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; UNITED STATES QUANTUM LEAP, LLC; FULVIO FABIANI; and JAMES A. BASS,

Third-Party Defendants.

_____/

THIRD-PARTY DEFENDANTS' *COMBINED* MOTION FOR PARTIAL SUMMARY JUDGMENT AS TO COUNTS III AND IV OF COUNTER-PLAINTIFFS' FOURTH AMENDED COUNTERCLAIMS AND THIRD-PARTY CLAIMS, AND INCORPORATED MEMORANDUM OF LAW

Pursuant to this Court's Order [**ECF No. 192**], Third-Party Defendants, J.M. Products,

Inc. ("JM Products"), 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 and pursuant to Rule 56, Fed. R. Civ. P., collectively move this Court for the entry of an Order granting summary judgment in favor of Third-Party Defendants as to Counts III and IV of the Fourth Amended Counterclaims and Third-Party Claims (the "Counterclaims and Third-Party Claims," **ECF No. 132**) filed by Counter-Plaintiffs Industrial Heat, LLC ("IH") and IPH International, B.V. ("IPH") (collectively, "Counter-Plaintiffs"). In support thereof, Third-Party Defendants state as follows:

1. On February 1, 2017, Defendants filed their Fourth Amended, Answer, Additional Defenses, Counterclaims and Third-Party Claims (**ECF No. 132**).

2. Partial Summary Judgment as to Third-Party Defendants JM Products and Johnson in Count III is appropriate because there exists no genuine dispute as to any material fact and the movants are entitled to judgment as a matter of law.

3. Summary Judgment as to all the Third-Party Defendants in Count IV is appropriate because there exists no genuine dispute as to any material fact and the movants are entitled to judgment as a matter of law.

WHEREFORE, for the reasons more fully set forth below and the undisputed facts incorporated herein, the Third-Party Defendants respectfully request this Court to enter judgment in their favor with regard to Counts III and IV of the Fourth Amended Counterclaims and Third Party Claims.

STATEMENT OF UNDISPUTED MATERIAL FACTS[1]

1. On or about October 26, 2012, Industrial Heat, Leonardo, Rossi and AEG entered into the License Agreement at issue in this action. (**ECF No. 132** at ¶35.)

2. None of JM Products, Johnson, or Bass is a party to the License Agreement at issue in this action. (**ECF No. 132** at ¶35.)

3. Bass was not involved in any discussion with IH related to the License Agreement at issue in this action. (Rossi Affidavit ¶8.)

4. On or about August 13, 2014, Industrial Heat, Leonardo, and JM Products entered into the Term Sheet. (*See* ECF No. 132-17.)

5. Industrial Heat changed some of the terms of the Term Sheet and its attorneys reviewed the Term Sheet. (Vaughn Depo. Tr. at 274:5-9, Johnson Depo. Ex. 49, IH Depo. Tr. at 241:6-10.)

6. Industrial Heat did not contact Johnson Matthey. (Vaughn Depo. Tr. at 271:7-10.)

7. Bass was not involved in any discussion with IH related to moving the Plant to Florida. (Rossi Affidavit ¶9)

8. Bass was not involved in any discussion with IH related to the Term Sheet. (Rossi Affidavit ¶10)

9. Industrial Heat participated in the drafting of the Term Sheet had its attorneys review the Term Sheet. (Vaughn Depo. Tr. at 274:5-9, Johnson Depo. Ex. 49, IH Depo. Tr. at 241:6-10.)

10. Industrial Heat never sought to collect any payments from JM Products in relation to the Term Sheet. (Darden Depo. Tr. at 187:23-25.)

[1] Citations to the record include the following material: Pleadings, Deposition Excerpts that are being attached as exhibits hereto and filed contemporaneously, and the Affidavit in Support of Third-Party-Defendants' Motion for Partial Summary Judgment by Andrea Rossi also filed contemporaneously with this motion.

11. Bass was retained to work as the Director of Engineering for JM Products. (Rossi Affidavit ¶7.)

12. Bass did not report the COP to Darden. (Darden Depo. Tr. at 302:8-10.)

13. Penon did not meet Bass or Johnson. (Penon Depo. Tr. 138:13-139:4.)

14. Murray did not meet or speak with Johnson or Bass. (Murray Depo. Tr. 350:2-12.)

15. Murray testified that there was no evidence the data he reviewed was manipulated. (Murray Depo. Tr. 257:15-17.)

16. No evidence exists that Fabiani manipulated the E-Cat data provided to Industrial Heat. (Murray Depo. Tr. 257:8-20,368:8-14;369:2-6; Vaughn Depo. Tr. 261:1-9; West Depo. Tr. 204:19-25).

