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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

CH2E NEVADA LLC, a Nevada limited liability company, Plaintiff, v. LATIF MAHJOOB, an individual; AMERICAN COMBUSTION TECHNOLOGIES OF CALIFORNIA, INC., a California corporation; DOES 1-X; and ROE COMPANIES XI-XX, inclusive, Defendants.	Case No. 2:15-cv-00694-JCM-NJK **REPLY IN FURTHER SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT**

Plaintiff CH2E, by and through undersigned counsel, hereby submits this Reply in Further Support of its Motion for Partial Summary Judgment (the "Motion").[1]

[1] Capitalized terms are as defined in the Motion.

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PRELIMINARY STATEMENT

As CH2E made clear in the Motion, to resolve the limited issues currently before the Court—which will significantly streamline the disputes for trial and clarify the strengths and weaknesses of the parties' positions—the Court does not need to address whether the Equipment was capable of operating at the levels warranted in the Agreement. Rather, CH2E's Motion can be resolved by simply applying unambiguous contractual provisions to undisputed facts.

In the Opposition, ACTI does not deny any of the facts presented by CH2E that, as a matter of law, support summary judgment. In fact, ACTI does not respond at all to CH2E's Statement of Undisputed Material Facts. Nor does ACTI produce any admissible evidence to support its Opposition to the Motion. Instead, relying entirely on an uncorroborated declaration by its principal, ACTI attempts to confuse the issues before the Court by arguing that the Court should ignore the plain language of the Agreement and adopt an interpretation based on the purported intent of its principal. ACTI's approach cannot save it from summary judgment.

For each of CH2E's three distinct theories for its breach of contract claim (one of which ACTI entirely ignores), the Court need not look past the four corners of the Agreement. Indeed, the Agreement provides that ACTI had to perform three contractual duties within contractually mandated timeframes. The plain language of the Agreement does not provide ACTI with discretion to complete its duties, nor does it allow for alternative interpretations, and summary judgment is therefore appropriate on CH2E's breach of contract claim.

Similarly, the plain language of the Agreement resolves ACTI's counterclaims. ACTI's breach of contract counterclaim fails because the plain language of the Agreement authorizes CH2E to deduct remediation costs from the final purchase price. And, ACTI's unjust enrichment is precluded as a matter of law because the Agreement expressly covers the subject matter of the claim. Thus, summary judgment is appropriate on both of ACTI's counterclaims.

In any event, ACTI's failure to provide the Court with any admissible evidence is fatal to its positions. Indeed, the sole piece of "evidence" on which ACTI relies is a self-serving, uncorroborated declaration of its principal. Under controlling precedent, this declaration cannot, as a matter of law, create an issue of fact capable of defeating summary judgment.

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Thus, for CH2E's breach of contract claim and ACTI's counterclaims, ACTI failed to put before the Court any admissible evidence that would allow the Court to find an issue of fact. Simply put, the deficiencies in ACTI's Opposition sealed its fate.

For the reasons set forth in the Motion and below, the Court should grant the Motion.

ARGUMENT

I. Because ACTI Failed to Respond to CH2E's Statement of Undisputed Material Facts, the Court Should Deem Those Facts Admitted.

Pursuant to Federal Rule of Civil Procedure 56, if a non-movant fails to specifically contest the moving party's statement of undisputed material facts, the Court may consider those facts admitted for purposes of the motion for summary judgment. FED.R.CIV.P. 56(e); *see also In re Baroni*, BAP No. CC-14-1579-KuDTa, 2015 WL 6941625, at *4 (B.A.P. 9th Cir. Nov. 10, 2015) ("Once the moving party has presented facts as undisputed and has presented admissible evidence in support of those facts, the non-moving party may be deemed to have admitted those facts for summary judgment purposes unless he or she specifically challenges those facts.").

Accordingly, this Court has held that "an opposing party's failure to respond does permit the Court to consider the moving party's assertions of fact as undisputed for purposes of the motion, and to grant summary judgment if the motion and supporting materials—including the facts considered undisputed—show that the movant is entitled to it." *Vail v. State*, No. 2:12-cv-01148-RFB-CWH, 2016 WL 81246, at *1 (D. Nev. Jan. 6, 2016) (internal quotations omitted).

