UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

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

ANDREA ROSSI and LEONARDO CORPORATION,

Plaintiffs,
v.

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

Defendants.
_____/

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

Counter-Plaintiffs,
v.

ANDREA ROSSI and LEONARDO CORPORATION,

Counter-Defendants,
and

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

Third-Party Defendants.
_____/

DEFENDANTS, FULVIO FABIANI AND UNITED STATES QUANTUM LEAP, LLC, MOTION TO DISMISS COUNTS IV AND V OF THE SECOND AMENDED COUNTERLAIMS AND THIRD-PARTY CLAIMS AND MEMORANDUM OF LAW

Defendants, United States Quantum Leap, LLC ("USQL") and Fulvio Fabiani ("Fabiani"), by and through undersigned counsel and pursuant to Rule 12(b)(6), Fed. R. Civ. P.,

move this Court of the entry of an Order dismissing Count IV as to USQL and Fabiani and Count V of the Second Amended Counterclaims and Third-Party Claims filed by Defendants Industrial Heat, LLC ("IH") and IPH International, B.V. ("IPH"), and state as follows:

1. On September 19, 2016, the Defendants filed their Second Amended Counterclaims and Third-Party Claims [DE:50].

2. Count IV attempts to allege a claim against the Counter-Defendants and all of the Third-Party Defendants pursuant to the Florida Deceptive and Unfair Trade Practices Act.

3. Count V attempts to allege a claim against Fabiani and USQL for the breach of a Technical Consulting Agreement.

4. The allegations set forth by the Defendants fail to state a claim upon which relief can be granted.

5. For the reasons set forth below, Fabiani and USQL respectfully request this Court to dismiss Counts IV and V of the Second Amended Counterclaims and Third Party Claims.

MEMORANDUM OF LAW

I. Count IV: Florida Deceptive and Unfair Trade Practices Act

Fabiani and USQL hereby adopt and incorporate the arguments set forth in Plaintiffs/Counter-Defendants Andrea Rossi (hereafter "Rossi") and Leonardo Corporation (hereafter "Leonardo") Motion to Dismiss Defendants' Second Amended Counterclaims Against Plaintiffs and Memorandum of Law as if set forth fully herein. In addition to such arguments, Third-Party Defendants state as follows:

Count IV of Defendants/Third-Party Plaintiffs' Second Amended Counterclaim/Third-Party Claim alleges, *inter alia,* that Third-Party Defendants, Fabiani and USQL violated the Florida Deceptive and Unfair Trade Practices Act (hereafter "FDUTPA") as part of a "common

scheme against Counter-Plaintiffs." [DE50, ¶141]. Notwithstanding such claim, the allegations made against Fabiani and USQL fail to give rise to a claim under FDUTPA.

Specifically, Defendants/Third-Party Plaintiffs allege that: (1) Industrial heat entered into a Technical Consulting Agreement with USQL and Fabiani which required, among other things, that USQL and Fabiani promptly disclose any and all improvements, inventions developments, etc… [DE:50, ¶63]; (2) USQL and Fabiani failed to promptly disclose information related to their work which is alleged to be the property of Industrial Heat. [DE50, ¶¶85, 86, 87, 88]; (3) Leonardo, Rossi, JMP, Johnson, USQL are all interconnected in a number of ways [DE50, ¶89]; (4) Fabiani and USQL were engaged in a common scheme against Counter-Plaintiffs [DE50, ¶141]; and (5) that USQL and Fabiani restricted access to the JMP area at the Doral Location [DE50, ¶83]. Notably absent from such allegations are any unfair or deceptive trade practices, nor any specific allegations as to what underlying acts of fraud were allegedly undertaken to IH or IPH's detriment.

The only allegations of wrongdoing on behalf of Fabiani and USQL are solely related to Fabiani and/or USQL's failure to provide information and/or materials to Industrial Heat as required by the parties Consulting Agreement. "Florida law permits a FDUTPA claim to travel with a related breach of contract claim if the FDUTPA claim challenges the acts underlying or "giving rise" to the breach, and does not "rely solely on a violation of the Agreement as a basis for assertion of a FDUTPA claim." *Rebman v. Follett Higher Educ. Grp., Inc.*, 575 F.Supp.2d 1272, 1279 (M.D.Fla.2008) (citing *PNR, Inc. v. Beacon Prop. Mgmt., Inc.*, 842 So.2d 773, 777 (Fla.2003) (granting summary judgment to defendant)). *Kenneth F. Hackett & Associates, Inc. v. GE Capital Info. Tech. Sols., Inc.*, 744 F. Supp. 2d 1305, 1312 (S.D. Fla. 2010). Clearly, the facts

alleged by Industrial Heat, LLC. and IPH International, B.V., while arguably would be in breach of the Consulting Agreement, do not constitute unconscionable, unfair, and deceptive practices.