17. Fabiani is not a party to the License Agreement at issue in this action and had no involvement in the negotiation and/or execution thereof. (**ECF No. 132** at ¶35; IH Depo. Tr. at 64:11-65:4; Darden Depo. Tr. at 78:16-20; *see also* Rossi Affidavit ¶8).

18. Third-Party Plaintiffs knew that Fabiani and Dr. Rossi had a pre-existing working relationship in connection with the E-Cat technology. (**ECF No. 132** at ¶62; IH Depo. Tr. at 139:14-140:7; Mazzarino Depo. Tr. 252:16-20; West Depo. Tr. 84:5-14).

19. On or about September 1, 2013, Industrial Heat and USQL entered into a Technical Consulting Agreement ("USQL Agreement") attached as Exhibit 11 to the Third-Party Claim. (**ECF No. 132** at Exh. 11).

20. The stated purpose of the USQL Agreement was that Fabiani would "supply Industrial Heat with technical consulting and assistance in order to manufacture and develop the electrical equipment and the electronic system of the [ECat]". (**ECF No. 132** at Exh. 11).

21. The intent of the parties was that Fabiani would continue to assist Dr. Rossi with the development of the E-Cat technology and manufacture of E-Cat plants. (IH Depo. Tr. at 139:18-23, 264:7-265:16; Darden Depo. Tr. 311:14-312:9; West Depo. Tr. 84:1-4, 185:6-13).

22. Fabiani's compensation under the USQL Agreement was not dependent on the success or failure of the E-Cat technology. (**ECF No. 132** at Ex. 11).

23. Fabiani was not involved in making any representations to the Third-Party Plaintiffs concerning moving the 1MW plant to Doral, Florida. (**ECF No. 132** at ¶70; West Depo. Tr. 189:21-190:7; IH Depo. Tr. at 280:1-3; *see also* Rossi Affidavit ¶9).

24. Fabiani was not a party to the Term Sheet at issue in this action and had no involvement in the negotiation and/or execution thereof. (**ECF No. 132** at ¶74; **ECF No. 132** at Ex. 17; *see also* Rossi Affidavit ¶10).

25. Fabiani did not make any representations to the Third-Party Plaintiffs concerning J.M. Products, Inc. (See **ECF No. 132** at ¶68-¶75).

26. Fabiani did not work for J.M. Products, Inc./J.M. Chemical Products, Inc. or otherwise involved with J.M. Products, Inc./J.M. Chemical Products, Inc. except for providing limited computer services (Bass Depo. Tr. 118:12-14; *see also* Rossi Affidavit ¶11).

27. Fabiani did not limit or interfere with the Third-Party Plaintiffs' access to the J.M. Products, Inc. portion of the warehouse in Doral, Florida. (IH Depo. Tr. 280:4-8; Darden Depo. Tr. 325:24-326:13; Vaughn Depo. Tr. 240:7-10; West Depo. Tr. 219:20-220:8)

28. The measurements taken by Fabiani were not utilized during the testing of the 1MW Plant by Fabio Penon in Doral, Florida. (Penon Depo. Tr. 140:24-141:8).

29. No evidence exists that Fabiani manipulated the E-Cat data provided to Industrial Heat. (Murray Depo. Tr. 257:8-20,368:8-14;369:2-6; Vaughn Depo. Tr. 261:1-9; West Depo. Tr. 204:19-25).

MEMORANDUM OF LAW

I. Summary Judgment Standard

Summary judgment shall be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(a), (c). "[T]he court must view all evidence and make all reasonable inferences in favor of the party opposing summary judgment." *Chapman v. AI Transport*, 229 F.3d 1012, 1023 (11th Cir.2000) (en banc) (quoting *Haves v. City of Miami*, 52 F.3d 918, 921 (11th Cir.1995)). "An issue of fact is material if it is a legal element of the claim under the applicable substantive law which might affect the outcome of the case." *Burgos v. Chertoff*, 274 F. App'x 839, 841 (11th Cir.2008) (quoting *Allen v. Tyson Foods Inc.*, 121 F.3d 642, 646 (11th Cir.1997) (internal quotation marks omitted)). "A factual dispute is genuine 'if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.' " *Channa Imps., Inc. v. Hybur, Ltd.*, No. 07–21516–CIV, 2008 WL 2914977, at *2 (S.D.Fla. Jul.25, 2008) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986)).

The movant's initial burden on a motion for summary judgment "consists of a responsibility to inform the court of the basis for its motion and to identify those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact." *Fitzpatrick v. City of Atlanta*, 2 F.3d 1112, 1115 (11th Cir.1993) (internal quotation marks and

alterations in original omitted) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986)).

