patent No. 8,430,971 (“the ‘971 Patent”) titled “Composition for treatment of drilling fluid and associated methods.” A true and correct copy of the exclusive license and the ‘971 Patent are attached hereto and incorporated herein as Exhibits “X” and “Y” respectively.

65. HEG is the exclusive licensee to U.S. Patent No. 8,784,573 (“the ‘573 Patent”) titled “Methods for using improved urea hydrochloride compositions” A true and correct copy of the exclusive license and the ‘573 Patent are attached hereto and incorporated herein as Exhibits “Z” and “AA” respectively.

66. Claimants, through the direction, control, with the financial benefit and with the actual knowledge of Mr. Thatcher, are manufacturing, offering for sale and selling products covered under the ‘047, ‘971 and ‘573 Patents to customers throughout the United States, which infringe one or more of the claims of the ‘047, ‘971 and ‘573 Patents literally and/or through the doctrine of equivalents.

67. Mr. Thatcher has further induced the Claimants to infringe the ‘047, ‘971 and ‘573 Patents by actively and knowingly aiding and abetting Claimants’ infringement. In light of Mr. Thatcher’s conduct alleged herein, Mr. Thatcher was faced with not having a license to use the Licensed Products, yet, in an attempt to prevent the FLUID companies from going under, he induced the companies to infringe the Patents by continuing to manufacture, offer for sale and sell products covered under the ‘047, ‘971 and ‘573 Patents to customers throughout the United States.

68. Claimants, through the direction, control, with the financial benefit and with the actual knowledge of Mr. Purdy are manufacturing, offering for sale and selling products covered

under the '047, '971 and '573 Patents to customers throughout the United States, which infringe one or more of the claims of the '047, '971 and '573 Patents literally and/or through the doctrine of equivalents.

69. Mr. Purdy has further induced the Claimants to infringe the '047, '971 and '573 Patents by actively and knowingly aiding and abetting Claimants' infringement. In light of Mr. Purdy's conduct alleged herein, Mr. Purdy was faced with not having a license to use the Licensed Products, yet, in an attempt to prevent the FLUID companies from going under, he induced the companies to infringe the Patents by continuing to manufacture, offer for sale and sell products covered under the '047, '971 and '573 Patents to customers throughout the United States.

70. Claimants, through the direction and control, and with the financial benefit and actual knowledge of Mr. Purdy and Mr. Thatcher are using, manufacturing, offering for sale and selling products under HEG's trademarked name ENVIRO-SYN® and have in fact filed for trademark registrations for ENVIRO-SYN in the United States. Mr. Purdy and Mr. Thatcher were the moving force behind the infringing use of the mark. True and correct copies of Claimants' unauthorized use of the ENVIRO-SYN® mark and trademark applications are attached hereto as Composite Exhibit "BB." Note that Mr. Purdy signed both applications and falsely declared that "no other person, firm, corporation, or association has the right to use the mark in commerce [...]," knowing full well that HEG owned the ENVIRO-SYN® mark and had actually licensed it for Claimants' use.

71. Claimants, through the direction and control, and with the financial benefit and actual knowledge of Mr. Purdy and Mr. Thatcher are also continuing to utilize certain videos on

their website at the following link <http://www.fluidenergygroup.com/about-us/video-gallery/>, which were created during the licensed period utilizing the Licensed Products. Such videos are now false and misleading in that Claimants are attempting to pass off their products as genuine HEG products when in fact they are not.

72. FLUID LUX, FLUID ENERGY, Mr. Thatcher and Mr. Purdy's use of the ENVIRO-SYN® mark in association with the sale of infringing products is not authorized or licensed.

73. Respondent has been damaged as a result of Claimants' activities described herein.

74. Respondent has performed all conditions precedent to be performed by Respondent or the conditions have occurred. Respondent has been forced to retain the law firm of Beusse Wolter Sanks & Maire, P.A. for representation in this action.

CLAIM I
BREACH OF CONTRACT
(Against FLUID ENERGY)

75. HEG hereby adopts and re-alleges paragraphs 1-12, 16-20, 24-59, 66-74 above as fully and completely as if set forth herein.

76. HEG and FLUID ENERGY entered into one Manufacturing Agreement and two License Agreements pertaining to the manufacture and sale of certain Licensed Products.

