UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

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

ANDREA ROSSI, individually; and LEONARDO CORPORATION, a Florida corporation,

Plaintiffs,

v.

THOMAS DARDEN, individually; JOHN T. VAUGHN, individually; INDUSTRIAL HEAT, LLC, a Delaware limited liability company; IPH INTERNATIONAL B.V., a Netherlands company; and CHEROKEE INVESTMENT PARTNERS, LLC, a Delaware limited liability company,

Defendants.

REPLY TO DEFENDANTS' OPPOSITION TO COUNTER-DEFENDANTS' MOTION TO DISMISS SECOND AMENDED COUNTERLCAIMS

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LEGAL STANDARD

Defendants/Counter-Plaintiffs', Industrial Heat, LLC ("IH") and IPH International, B.V. ("IPH"), (collectively "Defendants") interpretation and application of the legal standard for pleadings is incorrect. Defendants rely upon the language found in *Ashmore v. F.A.A.*, 2011 WL 3915752, at 1 (S.D. Fla. Sept. 2, 2011) (quoting *Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009) that to state a plausible claim for relief, a party must "plead factual content that allows the court to draw the reasonable inference that the [opposing party] is liable for the misconduct alleged." [DE: 68, *6]. While Defendants interpret the aforementioned standard to allow them to simply infer the possibility of misconduct, a plain reading of the holding in *Ashcroft v. Iqbal* reveals that a party must first affirmatively allege that misconduct has actually occurred. In addition, the allegations must also enable the court to infer that the opposing party was liable for such misconduct. *Id.* It is undisputed that in the 11th Circuit "[t]he mere possibility the defendant acted unlawfully is insufficient to survive a motion to dismiss." *M.C. Dean, Inc. v. City of Miami Beach, Florida*, No. 16-21731-CIV, 2016 WL 4179807, at *3 (S.D. Fla. Aug. 8, 2016) (citing *Sinaltrainal v. Coca–Cola Co.*, 578 F.3d 1252, 1261 (11th Cir.2009)).

ARGUMENT

I. Count I Fails to State a Claim for Breach of Contract

A. Industrial Heat Lacks Standing Under the License Agreement

In an attempt to resuscitate IH's claim for breach of the License Agreement, Defendants erroneously argue that because IH did not assign its alleged ownership interest in the 1 MW E-Cat Unit (hereafter "the Plant"), IH has standing to enforce any term of the License Agreement related to the Plant notwithstanding IH's assignment of "all rights" under the License Agreement to Defendant IPH International, B.V. [DE: 68, *8]. Looking specifically to the terms of the Assignment and Assumption of License Agreement (the "Assignment") executed by IH on April 29, 2013, the Assignment provides that "[IH] hereby transfers and assigns to [IPH] all right, title and interest of [IH] in and to the Agreement." [DE:50, *Exhibit 7*]. Based upon such language, there can be no question that IH was divested of standing to raise any claims arising from the License Agreement. Notwithstanding, Defendant IH argues, based solely upon the purported Amended and Restated Assignment and Assumption of License Agreement ("Amended Assignment"), that IH somehow retained its rights to enforce the terms of the License Agreement because the Plant (and only the Plant) was excluded from the Assignment. [DE: 68, *7-9].

Contrary to IH's argument, the alleged Amended Assignment provides that "[IH] hereby sells, transfers and assigns to [IPH]…all right, title and interest of [IH] in and to the License Agreement; provided however, that the Plant is excluded from such transfer and assignment and shall remain the property of [IH]." [DE: 50, *Exhibit 27*]. Clearly, the purported Amended Assignment reserved the ownership interest in the Plant to IH, but transferred all interest in the License Agreement to IPH. Such fact is further evidenced by the very next provision in the purported Amended Assignment which states that "[IPH] hereby accepts the assignment of the

License Agreement and assumes all of [IH's] obligations under the License Agreement." *Id.* There can be no question that all rights and obligations under the License Agreement, whether related to the Validation Test or otherwise, were assigned to IH as part of the Assignment. Moreover, Defendant's argument that IH's allegedly retained ownership rights in the Plant somehow also reserves rights to IH under the License Agreement is without support in fact or law. Since Defendant IH lacks the requisite standing to maintain any claim under the License Agreement IH's claims under Count I for breach of contract should be dismissed with prejudice.

B. Count I Fails to State a Claim for Breach of Contract

Defendants ignore the plain language employed by them which is clearly devoid of any factual allegation, but rather sets forth mere possibilities and/or conclusions. Specifically, Defendants have failed to allege, because they cannot, that Leonardo and/or Rossi failed to deliver all E-Cat IP to the Defendants nor any other alleged violation of the License Agreement. *See* [DE: 50 at *51-52]. Rather, Defendants allege that "[o]nly one of three conclusions can be drawn…" and then postulate that each of the three conclusions would result in a breach under the License Agreement. *Id.* "A court considering a motion to dismiss may 'begin by identifying the pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth." *In re Lamb*, 409 B.R. 534, 538 (Bankr. N.D. Fla. 2009) (citing *Ashcroft,* 129 S.Ct. 1937, at 1950).