"By its very terms, this standard provides that the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247–48, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986) (emphasis in original). "For factual issues to be considered genuine, they must have a real basis in the record ... mere conclusions and unsupported factual allegations are legally insufficient to defeat a summary judgment motion." *Ellis v. England*, 432 F.3d 1321, 1326 (11th Cir.2005) (citations omitted). Summary judgment is proper "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial ." *Id*. at 322. In those cases, there is no genuine issue of material fact "since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." *Id*. at 323.

II. JM Products and Johnson are entitled to partial summary judgment as to the fraudulent inducement claims

Count III of the Counterclaims and Third-Party Claims alleges that Rossi, Leonardo, JMP, and Johnson fraudulently induced IH into entering into the Term Sheet. (**ECF No. 132**, ¶¶133-138.)

A plaintiff asserting a cause of action for fraudulent inducement must establish: "(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). "It is established law in Florida that a party cannot justifiably rely on representations not contained in a subsequent agreement when the agreement conflicts with those representations or where the party participated in drafting the agreement and did not reduce the representations to writing." *Corporate Financial, Inc. v. Principal Life Ins. Co.*, 461 F.Supp.2d 1274, 1291 (S.D. Fla. 2006) (citing *SEB S.A. v. Sunbeam Corp.*, 148 Fed.Appx. 774, 798 (11th Cir. 2005) (internal citations omitted)); *see also Barnes v. Burger King Corp.*, 932 F.Supp. 1420, 1425 (S.D. Fla. 1996) (internal citations omitted) ("It is a basic tenet of contract law that reliance on representations by a contracting party in a suit based on the contract is unreasonable where the representations are not contained in the subsequent written agreement between the parties.")

> IH attempts to establish its fraudulent inducement claim by alleging, in part:
>
> that Rossi and Johnson made a number of false representations to [IH], most notably that JMP (at the time called J.M. Chemical Products, Inc.) 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 Florida.

(**ECF No. 132**, ¶73.) Johnson met with Rossi, Darden, and Vaughn in or near Raleigh, North Carolina on or about July 28, 2014. (*See* HJ000021, Darden Depo. Tr. at 171:14-18.) Part of the reason for the meeting was to discuss moving the Plant to Florida and IH was told that JM Products was a new company and would be operating in a new facility. (Darden Depo. Tr. at 173:22-24, 177:1-3, 177:8-10.) After the meeting, a term sheet was circulated and there was some back and forth as to the terms of the agreement and revisions were circulated between the parties. (Vaughn Depo. Tr. at 274:5-9, Johnson Depo. Ex. 49.) In fact, IH had its attorneys review the term sheet prior to its execution. (IH Depo. Tr. at 241:6-10.) Ultimately, JM Products, Leonardo, and IH entered into a Term Sheet on August 13, 2014. (*See* ECF No. 132-17.)

Despite IH's allegations, there is no evidence establishing that Johnson made any representations regarding Johnson Matthey or was present at any moment in time when same might have been discussed. (Vaughn Depo. Tr. at 204:22-24 and 270:18-20, IH Depo. Tr. at 227:21-228:3, 228:20-229:2.) Even assuming, *arguendo*, that there was any evidence to establish the alleged representations regarding Johnson Matthey's involvement with JM Products, such representations were not including into the Term Sheet. Further, it is uncontroverted that IH participated in the drafting of the Term Sheet. As a result, IH cannot now rely on those alleged representations which it did not include in the Term Sheet. *See Corporate Financial* at 1291.

Accordingly, summary judgment is proper as to the alleged representations concerning Johnson Matthey.

III. Count IV: Florida Deceptive and Unfair Trade Practice Acts ("FDUTPA")

Counter-Plaintiffs allege that Counter-Defendants and Third-Party Defendants violated FDUTPA as part of a common scheme against Counter-Plaintiffs arising from, in large part, the same alleged facts and circumstances set forth in Count III. (*See, e.g.,* **ECF No. 132**, ¶139-148.)

"To 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). When dealing with an alleged scheme involving multiple defendants, as is the case here, "the Court must engage in a defendant-specific inquiry to determine whether there is evidence of an unfair or deceptive act by a particular defendant." *Barnext Offshore, Ltd. v. Ferretti Group USA, Inc.*, 2012 WL 1570057 (S.D. Fla. 2012).

"Under FDUTPA, a 'an unfair practice is one that offends established public policy and one that is immoral, unethical, oppressive, unscrupulous or substantially injurious to

consumers.'" *Hennegan Co. v. Arriola*, 855 F.Supp.2d 1354, 1360-1361 (S.D. Fla. 2012) (citing *Washington v. LaSalle Bank Nat'l Ass'n.*, 817 F.Supp.2d 1345, 1350 (S.D. Fla. 2011)). "[D]eception occurs if there is a representation, omission, or practice that is likely to mislead the consumer acting reasonably in the circumstances, to the consumer's detriment." *Garcia v. Kashi Co.*, 43 F.Supp.3d 1359, 1384 (S.D. Fla. 2014) (citing *PNR, Inc. v. Beacon Prop. Mgmt., Inc.*, 842 So.2d 773, 777 (Fla.2003)); *see also Zlotnick v. Premier Sales Grp., Inc.*, 480 F.3d 1281, 1284 (11th Cir.2007). In addition, there must be "a showing of *probable, not possible* deception that is likely to cause injury to a *reasonable relying* consumer." *Id.* (emphasis supplied; internal citations omitted).