Here, in a section entitled "Statement of Undisputed Material Facts," the Motion clearly sets forth in numbered, single-sentence paragraphs the facts CH2E was presenting as undisputed and warranting summary judgment. (Mot. at 4-8, ¶¶ 1-37.)

In its Opposition, ACTI simply ignores this section, failing to contest specifically a single fact. Instead of addressing CH2E's Statement of Undisputed Material Facts, ACTI's Opposition contains a section entitled "Background and Statement of Undisputed and Disputed Facts." (Opp. at 3-5.) This Background section does not identify which paragraphs are disputed or undisputed, does not label any allegations as material, and does not identify whether any particular statement is intended to rebut any particular fact set forth in CH2E's Statement of

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Undisputed Material Facts.

Further, ACTI's Background section does not cite to or attach admissible evidence that could potentially be considered a rebuttal to CH2E's Statement of Undisputed Facts. Indeed, aside from general citations to the Agreement—which, as discussed below, grossly misrepresent the substance of the Agreement—ACTI relies entirely on an uncorroborated declaration of its principal. Notwithstanding the fact that this declaration largely focuses on irrelevant issues, it cannot, as a matter of law, create a genuine issue of material fact sufficient to survive summary judgment. *Korkosz v. Clark County*, 379 F.Appx. 593, 596 (9th Cir. 2010) (affirming summary judgment because non-movant "failed to provide any evidence . . . aside from his own uncorroborated, self-serving" affidavit); *Villiarimo v. Aloha Island Air Inc.*, 281 F.3d 1054, 1061 (9th Cir. 2002) ("uncorroborated and self-serving testimony" cannot, as a matter of law, create a genuine issue of material fact sufficient to survive summary judgment); *Teller v. Dogge*, 8 F. Supp. 3d 1228, 1234 (D. Nev. 2014) (Mahan, J.) ("Self-serving testimony, made when an individual is faced with summary judgment, that contradicts clear evidence on the record need not be given credence by the court.").

Simply put, ACTI chose to not respond to CH2E's Statement of Undisputed Material Facts and instead submitted a Background section intended to confuse the issues. Under this Court's precedent, CH2E respectfully submits that the Court should deem admitted CH2E's Statement of Undisputed Material Facts. *See Freed v. Tahoe Forest Hosp. Dist.*, No. 3:06-00035-BES-RAM, 2008 WL 818871, at *2 (D. Nev. Mar. 21, 2008) ("By submitting an opposition that obfuscates rather than promotes an understanding of the facts, Freed's counsel has failed to properly identify with reasonable particularity the evidence that precludes summary judgment.").[2]

[2] It is not the Court's job to "scour the record in search of a genuine issue of triable fact," and it therefore has no obligation to try to sort through the Opposition and compare it to CH2E's Statement of Undisputed Material Facts. *Freed*, 2008 WL 818871, at *2 (citation omitted). In any event, even if one scours ACTI's Background section and speculates as to how ACTI would have responded to CH2E's Statement of Undisputed Material Facts, there is simply nothing relevant to the following paragraphs from CH2E's Motion: 1-6, 8-17, 19-22, 24-33 and 36-37. Thus, under all circumstances, these paragraphs must be deemed admitted.

Further, although CH2E is under no obligation to respond to ACTI's Background section, a formal paragraph-by-paragraph response is attached hereto as Exhibit 1. This Reply and Exhibit 1, combined, do not

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II. ACTI Does Not Present Any Evidence Sufficient to Create an Issue of Fact that Can Avoid Summary Judgment on CH2E's Breach of Contract Claim.

A. ACTI's Refusal to Acknowledge All of CH2E's Breach Theories Is an Admission that Summary Judgment Is Appropriate.

In the Motion, CH2E made its three breach theories crystal clear: "There is therefore no dispute that ACTI materially breached the Agreement in at least three separate ways: (1) by failing to provide the detailed design drawings; (2) by failing to provide the Installation Acceptance Report; and (3) by failing to provide the refund upon notice of termination." (Mot. at 10.)

Nonetheless, ACTI entirely ignores CH2E's third breach theory, stating that "CH2E identified two purported grounds for its claim that ACTI breached the Agreement." (Opp. at 5.) ACTI ignores this breach because it has no defense.

