

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA  
MIAMI DIVISION**

ANDREA ROSSI, et al.,

Plaintiff,

CASE NO.: 1:16-CV-21199-CMA  
O'Sullivan

v.

THOMAS DARDEN, et al.

Defendants.

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INDUSTRIAL HEAT, LLC, et al.,

Counter-Plaintiffs,

v.

ANDREA ROSSI, et al.,

Counter-Defendants,

and

J.M. PRODUCTS, INC., et al.,

Third-Party Defendants.

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**THIRD-PARTY DEFENDANTS J.M. PRODUCTS, INC., HENRY JOHNSON, AND  
JAMES A. BASS' MOTION TO DISMISS COUNTER-PLAINTIFFS' SECOND  
AMENDED COUNTERCLAIM AND THIRD-PARTY CLAIMS**

Third-Party Defendants, J.M. Products, Inc. ("JMP"), Henry Johnson ("Johnson"), and James A. Bass ("Bass") (collectively, "Third-Party Defendants"), by and through their undersigned counsel, pursuant to Rule 12(b)(6), Fed. R. Civ. P., move this Court for the entry of an Order dismissing Counts III and IV of the Second Amended Counterclaim and Third-Party

Claims filed by Counter-Plaintiffs Industrial Heat, LLC (“IH”) and IPH International, B.V. (“IPH”) (collectively, “Counter-Plaintiffs”), and state:

### **BRIEF PROCEDURAL HISTORY**

1. Counter-Plaintiffs filed their Second Amended Counterclaim and Third-Party Claims including, *inter alia*, Count III for the alleged fraudulent inducement into the Term Sheet and Count IV for the alleged violation of the Florida Deceptive and Unfair Trade Practices Act (“FDUTPA”).

2. On or about September 29, 2016, Counter-Defendants Andrea Rossi (“Rossi”) and Leonardo Corporation (“Leonardo”) (collectively, “Counter-Defendants”) filed their Motion to Dismiss Defendants’ Amended Counterclaims Against Plaintiffs and Memorandum of Law (“Counter-Defendants’ Motion to Dismiss”).

3. Third-Party Defendants respectfully move this Court to dismiss Counts III and IV of the Second Amended Counterclaim and Third-Party Claims for the reasons set forth below and in Counter-Defendants’ Motion to Dismiss, which is incorporated here by this reference<sup>1</sup>.

In addition to the Counter-Defendants Motion to Dismiss, Third-Party Defendants state as follows:

### **RELEVANT FACTUAL ALLEGATIONS IN THE SECOND AMENDED COUNTERCLAIM AND THIRD-PARTY CLAIMS AND EXHIBITS THERETO**

4. Counter-Plaintiffs allege that “Rossi and Johnson made a number of false representations to IH, most notably that JMP was a confidential subsidiary of Johnson Matthey p.l.c. (“Johnson Matthey”), and that Johnson Matthey was interested in using the E-Cat technology in connection with a confidential manufacturing process it wanted to operate in

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<sup>1</sup> Counter-Defendants’ Motion to Dismiss contains certain facts and arguments that pertain only to Counts I and II, Third-Party Defendants do not join in those portions as they are not applicable to them.

Florida.” (DE:50, ¶74). They also allege that JMP “was not operating or planning to operate any manufacturing process in Florida, and was in fact owned by persons whom Johnson represented in writing did not have any ownership interest in JMP” and had “no commercial use for the steam power generated by the Plant.” (DE:50, ¶74, 76).

5. Counter-Plaintiffs further allege that JMP was “sending falsified invoices to [IH] stating the amount of energy or steam JMP was purportedly receiving and using from the Plant during a given month” and attach a “selection” of the alleged invoices as Exhibit 18. (DE:50, ¶77).

6. Counter-Plaintiffs allege that Third-Party Defendants’ involvement increased when “Leonardo, Rossi, JMP, Johnson and Fabiani enlisted Bass to pretend to be a JMP employee serving as its Director of Engineering to make JMP appear to be a real manufacturing company” and to “meet with IH at JMP’s Doral facility” and “others, falsely claiming that JMP was using steam from the Plant.” (DE:50, ¶78-79).

7. Lastly, Counter-Plaintiffs allege that “Leonardo, Rossi, JMP, Johnson, USQL, Fabiani and Bass also restricted access to the JMP area at the Doral location.” (DE:50, ¶83).

## **ARGUMENT**

### **Count III: Fraudulent Inducement**

8. As noted in Counter-Defendants’ Motion to Dismiss, Counter-Plaintiffs’ allegations fail to comply with the heightened requirements of Rule 9(b) and specificity necessary to properly plead its claim for fraudulent inducement.

9. As is evident from the relevant facts set forth above, all of the allegations against Third-Party Defendants are conclusory in nature and deficient as a matter of law.

10. IH alleges that Rossi, Leonardo, JMP, and Johnson falsely represented to IH that JMP was a manufacturing company with a real commercial use for the steam power generated by the Plant. (DE:50, ¶135).

11. IH fails to specify the exact statement(s) made, when they were made, to whom, specifically, they were made, by whom, specifically they were made, and what such person or entity obtained as a result.

12. In addition, IH fails to allege any facts that support its conclusion that JMP was not a manufacturing company, had no commercial use for the steam power generated by the Plant, and was created solely for as a ruse to induce IH to ship the Plant to Florida. (DE:50, ¶136).