As it relates to causation, the improper act or omission "must be direct, rather than remote or speculative." *Hennegan Co. v. Arriola*, 855 F.Supp.2d 1354, 1361 (S.D.Fla.2012); *see also* Fla. Stat. § 501.211(2) (A "person who has suffered a loss *as a result of* a violation of this part ... may recover *actual* damages.") (emphasis supplied).

Finally, Counter-Plaintiffs must establish facts sufficient to prove actual damages, which *necessarily* result from the allegedly deceptive act or unfair practice. *See e.g.*, *Bishop v. VIP Transp. Grp., LLC*, No. 615CV2118ORL22KRS, 2016 WL 4435700, at *5 (M.D. Fla. Aug. 2, 2016), *report and recommendation adopted*, No. 615CV2118ORL22KRS, 2016 WL 4382694 (M.D. Fla. Aug. 17, 2016).

a. FDUTPA Allegations Common to All Third-Party Defendants

Counter-Plaintiffs allege that Third-Party Defendants are subject to FDUTPA based on a three-part scheme orchestrated by Counter-Defendants to:

(i) move the Plant to Florida, where "the Plant's operations away from the oversight and control of Counter-Plaintiffs";

(ii) defraud Counter-Plaintiffs by manipulating "the operation of the Plant and measurement of the Plant's operations to create the false and deceptive appearance and impression that the Plant was performing at astronomical levels, with COP measurements … many multiples higher than anything achieved by any third party testing"; and

(iii) request payment in the amount of $89 million upon the successful completion of a performance test.

(**ECF No. 132**, ¶¶140-143.). The material facts adduced during discovery will establish that there are no genuine issues to be tried concerning the FDUTPA claim against the Third-Party Defendants

b. JM Products and Johnson are entitled to summary judgment as to all claims under FDUTPA

Counter-Plaintiffs allege that JM Products and Johnson:

(i) misrepresented the ownership of JM Products and its operations to induce Counter-Plaintiffs to move the Plant to Florida, away from their oversight and control (ECF No. 132, ¶¶73-75, 141);

(ii) sent "falsified invoices" to [IH] stating the amount of energy or steam [JM Products] was purportedly receiving and using from the Plant during a given month" (ECF No. 132, ¶76);

(iii) enlisted Bass to "pose as Director of Engineering for [JM Products]" and "meet with [IH] at [JM Products'] Doral facility and express [JM Products'] satisfaction with the steam power [JM Products] was receiving from the Plant and using to run its manufacturing operations" (ECF No. 132, ¶¶77-78); and

(iv) "restricted access to the [JM Products] area at the Doral location, claiming that there was a secretive manufacturing process being conducted there" (ECF No. 132, ¶82).

Counter-Plaintiffs contend these statements were intended to create the

> false impression that the Plant was operating as proposed by Rossi and Leonardo (in fact, even better, based on the electrical input data Fabiani and USQL were providing), which in turn would

> justify the operation of the Plant in Florida, with [Counter-Plaintiffs] bearing the cost of such operation and being mislead (sic) as to its performance.

(**ECF No. 132**, ¶146.)

This Court has already ruled in its Order [ECF No. 120] that although JM Products and Johnson might have contributed to the scheme by inducing the Plant's move to Florida, that did not did not directly result in Counter-Plaintiffs' damages. *Id*. at 11. Similarly, although Bass allegedly made false statements about JM Products and the confidential operations at the facility, which actions may have contributed to the scheme, none directly resulted in Counter-Plaintiffs' damages. *Id*. "The Florida location may have made it more difficult to monitor its operations, but it was Rossi's and Leonardo's alleged manipulation of the Plant's operations and deception about its ability to achieve "Guaranteed Performance" that caused the identified damages." *Id*. Lastly, this Court held that "[e]ven accepting Counter-Plaintiffs' allegations as to the deceptive nature of these acts, issuing falsified invoices; posing as an employee; and/or expressing satisfaction with a non-existent product, do not provide information about the *rate* at which the Plant generates energy." *Id*. at 11, fn. 10.