CH2E's termination right is not some tertiary right—it is a specific contractual right that allows CH2E to recover a portion of its investment upon written notice of specifically defined events. Indeed, Sections 8.2.3 and 8.4 of the Agreement expressly entitle CH2E, at its option, to terminate the Agreement through written notice and receive a defined partial refund. Kostura Dec., Ex. 1 at CH2E-0173610-11.

It is undisputed that CH2E provided written notice of more than one defined Event of Default on November 12, 2014. (Mot. at 6-7, ¶ 24.) It is also undisputed that ACTI's response to the written notice: (1) did not contest that an Event of Default had occurred; and (2) refused to provide the required partial refund. Kostura Dec., Ex. 5.

Thus, under the uncontested facts, CH2E is entitled to summary judgment on its breach of contract claim insofar as it is predicated on ACTI's refusal to honor its obligations under the termination and refund provisions. ACTI's failure to respond to CH2E's facts and arguments cannot save it.

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exceed the page limit set forth in LR 7-3(a).

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B. *Contrary to ACTI's Misrepresentations, the Plain Language of the Agreement Required ACTI to "Complete and Submit to CH2E" the Installation Acceptance Report on a Set Timeline.*

ACTI does not argue that the Agreement is ambiguous with respect to the Installation Acceptance Report. Accordingly, interpretation of the parties' rights and obligations relating to the Installation Acceptance Report is "a question of law and suitable for determination by summary judgment." *Liberty Ins. Underwriters Inc. v. Scudier*, 53 F.Supp.3d 1308, 1314 (D. Nev. 2013) (Mahan, J.).

ACTI admits that it did not complete and submit to CH2E the Installation Acceptance Report within the Agreement's timeframe but argues that the Court should not grant summary judgment on this breach because: (1) ACTI's principal intended the Agreement to provide ACTI with some discretionary control over whether to provide the Installation Acceptance Report; and (2) ACTI did not have to complete the Installation Acceptance Report until CH2E requested it. Both arguments are directly contradicted by the plain language of the Agreement.

1. The Agreement Does Not Allow ACTI Any Discretion in Completing the Installation Acceptance Report Within the Mandatory Timeframe.

As a preliminary matter, it is black letter law that "[p]arol, or extrinsic, evidence is not admissible to add to, subtract from, vary, or contradict written" contracts. *Crocket & Myers, Ltd. v. Napier, Fitzgerald & Kirby, LLP*, 440 F.Supp.2d 1184, 1191 (D. Nev. 2006) (citing *Ringle v. Bruton*, 86 P.3d 1032, 1037-38 (Nev. 2004)) (internal quotations omitted).

Neither ACTI nor CH2E argues that the Agreement is ambiguous with respect to the Installation Acceptance Report. ACTI's purported intentions and negotiation positions are thus inadmissible from both an evidentiary and substantive standpoint. *Id.* ("The parol evidence rule is not just an evidentiary rule, but a substantive rule that applies in equity as well as at law.") (citation omitted).

In any event, ACTI's argument that it had no obligation to provide the Installation Acceptance Report unless CH2E installed the Equipment to its liking is incorrect as a matter of law for at least four independent reasons.

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First, there is absolutely nothing in the Agreement that could be construed as providing ACTI with any discretion in submitting it to CH2E. Rather, the Agreement unambiguously provides that "[ACTI] *shall* complete and submit to [CH2E] the Installation Acceptance Report upon completion of the installation" within the mandatory 180-day timeframe. Kostura Dec., Ex. 1 at CH2E-0176316-17 (emphasis added). There is simply no way to interpret this language as providing ACTI with any discretion to withhold the report, and ACTI points to no language to the contrary.

Second, ACTI's argument that CH2E had the sole responsibility for installing the Equipment and that ACTI did not have to prepare the Installation Acceptance Report unless CH2E fulfilled this purported obligation (Opp. at 6) is contradicted by the plain language of the Agreement. Indeed, the Agreement makes clear—including in some of the very provisions ACTI cites—that ACTI had a contractual duty to supervise and direct the installation of the Equipment. *See* Kostura Dec., Ex. 1 at CH2E-0176316 (Section 3.1: "[ACTI] shall provide supervision of assembly and installation."); CH2E-017638 (Section 7.3: "All field erection activities under [ACTI's] supervision."); CH2E-0176320 (Section 9.2: "The Installation Site is to be prepared according to the general direction of [ACTI].").