13. Furthermore, the Term Sheet contradicts IH's claim as it specifically states that JMP "operates a production facility in Miami, FL, which requires low temperature steam." Term Sheet ¶2. *See, e.g. Mac-Gray Servs., Inc. v. DeGeorge*, 913 So.2d 630, 634 (Fla. Dist. Ct. App. 2005) ("A party cannot recover in fraud for alleged oral misrepresentations that are adequately covered or expressly contradicted in a later written contract.")

14. Lastly, IH was to provide all the maintenance, while Leonardo would operate the Plant, at no cost to IH or JMP. Term Sheet ¶7-8. JMP was expressly negated access to the Plant or any information regarding its operation, while IH was allowed to visit the Plant at any time and provide whatever security, monitoring and control measures deemed appropriate. Term Sheet ¶9, 13-14.

#### **Count IV: FDUTPA**

15. In their Second Amended Counterclaim and Third-Party Claims, Counter-Plaintiffs set forth over 100 paragraphs with allegations that purportedly support its claims.

However, only a few of them involve or relate to Third-Party Defendants.

16. Counter-Plaintiffs allege that Counter-Defendants, Third-Party Defendants, and others engaged in a common scheme of fraud and split this scheme into three major parts, none of which allege any facts involving Third-Party Defendants. (DE:50, ¶141-144). Generally, Counter-Plaintiffs allege that Counter-Defendants sought to manipulate the operation and measurements of the Plant in order to obtain an \$89 million payment upon successful completion of a performance test. (DE:50, ¶142-144).

17. The allegations that do include Third-Party Defendants are irrelevant, immaterial, and do not constitute fraud as alleged by the Counter-Plaintiffs.

18. Counter-Plaintiffs state that JMP's role in the scheme magnified when JMP started sending "falsified invoices" to IH stating the amount of energy or steam JMP was purportedly receiving and using from the Plant during a given month. (DE:50, ¶77). Counter-Plaintiffs allegations are belied by the Term Sheet and the face of the documents themselves. Pursuant to the Term Sheet, JMP was to pay rent based on the amount of energy received. Accordingly, JMP provided monthly reports with a breakdown of the energy received during a given month. Furthermore, Counter-Plaintiffs fail to plead, with specificity, what facts they are relying on to support the allegation that the reports were falsified.

19. A number of the allegations revolve around Bass. Counter-Plaintiffs allege that JMP, Johnson, and others enlisted Bass to pretend to be the Director of Engineering of JMP and that Bass gave his business card representing himself as such. (DE:50, ¶78-79). The Second Amended Third-Party Complaint is devoid of any fact that supports Counter-Plaintiffs' allegation that Bass was not an employee of JMP and was not the Director of Engineering.

20. Counter-Plaintiffs also allege that Bass met with IH at JMP's Doral facility and also met with others, expressing JMP's satisfaction with the energy received from the Plant. (DE:50, ¶79). Counter-Plaintiffs do not plead these allegations with the specificity required, including what representations, specifically, were made, when they were made, to whom they were made, what Bass obtained as a result of such representation. Also, Counter-Plaintiffs fail to allege any facts that support the conclusion that such statements were false or fraudulent. These allegations do not a fraud make.

21. In addition, Counter-Plaintiffs do not set forth any facts to support the conclusion that "JMP had no real use for the steam power" and "there was no secretive manufacturing process taking place." (DE:50, ¶79).

22. Lastly, Counter-Plaintiffs allege that "Leonardo, Rossi, JMP, Johnson, USQL, Fabiani and Bass restricted access to the JMP area at the Doral location, claiming that there was a secretive manufacturing process being conducted there, when in fact it was simply recycling steam from the Plant and sending it back to the Plant as water." (DE:50, ¶83). To begin, this allegation is contradicted by Counter-Plaintiffs allegation that Bass met with IH at the JMP facility in Doral. (DE:50, ¶79). Counter-Plaintiffs fail to state when access was denied, to whom it was denied, and how it was denied. In addition, Counter-Plaintiffs fail to set forth any allegations to support their conclusion that JMP "was simply recycling steam from the Plant and sending it back to the Plant as water." Furthermore, as per the Term Sheet, IH was only to have access to the Plant and IH was never promised access to JMP's section of the facility or its operations, which are irrelevant to the operation of the Plant.

23. All of the allegations are belied by the Term Sheet, which expressly provides that IH will maintain the Plant and Leonardo will operate the Plant. Term Sheet ¶7-8. JMP, Johnson

and Bass were under no obligation to operate, maintain, or otherwise measure the operations of the Plant, nor were they required to provide Counter-Plaintiffs with details concerning same. Term Sheet ¶9. The Term Sheet does not require JMP, Johnson, or Bass to provide Counter-Plaintiffs with any details concerning JMP's facility or its operations therein.

**WHEREFORE**, Third-Party Defendants J.M. Products, Inc., Henry Johnson, and James A. Bass respectfully request this Court to enter an Order dismissing Counts III and IV of Counter-Plaintiffs' Second Amended Counterclaim and Third-Party Claims.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on October 11, 2016, I electronically filed the foregoing with the Clerk of the Court using CM/ECF. Copies of the foregoing document will be served on all counsel of record via transmission of Notice of Electronic Filing generated by CM/ECF.

Arán Correa & Guarch, P.A.  
*Counsel for JMP, Johnson, and Bass*  
255 University Drive  
Coral Gables, Florida 33134  
Telephone: (305) 665-3400  
Telefax: (305) 665-2250

By: /s/ Francisco J. León de la Barra  
Francisco J. León de la Barra, Esq.  
Florida Bar No.: 105327  
Fernando S. Arán, Esq.  
Florida Bar No.: 349712