In Florida, "[t]o establish a claim for damages under FDUTPA a plaintiff must show three elements: 1) a deceptive act or unfair practice; 2) causation; and 3) actual damages." *Casey v. Florida Coastal Sch. of L., Inc.*, 3:14-CV-01229, 2015 WL 10818746, at *2 (M.D. Fla. Sept. 29, 2015). It goes without saying that the alleged failure to provide information pursuant to the terms of the Consulting Agreement falls well short of a "deceptive act or unfair practice" as contemplated by FDUTPA. To allow such claims, based upon nothing more than an alleged breach of contract, even if it is alleged that such breach was part of a greater scheme, would open the floodgates to litigating every breach of contract action under the FDUTPA statute. Moreover, as discussed in Rossi and Leonardo's motion, the specific "deceptive act or unfair practice" must be alleged with specificity under the heightened pleading requirements of Rule 9(b) where the underlying FDUTPA claim sounds in fraud. *Llado-Carreno v. Guidant Corp.*, 09-20971-CIV, 2011 WL 705403, at *5 (S.D. Fla. Feb. 22, 2011) (finding that the "particularity requirement of Rule 9(b) applies to all claims that sound in fraud, regardless of whether those claims are grounded in state or federal law"); see also *Stires v. Carnival Corp.*, 243 F.Supp.2d 1313, 1322 (M.D.Fla.2002) ("Most courts construing claims alleging violations of the Federal Deceptive Trade Practices Act or its state counterparts have required the heightened pleading standard requirements of Rule 9(b)."); *Vess v. Ciba–Geigy Corp. USA*, 317 F.3d 1097, 1108 (9th Cir.2003) ("Where, as here, the averments in the complaint necessarily describe fraudulent conduct, Rule 9(b) applies to those averments."). Plainly stated, if IH and IPH's claims against Fabiani and USQL are based solely upon the alleged failure to provide information in breach of the Consulting Agreement, then they have failed to state a cause of action under FDUTPA as

they have failed to identify any deceptive act or unfair practice. If, on the other hand, IH and IPH claim that such failure was part of some greater fraudulent scheme, then IH and IPH have failed to state, with the requisite specificity, the alleged underlying fraud perpetrated by Fabiani and/or USQL. Either way, the FDUTPA claim should be dismissed.

II. Count V: Breach of Contract

Count V of Industrial Heat's Counterclaim and Third-Party Claims alleges that Third-Party Defendants Fabiani and USQL breached the terms of the Technical Consulting Agreement (referred to in Count V as the "USQL Agreement"). (DE50, ¶¶149-156). Specifically, IH alleges that IH, Fabiani and USQL entered into the USQL Agreement on September 1, 2013. (DE50, ¶63). In support thereof, IH attached a copy of the Technical Consulting Agreement to the Third Party Complaint as Exhibit 11 thereto. (DE50, ¶61, Exhibit "11"). As grounds for its claim, IH alleges that Fabiani and USQL (1) "disregarded their contractual obligations to Industrial Heat in order to assist Leonardo and Rossi in their deceptive operations" (DE50, ¶153); (2) "failed to provide Industrial Heat with information relating to the scheme to manipulate the operation and testing of the Plant (DE50, ¶154); (3) "refused to provide other information to Industrial Heat, as alleged above" (although no "other information" is identified in the Third-Party Complaint) (DE50, ¶154); and lastly, (5) "failing to provide Industrial Heat with information, including reports and data, relating to the operation of the Plant" (DE50, ¶155). For the reasons set forth below, such claim must be dismissed.

a. Failure to State a Cause of Action

As discussed above, IH bases its claims in Count V upon Fabiani and USQL's alleged breach of the Technical Consulting Agreement referred to by IH as the "USQL Agreement." Such alleged breaches, as described more fully above, all pertain to Fabiani and USQL's actions

(or inactions) during the operation and testing of the E-Cat Plant while it was located in Doral, Florida. (DE50, ¶¶153-155). Notably, the E-Cat Plant was operated in Doral, Florida in 2015 and 2016. (*Second Amended Answer,* DE50, ¶71). Accordingly, it follows that the alleged breaches of the USQL agreement would have had to occur in 2015 or 2016 while the plant was in Doral, Florida. Notwithstanding the above, Technical Consulting Agreement upon which IH's claims are based provides, in relevant part, that:

> "This Agreement shall commence as of September 1, 2013 and shall continue in effect for an initial term through and including August 31, 2014 (the "Initial Term"). This Agreement shall terminate upon the expiration of the Initial Term unless the parties agree in writing to extend it." (DE50, Exhibit "11", §8).