It is simply not reasonable for ACTI to argue that due to its own failure to ensure a proper installation, it is somehow absolved of its other contractual obligation to prepare the Installation Acceptance Report.

Third, ACTI has not provided any admissible evidence that installation—as defined by Agreement and ACTI itself—was incorrect. ACTI states that installation relates to the fact that "the equipment can be arranged in different configurations depending on the desired layout of the purchaser." (Opp. at 6-7.) ACTI does not argue that the Equipment was incorrectly installed with respect to how it was configured based on the desired layout.

Rather, ACTI argues that "CH2E never installed a proper feed system, a shredding system for the tires, the carbon removal system, etc." (Mahjoob Dec. ¶ 5.) However, none of these are included in the list of parts that makes up the Equipment, and, in fact, the Agreement expressly states that two of the components are not part of the Equipment. Kostura Dec., Ex. 1 at

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CH2E-0176315-16 (Section 2(1): feeders not part of Equipment); CHE-0176319 (Spare Parts 7 and 8: knife gate system to shred tires not part of Equipment). Accordingly, as a matter of law, installation of these non-Equipment parts cannot be part of the installation of the Equipment.

In any event, the only support for ACTI's argument that the Equipment was not properly installed is a conclusory and uncorroborated declaration of its principal. (Mahjoob Dec. ¶ 5.) As a matter of law, this cannot create an issue of fact sufficient to survive summary judgment. *Korkosz*, 379 Fed.Appx. at 596; *Villiarimo*, 281 F.3d at 1061; *Teller*, 8 F. Supp. 3d at 1234.

Finally, the Agreement makes clear that the Installation Acceptance Report was not just a rubber stamp regarding installation, but also a verification that ACTI had performed other specific contractual obligations, such as providing sufficient training to CH2E personnel. Kostura Dec., Ex. 1 at CH2E-0176323 ("properly trained and skilled operators (as verified by [ACTI] in the Installation Acceptance Report)"). In other words, the Installation Acceptance Report was meant to certify ACTI's compliance with its myriad contractual obligations. If ACTI had not breached its obligation to provide the report within 180 days of the Agreement, the parties would have had a clear understanding of the issues faced at that time.

2. Under the Plain Language of the Agreement, ACTI Had the Affirmative Obligation to "Complete and Submit to CH2E" the Installation Acceptance Report.

The Agreement unequivocally places on ACTI the sole responsibility for preparing the Installation Acceptance Report. Indeed, Section 3.4 of Exhibit A to the Agreement specifically states that "***[ACTI] shall complete and submit to [CH2E] the Installation Acceptance Report.***" Kostura Dec., Ex. 1 at CH2E-0176316 (emphasis added).

The fact that the Agreement required the final wording of the report be "mutually agreed upon" simply provides CH2E with a beneficial contractual right to prevent ACTI from submitting a misleading or cursory report. *Id.* at CH2E-0176321. To interpret CH2E's contractual right to ensure proper performance by ACTI as somehow absolving ACTI of the need to perform is nonsensical.

Thus, ACTI's argument that "[t]he report was never prepared because CH2E never

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requested such a report" and that the parties would "jointly prepare such report" (Opp. at 6) is legally irrelevant.

ACTI admits that it failed to provide "complete and submit to CH2E" the report by the required deadline, and summary judgment is therefore appropriate.

C. Regardless of Whether "Detailed Equipment and Arrangement Drawings" Is Ambiguous—It Is Not—ACTI Failed to Present Any Admissible Evidence that It Submitted Any Drawings Within the Required Timeframe.

CH2E's Motion argues that ACTI breached the Agreement by failing to provide the requisite detailed drawings of the Equipment. In response, ACTI attempts to manufacture a factual dispute by arguing that the words "detailed equipment and arrangement drawings" in the Agreement are ambiguous and not intended to include design drawings.