77. FLUID ENERGY, as described in more detail above, breached the following provisions of the Fluid Energy Manufacturing Agreement:

- a. Section 2.5- FLUID ENERGY breached Section 2.5 of the Manufacturing Agreement by marketing and selling the Licensed Products outside of FLUID

ENERGY's territory without the written consent of HEG and during the term of the Agreement.

- b. Section 2.10- FLUID ENERGY breached Section 2.10 of the Manufacturing Agreement by conducting unauthorized testing from a third-party laboratory without prior approval from HEG.
- c. Section 3.2- FLUID ENERGY breached Section 3.2 of the Manufacturing Agreement by selling competitive goods during the term of the Agreements.
- d. Section 5.1- FLUID ENERGY breached Section 5.1 of the Manufacturing Agreement by failing to meet the quota of \$1,000,000 worth of Licensed Products sold for the year 2013.
- e. Section 5.2- FLUID ENERGY breached Section 5.2 of the Manufacturing Agreement by failing to meet the quotas, failing to amend its rights to non-exclusive rights as per 5.2(b) for 2014, failing to make payment equal to the shortfall of such quota to maintain exclusive rights as per 5.2(a) for 2014, while at the same time representing to investors, customers, dealers and via the web that FLUID ENERGY maintained exclusive rights.
- f. Section 6.3- FLUID ENERGY breached Section 6.3 of the Manufacturing Agreement by failing to make payments within 30 days of the date of invoice.
- g. Section 6.5 FLUID ENERGY breached Section 6.5 of the Manufacturing Agreement by failing to pay 8.0% interest on all overdue balances outstanding.

- h. Section 11.1 FLUID ENERGY breached Section 11.1 of the Manufacturing Agreement by improperly and without authorization obtaining a trademark registration in Canada for ENVIRO-SYN as well as filing trademark applications in the U.S. for ENVIRO-SYN.
- i. Section 11.2 FLUID ENERGY breached Section 11.2 of the Manufacturing Agreement by improperly telling investors and potential investors that FLUID ENERGY was the owner of the Patents and Licensed Technology as well as attempting to sell such Licensed Products outside of FLUID ENERGY's licensed territory.

78. FLUID ENERGY, as described in more detail above breached the following provisions of the Fluid Energy License Agreements:

- a. Section 4(B) and 22 – FLUID ENERGY breached Sections 4(B) and 22 by making, using, selling and offering to sell the Licensed Products after July 12, 2014 in breach of the two year non-compete provision.
- b. Section 5(A) FLUID ENERGY breached Section 5(A) of the License Agreements by failing to pay royalties for the months of January – June, 2014 and failing to meet the sales minimum by the deadline of December 31, 2013.
- c. Section 6(A) FLUID ENERGY breached Section 6(A) of the License Agreements by failing to furnish HEG written statements under oath specifying the total number of products sold during the preceding month for the months of October 2012-December 2013 and March-June of 2014.

d. Section 6(B) FLUID ENERGY breached Section 6(B) of the License Agreements by failing to make royalty payments for the months of January – June, 2014.

79. HEG has performed all conditions precedent to bring this cause of action or all of the conditions have occurred.

80. As a direct and proximate result of FLUID ENERGY's breach of the provisions outlined above, HEG has suffered loss and damage.

81. HEG has been damaged in an amount that is at least equal to \$1,873,755.67 which takes into account the four (4) invoices totaling \$224,945.67¹¹, unpaid royalties to date amounting \$648,810.00 and the unpaid exclusivity fee of \$1,000,000.00.

WHEREFORE, HEG prays for the following relief against FLUID ENERGY:

a. That FLUID ENERGY be required to pay HEG the actual damages suffered as a result of the breach, including, but not limited to, all royalties due and owing, all payments for products received, the unpaid exclusivity fee and any other damages as a result of Claimants' conduct.

b. That HEG recover its costs associated with this proceeding, including the arbitrators' fees, costs of any experts or any other assistance required by the tribunal and fees and expenses of the administrator as per Article 37(4).

c. That HEG recover pre-award and post-judgment interest at the amount allowed under the Agreements (8.0%).