In addition, IH's corporate representative testified that Counter-Plaintiffs "could care less about a customer." (IH Depo. Tr. at 191:23-24, 217:6-10.) This is supported by the fact that Counter-Plaintiffs never requested that JM Products or Johnson provide any records of the operation of the Plant. (Darden Depo. Tr. at 293:20-294:4, 294:9-17.) Counter-Plaintiffs' ultimate goal was "to accommodate [Rossi] and to determine the state of the art, whether or not it really works." (*See* Vaughn Depo. Tr. at 212:17-20.) Furthermore, there is no record evidence that supports the allegation that JM Products or Johnson restricted anyone's access to the JM Products area of the facility. In fact, there was very little interaction between IH personnel and Johnson. Specifically, Thomas Barker Dameron does not know Johnson [Dameron Depo. Tr. at

252:10-18.]; Joseph Murray did not meet or speak with Johnson [Murray Depo. Tr. at 350:2-7.]; Barry West does not know who Johnson is [West Depo. Tr. at 179:21-24.]; and Vaughn does not recall meeting with Johnson aside from that meeting in North Carolina and does not recall speaking with him otherwise [Vaughn Depo. Tr. at 207:10-17, 269:8-13.].

Even assuming, *arguendo*, that Counter-Plaintiffs had evidence to substantiate their allegations (which they do not), there is no record evidence that JM Products' or Johnson's allegedly deceptive acts directly caused Counter-Plaintiffs to believe the Plant was performing at the COP required by the License Agreement. As noted above, this Court previously ruled that the relevant inquiry with respect to causation is whether the allegedly deceptive acts "directly caused Counter-Plaintiffs to believe that the Plant was performing at the promised productivity rate." (ECF No. 120 at pp. 11-12.) The record evidence clearly shows that Counter-Plaintiffs did not rely on either JM Products' or Johnson's statements or representations to determine whether the Plant was operating as promised. This is further supported by the fact that Counter-Plaintiffs "became very suspicious" at the outset that the testing in Doral was "not going to be a fully transparent bona fide test." (Darden Depo. Tr. 188:1-10.)

Furthermore, Counter-Plaintiffs have failed to establish any actual damages that necessarily resulted from JM Products' or Johnson's allegedly deceptive or unfair conduct.

For the foregoing reasons, summary judgment as to Count IV is appropriate and JM Products and Johnson are entitled to judgment as a matter of law.

c. Bass is entitled to summary judgment as to all claims against him

Counter-Plaintiffs do not have any evidence to support any of the allegations contained in the Counterclaims and Third-Party Claims and therefore Bass is entitled to summary judgment against Counter-Plaintiffs as to all claims against Bass. To begin, the allegations involving Bass

are scarce, to say the least. This is due to the fact that throughout the operation of the Plant in Doral, where the alleged manipulation of the Plant occurred, Counter-Plaintiffs had very limited interaction with Bass, whether in person or otherwise. And there is no record evidence that Bass made any deceptive or unfair statements during those limited contacts.

Counter-Plaintiffs allege that Bass:

(i) met "with Industrial Heat at [JM Products'] Doral facility and express[ed] [JM Products'] satisfaction with the steam power [JM Products] was receiving from the Plant and using to run its manufacturing operations" (ECF No. 132, ¶78);

(ii) represented himself as the Director of Engineering for JM Products (ECF No. 132, ¶78);

(iii) "restricted access to the [JM Products] area at the Doral location, claiming that there was a secretive manufacturing process being conduct there" (ECF No. 132, ¶82); and

(iv) made false statements that JM Products "was receiving and using 1MW of power from the Plant" (ECF No. 132, ¶146.).

Counter-Plaintiffs contend these statements were intended to create the

> false impression that the Plant was operating as proposed by Rossi and Leonardo (in fact, even better, based on the electrical input data Fabiani and USQL were providing), which in turn would justify the operation of the Plant in Florida, with [Counter-Plaintiffs] bearing the cost of such operation and being mislead (sic) as to its performance.

(**ECF No. 132**, ¶146.)

To start, all of the alleged wrongdoing related to Bass arose *after* Counter-Plaintiffs entered into the License Agreement and Term Sheet and were not the result of any business relationship between Bass and Counter-Plaintiffs. It is undisputed that the License Agreement was entered into on October 26, 2012 and the Term Sheet on August 13, 2014. (**ECF No. 132**, ¶35 and Ex. 17.) It is also undisputed that Bass did not have any interaction with Counter-Plaintiffs prior to JM Products and IH entering into the Term Sheet. (See Rossi Affidavit ¶¶9-

10.) Bass first became in involved with JM Products around October of 2014 and did not begin working with JM Products until after the Plant had already been delivered to the Doral facility. (*See* JB000039, Bass Depo. Tr. at 2:1-7 and 23:5-9.) In its Supplement to Amended Responses and Objections to Plaintiff's First Set of Interrogatories, IH states that the first time any IH or IPH personnel visited the Doral facility when Bass was present was during the week of February 9, 2015. (*See Id*. at pg. 10-11.) Thomas Darden confirmed in his deposition that he and Bass had not met until after the decision had been made to bring the Plant to Florida. (Darden Depo. Tr. at pg. 298-299.) Accordingly, it is undisputed that Counter-Plaintiffs did not rely on any statements or representations made by Bass when deciding whether to move the Plant to Florida.