ACTI's argument fails because: (1) the Agreement is not ambiguous; and (2) the distinction ACTI attempts to draw is irrelevant because ACTI has not provided admissible evidence to support a finding that it provided *any* drawings to CH2E in the required timeframe, much less drawings sufficient to satisfy the Agreement's requirements.

1. Party Disputes Over the Meaning of "Detailed Equipment and Arrangement Drawings" Does Not Make the Term Ambiguous.

ACTI argues that the term "detailed equipment and arrangement drawings" is ambiguous because "the parties dispute what the Agreement intended by the term." (Opp. at 7.)

However, Nevada law is clear that "ambiguity does not arise simply because the parties disagree on how to interpret their contract." *Galardi v. Naples Polaris, LLC*, 301 P.3d 364, 366 (Nev. 2013). "Rather, an ambiguous contract is an agreement obscure in meaning, through indefiniteness of expression, or having a double meaning." *Id.* (internal quotes and citations omitted).

Here, "detailed equipment and arrangement drawings" is not susceptible to double meaning. The Agreement does not require simple "dimensions and specifications" as ACTI argues. (Opp. at 7.) It requires detailed drawings of the equipment and arrangements—*e.g.*, the detailed design drawings that CH2E repeatedly requested and eventually received by virtue of an

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Order of this Court.[3]

Further, ACTI's argument that "detailed" drawings could not require the disclosure of anything proprietary in nature (Opp. at 7) is contradicted by the plain language of the Agreement. Under Section 5.1 of the Agreement, CH2E "agree[d] that all . . . designs which are . . . related to[ ] the Equipment are and shall remain the property of [ACTI]" and "covenanted not to copy [or] duplicate . . . those proprietary interests[.] " Kostura Dec., Ex. 1 at CH2E-0176309. Adopting ACTI's interpretation would render this provision superfluous, as CH2E would essentially be agreeing not to copy or duplicate drawings that, according to ACTI, CH2E was not entitled to receive in the first instance.

Simply put, the Agreement is unambiguous and ACTI's reliance on uncorroborated declarations about purported negotiating intent is improper. ACTI had an obligation to provide *detailed* drawings, which it could have fulfilled by providing the design drawings attached to the Motion.

However, the Court need not determine whether the those drawings are the only drawings capable of satisfying the Agreement's requirement for "detailed equipment and arrangement drawings" because ACTI failed to present admissible evidence that it provided *any* drawings to CH2E within the mandated timeframe.

2. The Court Does Not Need to Determine Ambiguity Because ACTI Failed to Provide Any Admissible Evidence that It Provided Any Drawings Within the Contractual Timeframe.

ACTI does not attach to its Opposition a single drawing, email, letter or any other document to show that it provided to CH2E any type of drawing within the contractually mandated timeframe. Instead, ACTI simply submits an uncorroborated and conclusory declaration that it "provided multiple sets of equipment and arrangement drawings." (Mahjoob Dec. ¶ 10.)

[3] Although legally irrelevant, ACTI's repeated claim that CH2E never requested detailed design drawings is a blatant misrepresentation of fact to the Court. Long before this lawsuit, CH2E repeatedly asked ACTI for detailed design drawings in communications that were typically ignored by ACTI. Kostura Reply Dec. ¶ 5.

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Aside from the fact that ACTI's conclusory declaration does not even state that the purported drawings were provided to CH2E within the mandatory contractual timeframe, this uncorroborated declaration is insufficient as a matter of law to create an issue of fact. *Korkosz*, 379 Fed.Appx. at 596; *Villiarimo*, 281 F.3d at 1061; *Teller*, 8 F. Supp. 3d at 1234.

Accordingly, because ACTI did not provide any admissible evidence to rebut CH2E's Motion, summary judgment is appropriate.

III. ACTI's Uncorroborated Declaration and Arguments of Counsel Cannot Create Issues of Fact Capable of Saving Its Breach of Contract Counterclaim.

As a preliminary matter, ACTI's statement that "CH2E does not dispute that a question of fact exists as to whether it breached the Agreement" (Opp. at 8) is simply untrue. As CH2E stated clearly in the Motion, "[a]s a matter of law, CH2E could not have breached the Agreement by properly deducting costs it was authorized to deduct." (Mot. at 11.)

