UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 1:16-cv-21199-CIV-ALTONAGA/O'Sullivan

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

Counter-Plaintiffs,
v.

ANDREA ROSSI and LEONARDO CORPORATION,

Counter-Defendants,
v.

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

Third-Party Defendants.
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THIRD-PARTY DEFENDANTS' *COMBINED* REPLY TO COUNTER-PLAINTIFFS' RESPONSE IN OPPOSITION TO THIRD-PARTY DEFENDANTS' MOTION TO DISMISS COUNTS III, IV, AND V OF COUNTER-PLAINTIFFS' SECOND AMENDED COUNTERCLAIMS AND THIRD-PARTY CLAIMS

Third-Party Defendants, J.M. Products, Inc. ("JMP"), Henry Johnson ("Johnson"), James A. Bass ("Bass"), United States Quantum Leap, LLC ("USQL"), and Fulvio Fabiani ("Fabiani")

(collectively, the "Third-Party Defendants"), by and through their undersigned counsel, hereby collectively reply in support of their *Combined* Motion to Dismiss Counts III, IV, and V of Counter-Plaintiffs' Second Amended Counterclaims and Third-Party Claims (the "Counterclaims and Third-Party Claims," **ECF No. 50**).

PRELIMINARY STATEMENT

Third-Party Defendants acknowledge this Court's Order [**ECF No. 76**] denying Counter-Defendants' Motion to Dismiss Defendants' Amended Counterclaims Against Plaintiffs. To the extent that any of Third-Party Defendants' arguments for dismissal may have been ruled on by this Court's Order [**ECF No. 76**], such arguments will not be addressed in this Reply.

ARGUMENT

I. Count III: Fraudulent Inducement

In light of this Court's Order [**ECF No. 76**], JMP and Johnson do not address the issue of whether Counter-Plaintiffs have adequately pleaded their allegations concerning the oral representations made at the August 2014 meeting or the representations made in writing. However, it is important to note that irrespective of whether or not Counter-Plaintiffs have met their burden under Rule 9(b), Counter-Plaintiffs have failed to state a cause of action. As noted in the *Combined* Motion to Dismiss, "[t]o state a cause of action for fraudulent inducement, a plaintiff must plead: (1) the defendant made a false statement about a material fact; (2) the defendant knew the statement was false when he made it or was without knowledge of its truth or falsity; (3) the defendant intended that the plaintiff rely and act on the false statement; and (4) the plaintiff justifiably relied on the false statement to his detriment." *Persaud v. Bank of Am., N.A.*, 14-21819-CIV, 2014 WL 4260853, at *12 (S.D. Fla. Aug. 28, 2014) (internal citations omitted). Here, Counter-Plaintiffs have failed to allege that JMP or Johnson knew the statements were false when made or were without knowledge of their truth or falsity. Accordingly, it is respectfully submitted that Count III of the Counterclaims and Third-Party Claims must be dismissed.

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

A. Counter-Plaintiffs fail to plead sufficient facts to show any deceptive act or practice by JMP, Johnson, or Bass which directly resulted in actual damages

Counter-Plaintiffs create a script to an exciting sci-fi drama in their Counterclaims and Third-Party Claims but otherwise fail to state a cause of action against Third-Party Defendants. As noted in the *Combined* Motion to Dismiss, Counter-Plaintiffs lump Third-Party Defendants together with Counter-Defendants in an alleged common scheme to defraud Counter-Plaintiffs by manipulating the operation of the Plant during the Guaranteed Performance test and demanding payment of $89 million. However, the Counterclaims and Third-Party Claims is devoid of any specific allegations as to how each Third-Party Defendant's individual actions caused any *actual* damage to Counter-Plaintiffs.