As noted above, Counter-Plaintiffs allege that Bass represented to Counter-Plaintiffs that JM Products was satisfied with the steam it was receiving and made statements that JM Products was receiving 1MW of power from the Plant. However, contrary to these allegations, IH, through its designated corporate representative, testified in its deposition that it has no evidence to support such allegations.

> 20 Q. So were you at any point in time involved or
> 21 present in any conversation with Bass where he was
> 22 actually stating that the amount of steam received by the
> 23 JMC side was sufficient or good or enough?
> 24 A. I was not in a meeting with Bass that he stated
> 25 that.
>
> 1 Q. Do you know anybody that was in a meeting with
> 2 Bass when he may have stated that?
> 3 A. Not to my knowledge. We didn't meet with Bass
> 4 frequently. I think -- I think that this was the only
> 5 time that we met with Bass.
>
> . . .
>
> 9 Q. So let me ask you, other than in a meeting, in
> 10 this meeting, did you have any other conversations with
> 11 Mr. Bass? On the phone?
> 12 A. On the phone or e-mail? I don't recall talking
> 13 to him on the phone.

14 Q. Okay.
15 A. And I am trying to recall if we ever e-mailed
16 with him. I'm not sure.

(IH Depo. Tr. at 286:20-287:5, 287:9-16.) To sum up the testimony of IH, Vaughn stated that he does not recall Bass sending representations regarding the performance of the technology. (IH Depo. Tr. at 288:18-21.) Similarly, when Darden was asked in his deposition whether Bass had communicated to him or IH in writing any type of data concerning the performance of the Plant, Darden testified that he does not "remember getting any writing from [Bass] about that." (Darden Depo. Tr. at 95:9-24.) Furthermore, Darden testified that Bass did not report the COP measurement of the Plant to him. (Darden Depo. Tr. at 302:8-10.) Accordingly, it is clear that Counter-Plaintiffs did not rely on any statements allegedly made by Bass as to the operation of the Plant because no such statements exist.

Next is the allegation that Bass represented himself as the Director of Engineering for JM Products and, presumably, that this was false. There is no record evidence that Bass was not the Director of Engineering for JM Products at the time such representations were allegedly made. (IH Depo. Tr. at 294:20-295:2.) Bass is in fact an engineer and he was the Director of Engineering during his time with JM Products. (Bass Depo. Tr. at 8:17-21, 157:5-6.) Bass graduated Summa Cum Laude from Rutgers University with a degree in electrical engineering, specializing in closed loop control systems. (Bass Depo. Tr. at pg. 8:17-21.)

Lastly, Counter-Plaintiffs allege that Bass restricted access to the JM Products area of the Doral facility and represented that there was a secretive manufacturing process taking place. There is no record evidence that supports the allegation that Bass restricted anyone's access to the JM Products area of the facility. In fact, there was very little interaction between IH personnel and Bass. Specifically, Thomas Barker Dameron does not recall meeting Bass

[Dameron Depo. Tr. at 211:18-25.]; Joseph Murray did not meet or speak with Bass [Murray Depo. Tr. at 350:8-12.]; Barry West only met Bass a few times and did not mention Bass restricting access to any part of the facility when describing his interaction with Bass [*see generally*, West Depo. Tr. at pp. 177-179.]; Vaughn only met with Bass once -- in a meeting at the Doral facility and did not mention Bass restricting access to any part of the facility when describing the meeting [*see generally,* IH Depo. Tr. at pp. 283-286.]; and Darden only met with Bass once or twice and did not mention Bass restricting access to any part of the facility when describing his interactions [*see generally*, Darden Depo. Tr. at pp. 289-292.]). In addition, Fabio Penon never met Bass and did not require access to the JM Products area of the Doral facility as JM Products operation did not affect Penon's ability to measure the COP of the Plant. (Penon Depo. Tr. at 138:22-139:4, 139:10-13, 140:4-7.)

Similarly, there is no record evidence that a manufacturing process was not taking place. Even assuming, *arguendo*, that JM Products was not conducting any manufacturing process or otherwise using the steam provided by the Plant, there is no record evidence that Bass knew any such representation to the contrary to be false. This is further borne out by the fact that Bass' role at JM Products did not include the operation of its facility; it was primarily the design of a control system. (Bass Depo. Tr. at p. 113.) Indeed, Bass was told that JM Products was working with platinum sponge and graphene (Bass Depo. Tr. at pp. 27-29), which would constitute a viable manufacturing process.