In any event, ACTI did not respond to or put forth any evidence to contest the following facts presented by CH2E in the Motion—meaning that the Court should deem them admitted:

- As early as November 1, 2013, CH2E contacted ACTI to notify it that the Equipment was suffering from numerous defects and not operating at the warranted levels. (Mot. at 6 ¶ 20.)
- ACTI represented that it could fix the defects in a manner that would enable the Equipment to operate at the promised levels, and, on multiple occasions between November 1, 2013 and October 31, 2014, ACTI replaced and redesigned various components of the Equipment. (*Id.* at ¶ 21.)
- None of ACTI's attempted repairs, replacements or redesigns succeeded in fixing the individual defects in the Equipment or in bringing the Equipment into a state where it could process at the warranted levels. (*Id.* at ¶ 22.)
- After ACTI could not fix the Equipment, CH2E incurred over $2 million in costs paid to third parties in its attempt to cure the defective and non-conforming Equipment. (*Id.* at ¶ 23.)

ACTI's only defenses are that its principal does not remember specific requests related to each of the costs CH2E incurred, and arguments by counsel that it is possible that CH2E incurred these costs because of how it purportedly operated the Equipment. ACTI presents no admissible

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evidence to support either of these "defenses."[4]

However, as a matter of law, uncorroborated client declarations and attorney arguments cannot create issues of fact sufficient to survive summary judgment. *Korkosz*, 379 Fed.Appx. at 596; *Villiarimo*, 281 F.3d at 1061; *Teller*, 8 F. Supp. 3d at 1234; *Arpin v. Santa Claray Valley Transp. Agency*, 261 F.3d 912, 923 (9th Cir. 2001) ("arguments of counsel, however, are not evidence and do not create issues of fact capable of defeating an otherwise valid summary judgment") (citations and quotations omitted).

ACTI did not produce any admissible evidence in support of its breach of contract counterclaim. Summary judgment is appropriate.

IV. ACTI Does Not Seriously Contest that Summary Judgment Is Appropriate on Its Unjust Enrichment Counterclaim.

A. ACTI Essentially Concedes that the Agreement Covers the Subject Matter of Its Unjust Enrichment Claim.

ACTI does not dispute that its unjust enrichment counterclaim is barred if the Agreement covers the same subject matter. However, aside from a sweeping conclusory statement that "[n]one of the items set forth above were covered in the scope of the original agreement," ACTI only discusses one item—"the carbon activation to improve the quality of the carbon that the equipment was producing." (Opp. at 10)

While ACTI argues that "[t]his was completely beyond the scope of the agreement" (*id.*), in reality, the Agreement specifically covers the subject matter of this item that would "improve the quality of the carbon." *See* Kostura Dec., Ex. 1 at CH2E-0176321 ("[ACTI] shall provide a separate quote for the cost and additional time necessary to add the equipment required to remove these elements from the gas stream.").

In a transparent attempt to flip the burden onto CH2E, ACTI argues that the Court

[4] ACTI references an email that it did not actually attach to the Opposition. (Opp. at 9.) In any event, even if ACTI had attached the email, and even if the email could be construed as supporting ACTI's argument, and even if the email related to a cost in CH2E's Exhibit 3, it would still be irrelevant because no one cost in Exhibit 3 would bring the total cost incurred below the $750,000 threshold that ACTI is seeking in its breach of contract counterclaim.

should ignore its own allegations based on CH2E's pre-discovery answer to ACTI's compound allegations. This ploy merely highlights the fact that, by ACTI's own theory, its claim is barred as a matter of law.

The Agreement clearly covers the subject matter of ACTI's unjust enrichment claim, and summary judgment is therefore appropriate as a matter of law. *Beebe v. Litton Loan Serv. LP*, No. 2:09-cv-2379-RLH-LRL, 2011 WL 434401, at *2 (D. Nev. Sept. 14, 2011).

B. *ACTI Does Not Even Argue—Much Less Provide Admissible Evidence Sufficient to Prove—that It Can Prove the Individual Elements of Unjust Enrichment.*

In the Motion, CH2E set forth legal authority and factual evidence demonstrating that ACTI could not, as a matter of law, prove the elements of unjust enrichment. (Mot. at 12-13.)