"While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations." *Id.* In the instant case, Defendants have not, and cannot, point to a single allegation in the Second Amended Counterclaim to support Defendants conclusory allegation that Defendants failures could only be attributable to the possibility that (1) Leonardo and/or Rossi failed to deliver all of the E-Cat IP to Defendants; (2) Validation was never achieved and/or that Penon's Reported COP calculations were false; or (3) both. As pled, Plaintiffs are left

guessing whether Defendants' are claiming that Rossi and/or Leonardo failed to deliver the E-Cat IP or whether they are claiming that the E-Cat IP just does not work for some other reason. Absent factual allegations supporting their conclusions, Count I must be dismissed.

II. Count II Fails to State a Breach of Contract Claim

A. IPH Fails to Allege Any Violation of the Covenant Not to Compete Within Licensed Territory

In support of IPH's Second Amended Counterclaims, Defendant IPH argues that notwithstanding the geographic limitations to the License Agreement, the terms of the Covenant Not to Compete provision is unlimited in is territory. Defendant IPH's argument is clearly defective in that is seeks to piecemeal the License Agreement as opposed to reading the License Agreement as a whole. In Florida, courts "are constrained by law to construe a contract as a whole so as to give effect, as here, to all provisions of the agreement if it can be reasonably done." *McArthur v. A.A. Green & Co. of Florida, Inc.*, 637 So. 2d 311, 312 (Fla. 3d DCA 1994). In the instant case, it is clear that all aspects of the License Agreement were limited in territory to those geographic regions set forth in the §2 of the License Agreement. Such limitation is further evidenced by the License Agreement's acknowledgement of the existence of other license agreements in various jurisdiction. *See License Agreement, Exhibit "D"*. "[A] party cannot cherry pick which provisions of the contract apply to him. Rather, the entire contract applies in equal force to both parties, both the convenient and inconvenient provisions, because that is what the parties bargained for." *Gonzalez v. Watermark Realty Inc.*, 09-60265-CIV, 2010 WL 1299740, at *3 (S.D. Fla. 2010).

Defendant IPH does not allege, nor can he, that Plaintiffs engaged in any prohibited conduct within the licensed territory, but rather asks this court to interpret the contract to impose the non-compete provision to an unlimited territory. Such interpretation of the License Agreement

is unwarranted and erroneous. The License Agreement is clear and unambiguous in that it provides that the territory of the license was limited to those regions specifically set forth in §2. "Where contract language is clear and unambiguous, it is up to the court to interpret the contract as a matter of law." *Neumann v. Brigman*, 475 So. 2d 1247, 1249 (Fla. 2d DCA 1985). Accordingly, Defendant IPH's failure to allege that Plaintiffs' engaged in any prohibited conduct within the limited geographic territory of the license agreement is fatal where such conduct is otherwise permitted in territories other than those listed in the License Agreement.

a. This Court has not "Sustained" Defendant IPH's Allegations

Contrary to Defendant's assertion that this Court "sustained" Defendant IPH's allegations that Plaintiffs failed to pay taxes as required by the License Agreement, this Court made no such ruling. On October 14, 2016, this Court entered its Order on Plaintiffs' Motion to Strike … [DE: 54] in which the Court declined to strike paragraphs 126-133 of the Counterclaim. [DE: 67]. Nothing within the Order indicated that the Court "sustained" Defendant IPH's allegations, but rather found that Plaintiffs had failed to meet their burden for such allegations to be stricken. *Id.* At the hearing on Plaintiffs' Motion to Strike, Defendant IPH represented that such allegations went to their affirmative defense of prior breach, yet now Defendant IPH argues that paragraphs 126-133 have "reserved the right to assert the allegations as an affirmative claim if or when additional facts develop that warrant an affirmative claim for relief." [DE: 68 at *7]. Such reservation is unsupported by any legal authority. The allegations contained in paragraphs 126-133 should be dismissed, as a matter of law, in that such allegations fail to set forth any affirmative claim for relief or even a valid affirmative defense.

While Defendants rely upon *Coutant v. U.S. Treasury,* 2002 WL 34382737, at *5 (S.D. Fla. Feb. 27, 2002) for the proposition that a tax lien can "take priority over a private party's

interest in property if the private party's interest is not protected by a perfected tax lien prior to the attachment of the federal tax lien," such reliance is misplaced. *See* [DE: 68, at 7]. The holding in *Coutant* is inapplicable to the instant case. In *Coutant,* unlike the instant case, the court addressed the timing and priority of liens placed on the property of a debtor where such debtor retained ownership of the subject property. *Coutant* at *5.