¹¹ True and correct copies of the invoices are attached hereto as Exhibit CC.

d. That HEG be provided such further and other relief as this tribunal deems just and proper.

CLAIM II
BREACH OF CONTRACT
(Against FLUID LUX)

82. HEG hereby adopts and re-alleges paragraphs 1-12, 16-20, 24-59, 66-74 above as fully and completely as if set forth herein.

83. HEG and FLUID LUX entered into one Manufacturing Agreement and two License Agreements pertaining to the manufacture and sale of certain Licensed Products.

84. FLUID LUX, as described in more detail above breached the following provisions of the Fluid Lux Manufacturing Agreement:

- a. Section 2.5- FLUID LUX breached Section 2.5 of the Manufacturing Agreement by marketing and selling the Licensed Products outside of FLUID LUX's territory without the written consent of HEG and during the term of the Agreement.
- b. Section 2.10- FLUID LUX breached Section 2.10 of the Manufacturing Agreement by conducting unauthorized testing from a third-party laboratory without prior approval from HEG.
- c. Section 3.2- FLUID LUX breached Section 3.2 of the Manufacturing Agreement by selling competitive goods during the term of the Agreements.
- d. Section 5.1- FLUID LUX breached Section 5.1 of the Manufacturing Agreement by failing to meet the quota of \$1,000,000 worth of Licensed Products sold for the year 2013.

- e. Section 5.2- FLUID LUX breached Section 5.2 of the Manufacturing Agreement by failing to meet the quotas, failing to amend its rights to non-exclusive rights as per 5.2(b) for 2014, failing to make payment equal to the shortfall of such quota to maintain exclusive rights as per 5.2(a) for 2014, while at the same time representing to investors, customers, dealers and via the web that FLUID LUX maintained exclusive rights.
- f. Section 6.3- FLUID LUX breached Section 6.3 of the Manufacturing Agreement by failing to make payments within 30 days of the date of invoice.
- g. Section 6.5 FLUID LUX breached Section 6.5 of the Manufacturing Agreement by failing to pay 8.0% interest on all overdue balances outstanding.
- h. Section 11.2 FLUID LUX breached Section 11.2 of the Manufacturing Agreement by improperly telling investors and potential investors that FLUID LUX was the owner of the Patents and Licensed Technology as well as attempting to sell such Licensed Products outside of FLUID LUX's licensed territory.

85. FLUID LUX, as described in more detail above breached the following provisions of the Fluid Lux License Agreements:

- a. Section 4(B) and 22 – FLUID LUX breached Sections 4(B) and 22 by making, using, selling and offering to sell the Licensed Products after July 12, 2014 in breach of the two year non-compete provision.

- b. Section 5(A) FLUID LUX breached Section 5(A) of the License Agreements by failing to pay royalties for the months of January – June, 2014 and failing to meet the sales minimum by the deadline of December 31, 2013.
- c. Section 6(A) FLUID LUX breached Section 6(A) of the License Agreements by failing to furnish HEG written statements under oath specifying the total number of products sold during the preceding month for the months of October 2012-December 2013 and March-June of 2014.
- d. Section 6(B) FLUID LUX breached Section 6(B) of the License Agreements by failing to make royalty payments for the months of January – June, 2014.

86. HEG has performed all conditions precedent to bring this cause of action or all of the conditions have occurred.

87. As a direct and proximate result of FLUID LUX's breach of the provisions outlined above, HEG has suffered loss and damage.

88. HEG has been damaged in amount that is at least equal to \$1,873,755.67 which takes into account the 4 invoices totaling \$224,945.67¹², unpaid royalties to date amounting \$648,810.00 and the unpaid exclusivity fee of \$1,000,000.00.

WHEREFORE, HEG prays for the following relief against FLUID LUX:

a. That FLUID LUX be required to pay HEG the actual damages suffered as a result of the breach, including, but not limited to, all royalties due and owing, all payments for products received, the unpaid exclusivity fee and any other damages as a result of Claimants' conduct.

¹² True and correct copies of the invoices are attached hereto as Exhibit CC.

b. That HEG recover its costs associated with this proceeding, including the arbitrators' fees, costs of any experts or any other assistance required by the tribunal and fees and expenses of the administrator as per Article 37(4).

c. That HEG recover pre-award and post-judgment interest at the amount allowed under the Agreements (8.0%).

d. That HEG be provided such further and other relief as this tribunal deems just and proper.