ACTI completely failed to respond to these facts and arguments. ACTI did not point to a single piece of evidence or cite a single case to argue that it could support any of the individual elements of unjust enrichment. In fact, ACTI did not even make a conclusory statement that it could prove the elements of unjust enrichment.

On this ground alone, the Court should grant summary judgment in CH2E's favor on the unjust enrichment claim.

CONCLUSION

For the reasons stated above and in the Motion, CH2E respectfully requests that the Court grant this Motion and enter judgment in CH2E's favor and against ACTI on: (1) CH2E's claim for breach of contract, with damages in the amount of $6,636,000.00; (2) ACTI's counterclaim for breach of contract; and (3) ACTI's counterclaim for unjust enrichment.

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DATED this 21st day of August, 2017.

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CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of August 2017, and pursuant to Fed. R. Civ. P. 5(b), a true and correct copy of the foregoing **REPLY IN FURTHER SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT** was electronically filed and served through the Court's CM/ECF system, which will send a notice of electronic filing to the following:

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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

CH2E NEVADA LLC, a Nevada limited liability company, Plaintiff, v. LATIF MAHJOOB, an individual; AMERICAN COMBUSTION TECHNOLOGIES OF CALIFORNIA, INC., a California corporation; DOES 1-X; and ROE COMPANIES XI-XX, inclusive, Defendants.	Case No. 2:15-cv-00694-JCM-NJK **DECLARATION OF JAMES KOSTURA IN SUPPORT OF CH2E'S REPLY IN FURTHER SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT**

I, James Kostura, declare as follows:

1. My name is James Kostura, and I make this Declaration in support of CH2E's Reply in Further Support of Motion for Partial Summary Judgment in the above-captioned case.

2. I am over eighteen (18) years of age, and I am fully competent to testify to the matters set forth herein. I make this Declaration based upon my own personal knowledge.

3. I was the Managing Director of CH2E in 2013 and am currently the Chief Operating Officer.

4. CH2E installed the Equipment under the supervision and direction of ACTI. ACTI personnel also participated in installing the Equipment.

5. CH2E asked ACTI to provide detailed design drawings of the Equipment on numerous occasions prior to CH2E filing this lawsuit.

6. Prior to the lawsuit, ACTI provided incomplete drawings with limited information about some portions of the Equipment.

DATED this 21st day of August, 2017.

/s/ *Jamie Kostura*
Jamie Kostura

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EXHIBIT 1

Response to ACTI's Background and Statement of Undisputed and Disputed Facts

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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

CH2E NEVADA LLC, a Nevada limited liability company, Plaintiff, v. LATIF MAHJOOB, an individual; AMERICAN COMBUSTION TECHNOLOGIES OF CALIFORNIA, INC., a California corporation; DOES 1-X; and ROE COMPANIES XI-XX, inclusive, Defendants.	Case No. 2:15-cv-00694-JCM-NJK **RESPONSE TO ACTI'S BACKGROUND AND STATEMENT OF UNDISPUTED AND DISPUTED FACTS**

CH2E objects to ACTI's Background and Statement of Undisputed and Disputed Facts as follows:

- Paragraphs 3–6, 7, 9, 11, and 14 cite material that does not support the fact asserted in each paragraph.
- Paragraphs 6–8, 10–13, 17, and 19 do not cite admissible evidence to support the "facts" asserted.
- Paragraphs 1–2, 6–11, 14–17, and 19–20 cite only the self-serving declaration of ACTI's principal and fail to attach corroborating documentation or admissible evidence. *See Korkosz v. Clark Cty.*, 379 F. App'x 593, 596 (9th Cir. 2010) (uncorroborated, self-serving and speculative testimony does not create a genuine issue of material fact); *Teller v. Dogge*, 8 F. Supp. 3d 1228, 1234 (D. Nev. 2014) (Mahan, J.) ("Self-serving testimony, made when an individual is faced with summary judgment, that contradicts clear evidence on the record need not be given credence by the court.").
- Paragraphs 3–6 and 10 call for a legal conclusion rather than alleging facts.

Subject to and without waiving the foregoing objections, and subject to a standing objection as to relevance, CH2E further responds to each Paragraph of Defendant's Background and Statement of Undisputed and Disputed Facts as follows:

1. CH2E denies Paragraph 1 as stated, but admits that Ashley Day and Francis

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Beland negotiated the Agreement on behalf of CH2E.