In that case, the court found that a creditor must perfect its lien before a tax lien attaches to have priority. *Id.* In the instant case, Defendants allege that in October 2012, Industrial Heat, LLC made a payment to Leonardo that included "payment in full for the plant." [DE: 50, ¶4]. Furthermore, Defendant IPH alleges that IH retained ownership of the Plant notwithstanding an assignment of the License Agreement to IPH. [DE: 50, Exhibit 27]. It is well settled that "a tax lien cannot extend beyond the property interests held by the delinquent taxpayer, and the government may not collect more than the value of the property interests that are actually liable for that debt. *Id.* at *4. "Likewise, a tax lien cannot attach to any property interest that was transferred before the assessment." *Id.* Accepting the allegations of the Second Amended Counterclaim as true, the ownership of the Plant would have transferred to IH before any tax assessment could have become due under the License Agreement. As such, these allegations fail to state a cause of action upon which relief may be granted and therefore must be dismissed.

III. Count III Lacks the Requisite Specificity

Contrary to Defendants' argument that Plaintiffs "attempt to cast the one e-mail alleged to be made by Rossi as devoid of any specific content," the Plaintiffs concede that the e-mail is the only place in the Second Amended Counterclaim in which Defendant IH has pled a cause of action for fraudulent inducement with the requisite specificity required under Rule 9(b). [DE: 56, *13]. Other than those allegations which relate to the single subject e-mail, all of the other allegations in

the Second Amended Counterclaim improperly group Rossi, Leonardo, JM Products, Inc., and Johnson together as a singular entity. "Rule 9(b) does not allow a complaint to merely 'lump' multiple defendants together but 'require[s] plaintiffs to differentiate their allegations when suing more than one defendant ... and inform each defendant separately of the allegations surrounding his alleged participation in the fraud." *Stone Invest Dakota LLC v. De Bastos*, 15-61406-CIV, 2015 WL 6997979, at *5 (S.D. Fla. 2015).

To the extent Defendant IH relies upon any other purported statements made by the respective Plaintiffs and/or Third-Party Defendants, Defendant IH must identify the person/entity which purportedly made each such statement upon which Defendant IH relied. Absent the specific identification of the person/entity allegedly making the fraudulent misrepresentation, Defendant IH has failed to satisfy the specificity requirements of Rule 9(b) as to each of the alleged misrepresentations. If Defendant IH intends to rely solely upon the statements made in the subject e-mail to support its claim, then Plaintiffs concede that they have satisfied the heightened pleading standard, but alternatively, if Defendant IH wishes to rely upon the other alleged misrepresentations set forth in the Second Amended Counterclaim, such allegations must likewise satisfy the Rule 9(b) pleading standard.

IV. Count IV FDUTPA Claim is Legally Insufficient

A. Standing:

Defendants IH and IPH argue that both IH and IPH both have standing with relation to their claims under the Florida Deceptive and Unfair Trade Practice Act ("FDUTPA"), Ch. 501.204(1), Fla. Stat., because "a FDUTPA claim does not require the existence of contractual privity." [DE: 68, 10]. While Plaintiffs generally acknowledge the Defendants' argument as the present state of the law in Florida, Plaintiffs have not raised the issue of contractual privity as the

basis for dismissal. Rather, Plaintiffs point out that while Defendants haphazardly assert allegations on behalf of IH and IPH collectively and interchangeably, the two entities are not parties to the same business transactions in which Defendants allege deceptive acts were committed. Specifically, IPH was never a party to, or participant in, the Term Sheet nor the business dealings described therein. Accordingly, any claim arising out of those dealings would not be actionable by IPH. Likewise, any business dealings relating to the transactions contemplated by the License Agreement did not involve IH after the License Agreement was assigned to IPH. As such, IH would lack standing to assert any claim based upon such alleged dealings. Logic dictates that if one or the other Defendant was not a party to the allegedly fraudulent and/or deceptive transaction, such Defendant could not have suffered actual damages arising from such transaction, and therefore would lack standing to bring such a claim.

B. Defendants' Claims Based Upon Fraud Must Be Pled With Specificity

Defendants erroneously rely upon *Deere Constr., LLC. v. Cemex Constr. Materials FL.,* 2016 WL 4374970, at 8 (S.D. Fla. July 26, 2016) for the proposition that Rule 9(b)'s heightened pleading standard does not apply to FDUTPA claims. Plaintiffs agree that as a general rule, FDUTPA claims, without more, do not automatically trigger the heightened pleading requirements of Rule 9(b) but where, as here, the FDUTPA claim is based solely upon the alleged fraudulent misrepresentations made by Plaintiffs, the application of the Rule 9(b) heightened pleading requirements are warranted. As numerous courts have noted, not all claims under FDUTPA, such as those claims asserted in *Deere,* are based in fraud. *See Id. at *8.* In those cases where fraud is not asserted as the basis for the claim, logic dictates the application of Rule 8's pleading requirements is appropriate. In the United States Southern District Court in Florida, the district is seemingly split as to the pleading requirements applicable to a FDUTPA claim based upon fraud.