It is clear that Bass did not (i) play any role in the decision to move the Plant to Florida, (ii) manipulate any data involving the Plant, (iii) make any representations as to the operation of the Plant, or (iv) demand payment of $89 million. Accordingly, Counter-Plaintiffs have failed to

establish any facts to support any of the allegations that purportedly give rise to a claim against Bass under FDUTPA.

Furthermore, in its Order [**ECF No. 120**], this Court ruled that the relevant inquiry with respect to causation is whether the allegedly deceptive acts "directly caused Counter-Plaintiffs to believe that the Plant was performing at the promised productivity rate." (*Id*. at pp. 11-12.) Counter-Plaintiffs have failed to establish causation between any of Bass' allegedly deceptive acts and any actual damages. Even assuming, *arguendo*, that Counter-Plaintiffs had evidence to substantiate their allegations (which they do not), there is no record evidence that Bass' allegedly deceptive acts directly caused Counter-Plaintiffs to believe the Plant was performing at the COP required by the License Agreement. To the contrary, the evidence clearly shows that Counter-Plaintiffs did not rely on Bass' statements or representations to determine whether the Plant was operating as promised.

> After the plant got installed in Florida and we saw
> that Rossi had removed all of the instrumentation and
> the monitoring access that we had, and as we realized
> that he was restricting access to it so it was not
> going to be a fully transparent bona fide test, at that
> point we became very suspicious.
> We realized that it was -- something bad
> was going on down there. And we don't want to get
> thrown in jail for participating in some kind of fraud
> so we said we don't want to receive payment from them.

(Darden Depo. Tr. at 188:1-10.) Before the Plant even began operating in Florida, Counter-Plaintiffs were suspicious of the goings-on at the Doral facility. Given the suspicions of fraud and the potential involvement of JM Products and, by association, Bass, in such fraud, Counter-Plaintiffs cannot conceivably establish any evidence to support an allegation that Bass' allegedly deceptive acts directly caused them damages. *See also City First Mortg. Corp. v. Barton*, 988

So.2d 82, 86 ("FDUTPA does not provide for the recovery of nominal damages, speculative losses, or compensation for subjective feelings of disappointment.") (internal citations omitted)

In sum, Counter-Plaintiffs cannot point to any record evidence that establishes the alleged wrongdoing by Bass, or that such alleged wrong-doing directly caused any actual damages suffered by Counter-Plaintiffs.

For the foregoing reasons, summary judgment as to Count IV is appropriate and Bass is entitled to judgment as a matter of law.

d. USQL and Fabiani are entitled summary judgment as to all claims under FDUTPA

The bottom line and overwhelming emphasis of this action is the multi-million dollar dispute between Dr. Andrea Rossi and Thomas Darden concerning debatable scientific technology with enormous potential. This litigation is commenced by Dr. Rossi with the filing of the initial pleading seeking entitlement to $89 million based primarily on certain licensing agreements between Rossi and his companies and companies owned and controlled by Mr. Darden. The responsive pleading defends and asserts various counterclaims and third-party claims. Count IV of the responsive pleading attempts to state a claim under the Florida Deceptive and Unfair Trade Practices Act. Third-Party Plaintiff, Industrial Heat, LLC ("Industrial Heat") and IPH International B.V. ("IPH"), allege that they were damaged by a common scheme involving various participants. It comes as no surprise that the Third-Party Plaintiffs would include Fulvio Fabiani, long-time assistant to Dr. Rossi in the E-Cat technology, as a participant in such scheme. The undisputed factual record before this Court, however, establishes that Fabiani was nothing more than a consultant contracted by Industrial Heat for the purpose of assisting Dr. Rossi.

The undisputed material facts before this Court demonstrate that Fabiani through his Florida limited liability company, USQL, was paid by Mr. Darden's company, Industrial Heat, to serve as a consultant and assistant to Dr. Rossi for the development of the E-Cat technology. Fabiani's *raison d'être* was to support Dr. Rossi's work. The Third-Party Plaintiffs disregard the limited role played by Fabiani and ascribe to him unlimited participation in the alleged common scheme.

In considering Fabiani's Motion to Dismiss the Third Amended FDUTPA claim this Court correctly noted at the time that "[w]hile Counter-Plaintiffs lump Fabiani and Quantum Leap into the "FDUTPA Defendants" group, these Third-Party Defendants were not involved in the substantive acts mentioned in Count IV." (**ECF No. 120**, pg. 10). The Court dismissed the FDUTPA claim against Fabiani and USQL because it found that there were no specific allegations of deceptive statements or acts attributable to Fabiani and USQL other that the failure to provide documents. The Fourth Amended FDUTPA claim was allowed to proceed by this Court because of the addition of one new allegation that electrical input data provided by Fabiani and USQL did not correspond to data received from Florida Power & Light. (**ECF No. 132**, ¶142).