CLAIM III
PATENT INFRINGEMENT (the '047 PATENT)
(Against FLUID ENERGY, FLUID LUX, MR. PURDY and MR. THATCHER)

89. HEG hereby adopts and re-alleges paragraphs 1-15, 37-74 above as fully and completely as if set forth herein.

90. HEG is the exclusive licensee to United States Patent No. 8,580,047 ("the '047 Patent") at all times material hereto. *See* Exhibit "W."

91. The '047 Patent covers methods for improved urea hydrochloride compositions.

92. Claimants, FLUID LUX and FLUID ENERGY, through the participation, direction, control and with the financial benefit and actual knowledge of Mr. Purdy and Mr. Thatcher are making, using, selling and offering for sale products that are produced using methods disclosed and claimed in the '047 Patent, without the authorization of HEG, in violation of 35 U.S.C. §§271(a), (b), and (g).

93. Mr. Purdy and Mr. Thatcher actively and knowingly induced the infringement alleged in Paragraph 92 by aiding and abetting FLUID LUX's and FLUID ENERGY's infringement.

94. FLUID LUX, FLUID ENERGY, Mr. Purdy and Mr. Thatcher's aforesaid activities have been without authority and/or license from HEG and are considered intentional and willful.

95. HEG is entitled to recover from the FLUID LUX, FLUID ENERGY, Mr. Purdy and Mr. Thatcher the damages sustained by HEG as a result of the wrongful acts alleged herein in an amount subject to proof at trial, which, by law, cannot be less than a reasonable royalty, together with interest and costs as fixed by this tribunal under 35 U.S.C. § 284.

96. FLUID LUX, FLUID ENERGY, Mr. Purdy and Mr. Thatcher's infringement of HEG's exclusive rights under the '047 Patent will continue to damage HEG, causing irreparable harm for which there is no adequate remedy at law, unless enjoined by this tribunal.

WHEREFORE, HEG respectfully requests the following relief against Counterclaim Respondents.

a. That Counterclaim Respondents and all employees, independent contractors, agents or those acting in concert be preliminarily and permanently enjoined from:

- i. Making, using, offering for sale or selling synthetic acid replacements utilizing the methods claimed in the '047 Patent;
- ii. Otherwise infringing on the '047 Patent.

b. That Counterclaim Respondents be ordered to pay compensatory damages to HEG pursuant to 35 U.S.C. §284.

c. That HEG be entitled to enhancement of damages against Counterclaim Respondents pursuant to 35 U.S.C. §284.

d. That HEG be awarded its reasonable attorneys' fees and costs pursuant to 35 U.S.C. §285 and Federal Rule of Civil Procedure 54(d).

e. That HEG be awarded prejudgment and post judgment interest.

f. That this tribunal provides such other and further relief that it deems necessary and reasonable.

CLAIM IV
PATENT INFRINGEMENT (the '971 PATENT)
(Against FLUID ENERGY, FLUID LUX, MR. PURDY and MR. THATCHER)

97. HEG hereby adopts and re-alleges paragraphs 1-15, 37-74 above as fully and completely as if set forth herein.

98. HEG is the exclusive licensee to United States Patent No. 8,430,971 ("the '971 Patent") at all times material hereto. *See* Exhibit "Y."

99. The '971 Patent covers compositions for treatment of a drilling fluid and associated methods therewith.

100. Claimants, FLUID LUX and FLUID ENERGY, through the participation, direction, control and with the financial benefit and actual knowledge of Mr. Purdy and Mr. Thatcher are making, using, selling and offering for sale products that are produced using methods disclosed and claimed in the '971 Patent, without the authorization of HEG, in violation of 35 U.S.C. §§271(a), (b), and (g).

101. Mr. Purdy and Mr. Thatcher actively and knowingly induced the infringement alleged in Paragraph 100 by aiding and abetting FLUID LUX's and FLUID ENERGY's infringement.

102. FLUID LUX, FLUID ENERGY, Mr. Purdy and Mr. Thatcher's aforesaid activities have been without authority and/or license from HEG and are considered intentional and willful.