In their Opposition to Third-Party Defendants' Combined Motion to Dismiss Counts III, IV, and V of Counter-Plaintiffs' Second Amended Counterclaims and Third-Party claims ("Counter-Plaintiffs' Response"), Counter-Plaintiffs focus on the allegations that "Johnson and JMP's deception about the operations of JMP was used to induce Counter-Plaintiffs to allow the 1MW Plant to be moved to Florida out of their direct control," and that "Johnson, Bass, and JMP's false statements about the power they were receiving and using from the 1MW Plant were designed, among other things, to reinforce Rossi and Leonardo's false claims about how successfully the Plant was operating." (**ECF No. 73**, pg. 9.) These allegations are belied by the License Agreement and the Term Sheet as it was contemplated in the Term Sheet, and even in the License Agreement, that Leonardo and Rossi would operate the Plant during the Guaranteed Performance test. "Each of Leonardo and Rossi will use their commercially reasonably (sic) best efforts to cause Guaranteed Performance to be achieved, including making repairs, adjustments and alterations to the Plant as needed to achieve Guaranteed Performance." (**ECF No. 1-2**, pg. 24, License Agreement Section 5.) Similarly, the Term Sheet expressly provided that Leonardo and Rossi would operate the Plant with the assistance of "any others designated by IH" at no additional cost to IH, IH would maintain the Plant, and IH "may provide whatever security, monitoring and control measures it deems appropriate to protect and monitor the 1MW Plant and related equipment." (**ECF No. 50-17**, pg. 2.)

The crux of the scheme alleged by Counter-Plaintiffs is to manipulate the Guaranteed Performance test, which required that the Plant operate at a certain level of efficiency or COP – meaning that the Plant had to generate a certain amount of energy over the energy consumed by the Plant. The amount of power being received and used by JMP is not related and does not allow the inference that the Plant is operating at the requisite COP, only that JMP is receiving the stated

amount of energy. Furthermore, Bass' representation that JMP was satisfied with the steam power being received has no bearing on the performance or efficiency of the Plant, which is what IH was to be testing. The allegedly false statements are in no way, shape, or form deceptive within the ambit of FDUTPA.

Notably absent from Counter-Plaintiffs' Response is any argument as it pertains to their failure to allege causation as part of their FDUTPA claim against JMP, Johnson, or Bass. This is because Counter-Plaintiffs did not, and cannot, establish causation between any of JMP, Johnson, or Bass' allegedly deceptive acts and any actual damages. As mentioned above, it was not only contemplated from the inception of the License Agreement that Leonardo and Rossi would operate the Plant, but the Term Sheet provides IH with the obligation to maintain the Plant and the ability to designate any individual or security, monitoring or control measures deemed necessary. Furthermore, the role of Bass as an employee of JMP or Bass' statements as to JMP's satisfaction with the steam power JMP was receiving and using to run its operations are irrelevant to the grand scheme that Counter-Plaintiffs are alleging. Simply put, Bass is mentioned in merely 5 out of 156 paragraphs and the alleged acts occur well after License Agreement and Term Sheet were entered into, and well after the Plant was already in operation. As a result, Counter-Plaintiffs cannot establish the *direct* causation of the alleged wrongdoing and the alleged damages. *See Hennegan Co. v. Arriola*, 855 F.Supp.2d 1354, 1361 (S.D.Fla.2012) (King, J.).

Counter-Plaintiffs claim that they have pleaded "multiple harms," none of which constitute actual damages within the meaning of the FDUTPA. (**ECF No. 73** at pgs. 10, 11.) The harms that Counter-Plaintiffs allege – the transfer of the Plant from North Carolina to Florida, the instant litigation, and payment for contractual services that purportedly conferred no benefit on Counter-Plaintiffs – are more akin to consequential damages that "are not recoverable under FDUTPA." *QSGI, Inc. v. IBM Glob. Fin.*, No. 11-80880-CIV, 2012 WL 1150402, at *5 (S.D. Fla. Mar. 14, 2012). Furthermore, Counter-Plaintiffs do not attribute any of the alleged damages to the alleged wrongdoing by JMP, Johnson or Bass. Because Counter-Plaintiffs cannot and have not alleged sufficient facts to support their conclusory allegation that Counter-Plaintiffs "have suffered and continue to suffer actual damages," they logically cannot show that Third-Party Defendants caused actual damages. As such, Defendants' FDUTPA claim fails as a matter of law and the count must be dismissed. *See Prunty v. Sibelius*, No. 2:14-CV-313-FTM-29, 2014 WL 6676951, at *5 (M.D.

Fla. 2014), *report and recommendation adopted as modified*, No. 2:14-CV-313-FTM-29CM, 2014 WL 7066430 (M.D. Fla. 2014).