2. CH2E denies Paragraph 2 as stated, but admits that Jamie Kostura did not directly negotiate the Agreement with ACTI.

3. CH2E denies the first sentence of Paragraph 3 as stated, but admits that the Agreement called for ACTI to manufacture and deliver "all such machinery, equipment, technologies and systems described in Section 1 of Exhibit A[.]" CH2E denies the second sentence of Paragraph 3 as stated, and admits only that the plain language of the Agreement unambiguously sets forth the rights and responsibilities of CH2E and ACTI with respect to the erection and installation of the Equipment. *See* Kostura Dec., Ex. 1 at CH2E-0176307; CH2E-0176316-17; CH2E-0176320-21; CH2E-017638.

4. CH2E denies Paragraph 4 as stated, but admits that the plain language of the Agreement unambiguously sets forth the rights and responsibilities of CH2E and ACTI with respect to the erection and installation of the Equipment, and the Installation Acceptance Report. *See id.* at CH2E-0176307; CH2E-0176316-17; CH2E-0176320-21; CH2E-017638.

5. CH2E denies Paragraph 5 as stated, but admits that the plain language of the Agreement unambiguously sets forth the rights and responsibilities of CH2E and ACTI with respect to the Installation Acceptance Report. *See id.* at CH2E-0176316-17.

6. CH2E denies Paragraph 6 as stated, but admits that the plain language of the Agreement unambiguously sets forth the rights and responsibilities of CH2E and ACTI with respect to the Installation Acceptance Report. *See id.*

7. CH2E admits that it did not propose language or jointly prepare a draft of the Installation Acceptance Report, but states that it had no obligation to do so under the plain language of the Agreement. *See id.*

8. CH2E denies Paragraph 8. *See* Kostura Reply Dec. at ¶ 4.

9. CH2E denies Paragraph 9 as stated, but admits that ACTI and CH2E started up and ran the equipment.

10. CH2E denies Paragraph 10 as stated, but admits that the plain language of the Agreement unambiguously sets forth the rights and responsibilities of CH2E and ACTI. *See*

Kostura Dec., Ex. 1 at CH2E-0176320.

11. CH2E denies Paragraph 11 as stated. CH2E asked ACTI to provide detailed design drawings on numerous occasions. Kostura Reply Dec. at ¶ 5.

12. CH2E denies Paragraph 12 as stated, but admits that ACTI did not provide its manufacturing or design drawings to CH2E as requested by CH2E and required under the Agreement.

13. CH2E denies Paragraph 13 as stated, but admits that ACTI provided incomplete drawings with limited information about some portions of the Equipment. Kostura Reply Decl. at ¶ 6.

14. CH2E denies Paragraph 14 as stated. CH2E requested ACTI to provide detailed design drawings related to the Equipment on numerous occasions prior to this litigation. Kostura Reply Dec. at ¶ 5.

15. CH2E denies Paragraph 15 as stated, but admits that during the course of the project, CH2E requested that ACTI provide equipment that was not specifically listed in the Agreement.

16. CH2E denies Paragraph 16 as stated, but admits that CH2E requested that ACTI provide a carbon activation system.

17. CH2E denies Paragraph 17 as stated, but admits that the carbon activation system was not part of the original purchase price in the Agreement, and CH2E agreed to compensate ACTI for the carbon activation system. CH2E further states that the purchase of the carbon activation system was contemplated by the Agreement. *See* Kostura Dec., Ex. 1 at CH2E-0176316-17.

18. CH2E denies Paragraph 18 as stated. CH2E's pre-discovery answers to the compound allegations in ACTI's counterclaims speak for themselves.

19. CH2E is unable to respond to the allegations in Paragraph 19 because ACTI did not attach Exhibits 1 – 7 to the Mahjoob Declaration.

20. CH2E denies Paragraph 20. CH2E requested ACTI to correct deficiencies in the Equipment on numerous occasions. Kostura Dec. at ¶¶ 6-8. CH2E is unable to respond to the

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remaining allegations in Paragraph 20 because the term "these items" refers to items in Exhibits 1 – 7, which ACTI did not attach to the Mahjoob Declaration.

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