103. HEG is entitled to recover from the FLUID LUX, FLUID ENERGY, Mr. Purdy and Mr. Thatcher the damages sustained by HEG as a result of the wrongful acts alleged herein in an amount subject to proof at trial, which, by law, cannot be less than a reasonable royalty, together with interest and costs as fixed by this tribunal under 35 U.S.C. § 284.

104. FLUID LUX, FLUID ENERGY, Mr. Purdy and Mr. Thatcher's infringement of HEG's exclusive rights under the '971 Patent will continue to damage HEG, causing irreparable harm for which there is no adequate remedy at law, unless enjoined by this tribunal.

WHEREFORE, HEG respectfully requests the following relief against Counterclaim Respondents.

- a. That Counterclaim Respondents and all employees, independent contractors, agents or those acting in concert be preliminarily and permanently enjoined from:
 - i. Making, using, offering for sale or selling synthetic acid replacements utilizing the methods claimed in the '971 Patent;
 - ii. Otherwise infringing on the '971 Patent.
- b. That Counterclaim Respondents be ordered to pay compensatory damages to HEG pursuant to 35 U.S.C. §284.
- c. That HEG be entitled to enhancement of damages against Counterclaim Respondents pursuant to 35 U.S.C. §284.

d. That HEG be awarded its reasonable attorneys' fees and costs pursuant to 35 U.S.C. §285 and Federal Rule of Civil Procedure 54(d).

e. That HEG be awarded prejudgment and post judgment interest.

f. That this tribunal provides such other and further relief that it deems necessary and reasonable.

CLAIM V
PATENT INFRINGEMENT (the '573 PATENT)
(Against FLUID ENERGY, FLUID LUX, MR. PURDY and MR. THATCHER)

105. HEG hereby adopts and re-alleges paragraphs 1-15, 37-74 above as fully and completely as if set forth herein.

106. HEG is the exclusive licensee to United States Patent No. 8,784,573 ("the '573 Patent") at all times material hereto. *See* Exhibit "AA."

107. The '573 Patent covers methods for using improved urea hydrochloride compositions.

108. Claimants, FLUID LUX and FLUID ENERGY, through the participation, direction, control and with the financial benefit and actual knowledge of Mr. Purdy and Mr. Thatcher are making, using, selling and offering for sale products that are produced using methods disclosed and claimed in the '573 Patent, without the authorization of HEG, in violation of 35 U.S.C. §§271(a), (b), and (g).

109. Mr. Purdy and Mr. Thatcher actively and knowingly induced the infringement alleged in Paragraph 108 by aiding and abetting FLUID LUX's and FLUID ENERGY's infringement.

110. FLUID LUX, FLUID ENERGY, Mr. Purdy and Mr. Thatcher's aforesaid activities have been without authority and/or license from HEG and are considered intentional and willful.

111. HEG is entitled to recover from the FLUID LUX, FLUID ENERGY, Mr. Purdy and Mr. Thatcher the damages sustained by HEG as a result of the wrongful acts alleged herein in an amount subject to proof at trial, which, by law, cannot be less than a reasonable royalty, together with interest and costs as fixed by this tribunal under 35 U.S.C. § 284.

112. FLUID LUX, FLUID ENERGY, Mr. Purdy and Mr. Thatcher's infringement of HEG's exclusive rights under the '573 Patent will continue to damage HEG, causing irreparable harm for which there is no adequate remedy at law, unless enjoined by this tribunal.

WHEREFORE, HEG respectfully requests the following relief against Counterclaim Respondents.

- a. That Counterclaim Respondents and all employees, independent contractors, agents or those acting in concert be preliminarily and permanently enjoined from:
 - i. Making, using, offering for sale or selling synthetic acid replacements utilizing the methods claimed in the '573 Patent;
 - ii. Otherwise infringing on the '573 Patent.
- b. That Counterclaim Respondents be ordered to pay compensatory damages to HEG pursuant to 35 U.S.C. §284.
- c. That HEG be entitled to enhancement of damages against Counterclaim Respondents pursuant to 35 U.S.C. §284.

d. That HEG be awarded its reasonable attorneys' fees and costs pursuant to 35 U.S.C. §285 and Federal Rule of Civil Procedure 54(d).

e. That HEG be awarded prejudgment and post judgment interest.

f. That this tribunal provides such other and further relief that it deems necessary and reasonable.