For the foregoing reasons, Count IV of the Counterclaims and Third-Party claims must be dismissed.

B. Allegations of Unfair or Deceptive Acts Involving USQL and Fabiani are Insufficient as a Matter of Law to Maintain FDUTPA Claim

As set forth above, this Court issued its Order denying Counter-Defendant's Rossi and Leonardo's Motion to Dismiss the Second Amended Counterclaims on November 16, 2016. In this Order the Court ruled on certain arguments made by Counter-Defendants that were similarly made by the Third-Party Defendants in the Combined Motion to Dismiss. In particular, the Court ruled on whether the Counter-Plaintiffs stated a cause of action under the Florida Deceptive and Unfair Trade Practices Act (hereafter "FDUTPA"). (**ECF No. 76**, pgs. 14-17.) Applying the Court's analysis to the facts alleged against both USQL and Fabiani justifies the dismissal of Count IV against these two particular Third-Party Defendants.

In the November 16th Order, the Court held that "[a]lthough the FDUTPA is not intended to convert every breach of contract claim into a claim under the statute, '[t]o the extent an action giving rise to a breach of contract . . . may also constitute an unfair or deceptive act, such a claim is and has always been cognizable under the FDUTPA.' *PNR, Inc. v. Beacon Prop. Mgmt., Inc.*, 842 So. 2d 773, 777 n.2 (Fla. 2003)." (**ECF No. 76**, pg. 15.) The Counter-Plaintiffs also cite the correct general legal proposition in their opposition to the Combined Motion to Dismiss. However, the Counter-Plaintiffs opposition to the Combined Motion to Dismiss fails to properly apply the law to the facts alleged against USQL and Fabiani. In paragraph 146 of the Second Amended Third-Party Claims [**ECF No. 50**], the Counter-Plaintiffs summarize the "unconscionable, unfair, and deceptive acts and practices" that form the basis for the FDUTPA claim in Count IV. A review of each individual allegation reveals that neither USQL nor Fabiani were involved in the substantive acts that constituted the alleged common scheme.

Paragraph 146(a) alleges that the "FDUTPA Defendants" deceived Counter-Plaintiffs concerning JMP, the operations of JMP, the role of Bass and the reasons for JMP wanting to use the steam power generated by the plant. This general allegation seeks to impute the myriad of prior allegations jointly and severally against all the FDUTPA Defendants without distinction. The specific allegations made by the Counter-Plaintiffs, however, do not provide support for this

attempt to attribute these specific acts to USQL and Fabiani. Counter-Plaintiffs alleged that Leonardo and Rossi devised the scheme to move the plant to Florida [**ECF No. 50**, ¶69]; Johnson created JMP [**ECF No. 50**, ¶70]; Leonardo and Rossi made the "pitch" to move the plant to Florida [**ECF No. 50**, ¶71]; Rossi and Johnson made false representations and warranties concerning the ownership of JMP [**ECF No. 50**, ¶74]; only JMP and Leonardo were parties to or negotiated the provisions of the Term Sheet [**ECF No. 50**, ¶75]; and JMP sent the false invoices [**ECF No. 50**, ¶77].[1] The allegations make clear that USQL had no involvement with or partook in any acts related to JMP. Accepting the allegations as true, Fabiani's only involvement is by virtue of a general allegation naming Fabiani as one of many with the alleged knowledge that Bass was not a real employee, but he is not alleged to have committed any of the substantive acts concerning the involvement of JMP in the grand scheme to deceive and cause damages to Counter-Plaintiffs.

Paragraph 146(b) alleges that the "FDUTPA Defendants" deceived Counter-Plaintiffs concerning the reasons for wanting to move the Plant to North Carolina. The relevant allegations concerning this portion of the common scheme can be found in paragraphs 69 through 76 of the Third-Party Claims. Neither USQL nor Fabiani are mentioned as taking part in any acts related to this alleged deception.