Stone Invest Dakota LLC v. De Bastos, 15-61406-CIV, 2015 WL 6997979, at *4 (S.D. Fla. 2015) (stating that "the Court acknowledges that courts within this district have reached various conclusions about the application of Rule 9(b) to FDUTPA claims).

Alternatively, in those cases, as here, the basis for the FUDTPA claim is based entirely upon an alleged fraudulent scheme, the principals of fair notice dictate that a heightened pleading standard is required. *See SIG, Inc. v. AT & T Digital Life, Inc.,*971 F.Supp.2d 1178, 1187 (S.D.Fla.2013) ("because fair notice is the most basic consideration underlying Rule 9(b), a complaint must reasonably notify defendants of their purported role in the scheme, and, in cases involving multiple defendants, the complaint must inform each defendant of his or her alleged role in the fraud"). Confronted with this very issue, this Court has reasoned that:

> Federal Rule of Civil Procedure 9(b) requires that "[i]n alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake." Plaintiff asserts "the particularity requirement [of] Rule 9 is inapplicable to the FDUPTA [sic] claim pursuant to the law of the State of Florida." (Resp.11). Plaintiff's argument seems to be that because the FDUTPA creates liability for deceptive and unfair trade practices—categories which encompass but are not limited to fraud—"[a] finding of fraud is not necessary to sustain a violation under the [F]DUTPA." (Resp. 10 (citing *W.S. Badcock Corp. v. Myers,* 696 So.2d 776, 779 (Fla. 1st DCA 1996)). From a strictly logical point of view this may be true, but Llado–Carreno appears to be alleging that Guidant committed fraud by "deceptively and unlawfully induc[ing him] to purchase and/or have [the H177] implanted in his body." (Compl.¶ 53).
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> 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 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)."); *see also 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.").

Llado-Carreno v. Guidant Corp., 73 UCC Rep. Serv. 2d 617 (S.D. Fla. 2011).

This Court's holding in *Llado-Carreno v. Guidant Corp.,* on its face is seemingly inconsistent with this Court's holding in *Deere Constr., LLC v. Cemex Constr. Materials FL.,* 2016 WL 4374970, which held generally that the "requirements of Rule 9(b) do not apply to claims under the FDUTPA." In reaching this conclusion, this court reasoned in part that "FDUTPA claims can be based on deceptive or unfair practices that do not involve fraud." *Deere Constr., LLC v. Cemex Constr. Materials Florida, LLC*, 15-24375-CIV, 2016 WL 4374970, at *8 (S.D. Fla. 2016). A reasonable person could justify the two seemingly conflicting lines of cases by concluding that where, as here, the FDUTPA claim is based entirely upon allegations of fraud, such allegations must be pled with the requisite specificity under Rule 9(b). But, where the FDUTPA claims have any basis other than an alleged "fraudulent scheme" the pleading standard set forth in Rule 8 applies.

Notwithstanding, even under the more liberal Rule 8 pleading standard, Defendants have failed to allege sufficient facts to establish the elements necessary to maintain a cause of action under the FDUTPA. Specifically, Defendants IH and IPH have failed to allege any facts to support their mere, bare bones, allegation that Defendants "have suffered and continue to suffer actual damages." *Prunty v. Sibelius*, 2:14-CV-313-FTM-29, 2014 WL 6676951, at *5 (M.D. Fla. 2014), report and recommendation adopted as modified, 2:14-CV-313-FTM-29CM, 2014 WL 7066430 (M.D. Fla. 2014). Courts within this District have held that FDUTPA claims subject to dismissal where the pleader failed to plead "actual damages" as required by Florida law. *QSGI, Inc. v. IBM Glob. Fin.*, 11-80880-CIV, 2012 WL 1150402, at *4–5 (S.D. Fla. 2012). In *QSGI, Inc.,* the court dismissed the plaintiff's FDUTPA claim "[b]ecause [the plaintiff] failed to plead facts sufficient to show actual damages." *Id.* Accordingly, Defendants' failure to plead facts sufficient to show actual damages is fatal to their claim. For the foregoing reasons, Court IV must be dismissed.

Dated: October 27, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on October 27, 2016, I electronically filed the foregoing with the Clerk of the Court using CM/ECF. Copies of the foregoing document will be served upon interested counsel either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

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