CLAIM VI
TRADEMARK INFRINGEMENT UNDER 15 U.S.C. §1114
(Against FLUID ENERGY, FLUID LUX, MR. PURDY and MR. THATCHER)

113. HEG hereby adopts and re-alleges paragraphs 1-15, 19-24, 66-74 above as fully and completely as if set forth herein.

114. Respondent HEG is the owner of all right, title, and interest in U.S. Trademark Reg. No. 4,224,628 for ENVIRO-SYN®.

115. Claimants were previously licensed to use the mark ENVIRO-SYN® mark in connection with the promotion, advertising, sale, and offering of the Licensed Products for sale, but such license was revoked on June 12, 2014 as found in the Termination Letter attached hereto as Exhibit "U."

116. Claimants' use in commerce of the identical mark ENVIRO-SYN® in association with identical goods is likely to cause confusion among consumers and has in fact already caused confusion in that customers believe they are receiving the true ENVIRO-SYN® licensed products when in fact this is not true.

117. Claimants' use of the mark has been at the direction, control and financial benefit of Mr. Purdy and Mr. Thatcher, and they were the moving force behind the infringing use of the mark.

118. As a direct and proximate result of Claimants' infringing use of the ENVIRO-SYN® mark, Claimants have caused Respondent to lose profits, and to lose goodwill associated with the ENVIRO-SYN® mark.

119. Respondent HEG will be irreparably damaged by continued loss of profits, loss of goodwill and loss of control over the reputation of the ENVIRO-SYN® mark unless FLUID LUX, FLUID ENERGY, Mr. Thatcher and Mr. Purdy are prevented from continuing to promote, advertise, sell or to offer the no longer Licensed Products with the identical ENVIRO-SYN mark.

120. FLUID LUX, FLUID ENERGY, Mr. Thatcher and Mr. Purdy have thereby created a likelihood of confusion in the market place that will continue and increase if FLUID LUX, FLUID ENERGY, Mr. Thatcher and Mr. Purdy are permitted to continue their unauthorized use and misappropriation of Respondent's ENVIRO-SYN® trademark.

121. FLUID LUX, FLUID ENERGY, Mr. Thatcher and Mr. Purdy continued to use the ENVIRO-SYN® trademark after such license was terminated and have thereby infringed Respondent's mark willfully and with wanton disregard of Respondent's rights, and will continue to do so unless enjoined.

122. Once FLUID LUX, FLUID ENERGY, Mr. Thatcher and Mr. Purdy's infringing conduct was brought to their attention by HEG; FLUID LUX, FLUID ENERGY, Mr. Thatcher and Mr. Purdy refused to stop using the ENVIRO-SYN® mark and made a deliberate decision to continue using the ENVIRO-SYN® mark to advertise, promote, offer for sale, and sell their infringing goods.

123. FLUID LUX, FLUID ENERGY, Mr. Thatcher and Mr. Purdy's use and continued use of the ENVIRO-SYN mark is willful, wanton, and shows a reckless disregard for HEG's rights.

124. HEG has been damaged and is likely to be further damaged by FLUID LUX, FLUID ENERGY, Mr. Thatcher and Mr. Purdy's infringing acts, and that damage will be irreparable unless Claimants' conduct is enjoined.

WHEREFORE, HEG respectfully requests the following relief against Counterclaim Respondents.

a. That Counterclaim Respondents and all employees, independent contractors, agents or those acting in concert be preliminarily and permanently enjoined from:

- i. Using the ENVIRO-SYN® mark or any mark that is confusingly similar thereto in association with the advertising, promotion, offering for sale or sale of synthetic acid replacements or any products similar thereto;
- ii. Otherwise infringing on the ENVIRO-SYN® mark.

b. That Counterclaim Respondents be ordered to pay all profits received by Counterclaim Respondents as a result of the infringing activity and compensate HEG for any damages sustained pursuant to 15 U.S.C. §1117.

c. That the tribunal award HEG treble damages because of the intentional and willful acts set forth herein pursuant to 15 U.S.C. §1117(a).

d. That this case be deemed exceptional and Counterclaim Respondents be ordered to pay HEG reasonable attorney's fees pursuant to 15 U.S.C. §1117(a).

e. That this tribunal provides such other and further relief that it deems necessary and reasonable.