Paragraph 146(c) alleges that the "FDUTPA Defendants" deceived Counter-Plaintiffs by manipulating the operation of the plant and the measurements of the Plant's operations. In paragraph 143, the Counter-Plaintiff alleged that the manipulated and fabricated testing and measurements were done "through Leonardo, Rossi and Penon." Admittedly paragraph 7 of the Third-Party Claims alleges without specificity that Fabiani somehow also manipulated the operation of the Plant. This general allegation should not be considered by the Court as it is repugnant to the specific allegation in paragraph 143. Moreover, in paragraphs 90 through 92 the Counter-Plaintiffs allege with specificity that the improper measurement of the Plant's operations in Florida during the Guaranteed Performance test was done and reported by Penon. These specific allegations of the Third-Party Claims concerning the alleged manipulation of testing and the

[1] None of these acts involve USQL or Fabiani, nevertheless, in paragraphs 78-79 Counter-Plaintiffs allege without any prior support that Fabiani had a role in enlisting Bass to pretend to be a JMP employee. This conclusory leap to include Fabiani in the business of JMP is contradicted by the prior allegations made by the Counter-Plaintiff and provisions of the Term Sheet where it is specified that Fabiani's only role is in assisting the operation of the Plant. Nowhere is it alleged by the Counter-Plaintiffs that Fabiani had any role with JMP.

resulting data are directed at Penon, Leonardo and Rossi; not USQL or Fabiani.

Paragraph 146(d) alleges, similar to the previous paragraph, that the "FDUTPA Defendants" provided false information as to the operation of the Plant and the measurements of the Plant. This allegation as it relates to USQL and Fabiani is completely belied by the allegations throughout the Third-Party Claims that USQL and Fabiani failed to provide required information. The crux of the claim against USQL and Fabiani is their failure and refusal to provide the information properly requested pursuant to the USQL Agreement. (*See* **ECF No. 50**, ¶86-88.) Indeed it was Third-Party Defendant, Penon, alleged to have provided the "purported measurement of the Plant's operation in Florida during the purported Guaranteed Performance test." (**ECF No. 50**, ¶90.) According to the allegations of the Third-Party Claims, it was Leonardo, Rossi and Penon that were making representations as to the performance of the Plant. (**ECF No. 50**, ¶87.)

Paragraph 146(e) alleges that the "FDUTPA Defendants" refused to provide other information properly requested by Counter-Plaintiffs. The Court's Order [**ECF No. 76**] specifically addresses this allegation, ruling that "Counter-Plaintiffs do not allege a deceptive or unfair practice so much as a breach of contract." (**ECF No. 76**, pg. 16). This alleged act of failing and refusing to provide information is the only alleged basis for liability against USQL and Fabiani and such act is *only* properly pled as the basis for the breach of contract claim. Therefore, as the Court noted, it should be included in the breach of contract count against them. This act, however, is insufficient to state a claim against USQL and Fabiani under FDUTPA.

Paragraph 146(f) alleges that the "FDUTPA Defendants" prevented the Counter-Plaintiffs from obtaining truthful information about the Plant's operations, measurements, role of JMP, or the role of Penon. This subparagraph essentially paraphrases the previous allegations. As set forth above, the alleged inaccurate information was obtained from Leonardo, Rossi and Penon and the circumstances involving and surrounding JMP and Penon do not involve USQL or Fabiani. Again, there are no specific acts alleged against either USQL or Fabiani that would be sufficient for a finding that either committed a deceptive or unfair practice.

Finally, Paragraph 146(f) alleges that the "FDUTPA Defendants" charged the Counter-Plaintiffs for services, expenses and equipment that were not used for the benefit of Counter-Plaintiffs. This allegation appears to relate to the damages sustained by the Counter-Plaintiffs. To the extent the Counter-Plaintiffs did not receive any benefit for the payments made to USQL or

Fabiani, such payments are properly recoverable as damages in the Count V breach of contract claim.