The agreement further provides that:

> "USQL shall not be obligated under this Agreement nor otherwise liable to Industrial Heat for any further payments following termination of this Agreement…" *Id.*

Although the Technical Consulting Agreement provides that it may be extended if the parties agree in writing (*Id.*), IH has not alleged that any extension occurred nor has IH attached a copy of any written agreement extending such contract. Accordingly, based solely upon the allegations contained in the Third-Party Complaint, and exhibits thereto, IH's claim for breach of contract fails. Clearly, any actions and/or inactions occurring after the stated termination of the Technical Consulting Agreement (August 31, 2014) cannot give rise to a claim for breach of contract. Moreover, by the plain and unambiguous terms of the Technical Consulting Agreement, upon termination of the Agreement, USQL and/or Fabiani had no further obligations to Industrial Heat. For the foregoing reason, IH's claim for breach of contract fails.

b. <u>The Technical Consulting Agreement as to Fabiani is Void as a Matter of Law</u>

As evidenced by the Technical Consulting Agreement attached to the Third-Party Complaint as Exhibit "11", the parties to the agreement are listed as United States Quantum

Leap, LLC and Industrial Heat, LLC. (DE50, Exhibit "11"). According to the terms set forth in the Agreement, USQL and IH executed the Agreement on September 1, 2013, and the Agreement was effective on that date. *Id.* Pursuant to the terms of the Agreement, IH was to pay USQL for consulting services during the term of the Agreement. *Id.* As such, USQL and Fabiani do not contest that there was consideration for the agreement between USQL and IH.

As further evidenced by the Technical Consulting Agreement, Fulvio Fabiani executed a joinder to the agreement, agreeing to be bound by certain provisions thereof, more than a week later on September 9, 2013. *Id* at 9. Suffice it to say, no consideration was given or promised to Fulvio Fabiani at any time in exchange for his agreement to be bound by the terms of IH and USQL's Agreement. "Under Florida law, the elements of a contract are offer, acceptance, and consideration."*2P Com. Agency S.R.O. v. Familant*, 2:11-CV-652-FTM-29, 2012 WL 6615889, at *5 (M.D. Fla. Dec. 19, 2012)(citing *Air Products and Chemicals, Inc. v. Louisiana Land Exploration Co.*, 806 F.2d 1524, 1529 (11th Cir.1986)). Here, the alleged Joinder fails to describe any consideration given to Fabiani in exchange for his agreement to be bound by the terms of the Agreement between USQL and IH. Similarly, IH does not allege, nor could they, that any consideration was given to Fabiani in exchange for his agreeing to be bound by the terms of the agreement between USQL and IH. Moreover, IH cannot argue that the consideration was the execution of the Agreement with USQL because it is clear that the agreement had already been executed and effective well before Fabiani executed the Joinder provision. Accordingly, the entry into such agreement could not have served as consideration to Fabiani to execute the Joinder as IH was already bound by the terms of the Agreement.

Accordingly, as to Third-Party Defendant Fabiani, the Joinder to the USQL Agreement was Void and therefore unenforceable. Therefore, Count V as to Fabiani must be dismissed with prejudice.

c. Alternatively, Fabiani Is Not a Party to the Entire USQL Agreement

Assuming, arguendo, that there had been consideration provided to Fabiani in exchange for his agreeing to be bound by certain terms of the USQL Agreement (there was not), the Joinder provision did not bind Fabiani to all of the terms of the USQL Agreement. Specifically, the Joinder provision executed by Fabiani provides, in relevant part, that:

> "The undersigned, Fulvio Fabiani, the sole member and the sole manager of USQL United States Quantum Leap LLC ("USQL"), hereby joins in the foregoing Agreement for the purpose of agreeing to be bound by the provisions thereof relating to confidentiality, rights to materials, and new developments to the same extent as USQL is bound by such provisions." *Id.*

Contrary to the plain and unambiguous terms of the Joinder agreement set forth above, IH attempts to impose an obligation on Fabiani to be bound by terms of the Agreement unrelated to "confidentiality, rights to materials, and new developments". Specifically, IH alleges that Fabiani breached §3 of the Agreement which requires the parties to act in "a manner reasonably believed by USQL to be in or not opposed to the best interests of Industrial Heat." *Id.* It is clear that the Joinder executed by Fabiani, if valid, was clearly limited to those certain provisions of the Agreement enumerated in the Joinder provisions and IH has provided no basis to attempt to expand the application of such Joinder provision to all terms of the agreement against Fabiani. Accordingly, all claims for breach of contract arising from any provision other those enumerated in the Joinder, including any violation of §3 of the Agreement, must be dismissed as Fabiani is clearly not a party to such provisions of the contract.

III. Conclusion

For the foregoing reasons, this Court should dismiss Counts IV and V of the Second Amended Counterclaims and Third-Party Claims filed against United States Quantum Leap, LLC and Fulvio Fabiani.

Respectfully submitted this 11th day of October, 2016.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served on all counsel on the attached Service List by the electronic filing of the foregoing document with the Clerk of Court using CM/ECF on October 11, 2016.

/s/ *Rodolfo Nunez*
Rodolfo Nuñez, Esq.

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