COUNT VII
(TRADEMARK INFRINGEMENT AND UNFAIR COMPETITION
UNDER 15 U.S.C. §1125(a))

125. Respondent HEG re-alleges each and every allegation set forth in 1-15, 19-24, 50-74 above, as if fully set forth herein.

126. Respondent HEG has used the ENVIRO-SYN® mark in interstate commerce to advertise, promote, and distinctly identify its synthetic acid goods since at least as early as November of 2010.

127. FLUID LUX, FLUID ENERGY, Mr. Thatcher and Mr. Purdy's continued to use the ENVIRO-SYN® mark to promote their infringing goods after the license was revoked on June 12, 2014 constitutes trademark infringement and unfair competition, and such use of the mark has been at the direction, control and financial benefit of Mr. Purdy and Mr. Thatcher, who were the moving force behind the infringing use of the mark.

128. Respondent's use of the ENVIRO-SYN® mark in interstate commerce pre-dates FLUID LUX, FLUID ENERGY, Mr. Thatcher and Mr. Purdy's adoption and use of the ENVIRO-SYN® mark.

129. FLUID LUX, FLUID ENERGY, Mr. Thatcher and Mr. Purdy's unauthorized use of the ENVIRO-SYN® mark is likely to cause confusion, mistake, or to deceive customers as to Respondent's affiliation, connection, association, sponsorship, or approval of FLUID LUX, FLUID ENERGY, Mr. Thatcher and Mr. Purdy's goods.

130. Respondent has been damaged and is likely to be further damaged by FLUID LUX, FLUID ENERGY, Mr. Thatcher and Mr. Purdy's infringing acts, and that damage will be irreparable unless such conduct is enjoined.

131. Once FLUID LUX, FLUID ENERGY, Mr. Thatcher and Mr. Purdy's infringing conduct was brought to their attention by HEG, FLUID LUX, FLUID ENERGY, Mr. Thatcher and Mr. Purdy refused to stop using the ENVIRO-SYN® mark and made a deliberate decision to continue using the ENVIRO-SYN® mark to advertise, promote, offer for sale, and sell their infringing goods.

132. FLUID LUX, FLUID ENERGY, Mr. Thatcher and Mr. Purdy's use and continued use of the ENVIRO-SYN® mark is willful, wanton, and shows a reckless disregard for Respondent's rights.

WHEREFORE, HEG respectfully requests the following relief against Counterclaim Respondents.

a. That Counterclaim Respondents and all employees, independent contractors, agents or those acting in concert be preliminarily and permanently enjoined from:

- i. Using the ENVIRO-SYN® mark or any mark that is confusingly similar thereto in association with the advertising, promotion, offering for sale or sale of synthetic acid replacements or any products similar thereto;
- ii. Otherwise infringing on the ENVIRO-SYN® mark.

b. That Counterclaim Respondents be ordered to pay all profits received by Counterclaim Respondents as a result of the infringing activity and compensate HEG for any damages sustained pursuant to 15 U.S.C. §1117.

c. That the tribunal award HEG treble damages because of the intentional and willful acts set forth herein pursuant to 15 U.S.C. §1117(a).

d. That this case be deemed exceptional and Counterclaim Respondents be ordered to pay HEG reasonable attorney's fees pursuant to 15 U.S.C. §1117(a).

e. That this tribunal provides such other and further relief that it deems necessary and reasonable.

DATED this 8th day of August, 2014.

Respectfully submitted,

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By: /s/ Amber N. Davis
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been mailed and emailed to Torys, LLP c/o David Wawro, Esq. ([dwawro@torys.com](mailto:dawawro@torys.com)) and Jaclyn Leader

jleader@torys.com) 1114 Avenue of the Americas, 23rd Floor, New York, NY 10036 and five (5) hard copies have been mailed to the International Chamber of Commerce (ICC) c/o Sicana, Inc., 1212 Avenue of the Americas, New York, NY 10036 and emailed to ica9@iccwbo.org this 8th day of August, 2014.

/s/ Amber N. Davis
Attorney