As noted by the Court, the common scheme alleged by the Counter-Plaintiffs to state a claim under FDUTPA was accomplished by: (1) manipulating the Counter-Plaintiffs into moving the Plant to Florida [**ECF No. 50**, ¶142]; (2) manipulating the results of the Plant's operation to create the false appearance the Plant was performing at exceptional levels [**ECF No. 50**, ¶143]; (3) demanding payment of $89 million based on the deceptive results of the Plant's operation [**ECF No. 50**, ¶144]; and (4) obtain payments for work that was completed to Counter-Plaintiffs' detriment [**ECF No. 50**, ¶145]. There can be no dispute that pursuant to the allegations in the Third-Party Claim, USQL and Fabiani were not involved in any acts that caused the Plant's move to Florida. The allegations also make clear that Leonardo, Rossi and Penon were the ones providing the operation results to the Counter-Plaintiffs. No allegation is made that USQL or Fabiani had any involvement in the negotiation of the Licensing Agreement or the demand for the final payment under that agreement. Yes, USQL and Fabiani received compensation and reimbursement of expenses from IH in accordance with their contract and any dispute about the propriety of such payments are to be resolved through Count V of the Third-Party Claim.

Notwithstanding the Court's ruling that the heightened pleading requirements of Rule 9(b) are inapplicable to the arguments presented in the Combined Motion to Dismiss, the Counter-Plaintiffs still have failed to allege a cognizable FDUTPA claim against USQL or Fabiani. USQL is not alleged to have participated in any acts of alleged deception or unfair practice except for the failure to provide information. Fabiani's name may be included generally in certain allegations relating to the true identity of Bass or in manipulating data, however, his gratuitous inclusion in these general allegations does not survive scrutiny when examined against the specific factual allegations that make clear Fabiani had no actual involvement in these alleged deceptive acts or unfair practices. Accordingly, Counter-Plaintiffs failed to provide any specific allegations of unfair and deceptive acts supporting the "common scheme" as to USQL and Fabiani. With respect to these two Third-Party Defendants, the requirements of Rule 8(a)(2) have not been satisfied. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)("[T]he pleading standard Rule 8 announces does not require 'detailed factual allegations,' but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation").

III. Count V (Breach of Contract Claim Against USQL and Fabiani) Requires More Specificity

Third Party Defendants Fabiani and USQL do not disagree with Defendants that they entered into a contractual relationship with IH to perform services, but re-assert that the Technical Consulting Agreement was not the operative agreement and did not bind any of the parties after it expired. The Agreement expressly provided:

> The 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 expiration of the Initial Term unless the parties agree in writing to extend it.

(**ECF No. 50**, Ex. 11.) "The cardinal rule of contractual construction is that when the language of a contract is clear and unambiguous, the contract must be interpreted and enforced in accordance with its plain meaning." *CitiMortgage, Inc. v. Turner*, 172 So. 3d 502, 504 (Fla. 1st DCA 2015), *reh'g denied* (Sept. 4, 2015), *review denied sub nom. Loper v. Turner*, No. SC15-1813, 2016 WL 1083306 (Fla. Mar. 18, 2016) (*citing Columbia Bank v. Columbia Developers*, LLC, 127 So.3d 670, 673 (Fla. 1st DCA 2013)).

The allegations regarding the breach of this agreement revolve around acts and omissions that took place after the agreement expired. The Counter-Plaintiffs fail to make any allegations in the Third-Party Claims as to how the agreement was extended or that it even was extended. In the opposition to the Combined Motion to Dismiss, the Counter-Plaintiffs argue that certain emails attached to the operative pleading demonstrate that the Agreement had been extended into 2016. (**ECF No. 73**, pg. 11; **ECF No. 50**, Ex. 21.) While USQL and Fabiani agree that exhibits to a complaint can be considered by the Court, these emails fall short of detailing how the extension was accomplished, the term of the extension, any agreement between the parties as to the continuing relationship between the parties, or if the agreement to extend amended any terms of the original agreement. If the agreement was extended, the contract required the extension to be done in writing. Where is that writing? If something else happened it should be alleged. Without alleging facts to show that the Technical Consulting Agreement appended to Counter-Plaintiffs' operative pleading [**ECF No. 50**] was extended in writing, Counter-Plaintiffs cannot base a breach of contract claim on the Agreement. Dismissal is required under these circumstances.

Respectfully submitted this 17th day of November, 2016.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on November 17, 2016, I electronically filed the foregoing with the Clerk of Court using CM/ECF and copies of the foregoing will be served upon all counsel of record via transmission of Notice of Electronic Filing generated by CM/ECF.

/s/ Francisco J. León de la Barra
Francisco J. León de la Barra