This newly amended fact scenario involving the electrical input data is insufficient as a matter of law to survive the scrutiny by this Court of the undisputed material facts. The record before this Court demonstrates that (1) Fabiani played no role whatsoever in the Third-Party Plaintiffs to move the E-Cat Plant to Doral, Florida; (2) Fabiani had no role whatsoever in the discussions and negotiations between JMP and Industrial Heat; (3) Fabiani's measurements were not relied upon or pertinent to Mr. Darden's obligation to pay Dr. Rossi; and (4) there is

absolutely no evidence that Fabiani manipulated the operation of the E-Cat plant or the data provided by him to Industrial Heat.

Fabiani was not involved in making any representations to the Third-Party Plaintiffs concerning moving the E-Cat plant to Doral, Florida. The allegations of the Complaint are devoid of any mention of Fabiani's involvement in the representations concerning moving the plant to Doral, Florida. Instead, the allegation is that the representation about the customer comes from Rossi. (*See* **ECF No. 132** at ¶70). When the Industrial Heat corporate representative was deposed and asked whether "Mr. Fabiani have any involvement in convincing Industrial Heat to move the plant?" his answer was "I'm not sure". (IH Depo. Tr. at 280:1-3).

Barry West is an employee/contractor/shareholder for Industrial Heat who worked on the E-Cat project from the beginning with Fabiani (West Depo. Tr. 35:6-22, 41:11-13). Mr. West worked with Fabiani for most of three years on behalf of Industrial Heat and he could not testify to one thing that he saw Fabiani do that was dishonest or inappropriate or deceitful to Industrial Heat. (West Depo. Tr. 227:4-11). With regard to moving the plant to Doral, Mr. West testified that Fabiani did not have a role in convincing Industrial Heat to allow the plant to move to Doral, he was not aware of it and that it was "Andea's deal". (West Depo. Tr. 189:21-190:7).

Similarly, Fabiani was only minimally involved with J.M. Products. The most relevant testimony concerning Fabiani's interaction with J.M. Products comes from Mr. West's deposition in the following exchange:

> Q. While you were working down in Miami with Mr. Fabiani, how much interaction did Mr. Fabiani have with the JM Products' side of the warehouse?
>
> A. It was limited, but Fulvio was over there, over there a lot, or at least up front in the office. I mean, once again, what was in behind the wooden box, the wooden wall was pretty much forbidden. So I don't know how much interaction Fulvio had back there. I know he was back there some, because I heard his voice over

there, but I think most of Fulvio's interaction with Mr. Bass and Reynoldo and all was up front in the office.

Q. Do you know whether Mr. Fabiani had – do you know whether Mr. Fabiani had permission to go back there into the JM side into the, I guess the closed off area?

A. I'm assuming he did, if Andrea or Jim or Reynoldo was there, yeah, I think maybe so. I know I wasn't allowed in there, and I never seen Fulvio use the one door back there but like once, and that's when Reynoldo let him pass one time for something. But once again, Mr. Jim was having computer problems all the time, and Fulvio is the computer fix it man. So he'd go up there and fix it. I think that's what -- according to what Fulvio tells me, that's what a lot of the issues were. Jim would have problems with his computer, and Fulvio would go help him.

Q. Okay. But you said that -- and you talked about this -- a door. Is that the door that leads to the JM Products' side?

A. Yes, sir, there was one personnel door there that remained shut and locked at all times.

Q. And you saw Mr. Fabiani go through that door one time, you said?

A. Yeah, I think one time in the very beginning, Reynoldo, he followed Reynoldo after something up there, went up front to work on Jim's computer or something. So, but then he showed up at the back door, because I had to let him in, because they didn't let him come back through that door. Andrea didn't want anybody passing through that door.

Q. So they even made Mr. Fabiani go around the building to come back into the back?

A. That's right, that was our access to the plant, and we weren't allowed to go to the front through their process area.

(West Depo. Tr. 197:8-199:3). This testimony demonstrates that Fabiani was restricted in his access to the J.M. Products side of the warehouse, was limited to times when Rossi or others were present and was mainly there for the purpose of servicing the company's computers.

Moreover, there is ample evidence to contradict the allegations in the FDUTPA claim that Fabiani restricted Industrial Heat's access to the J.M. Products side of the warehouse. Thomas Darden testified as follows:

> Q. And do you recall Mr. Fabiani in any way participating in any way to restrict your or your company's [access] to the J.M. side of the facility?
>
> A. I don't remember him needing to do that. I mean, we weren't trying to break down the door. The door was closed.
>
> Q. Well, that was just an allegation in your complaint that he restricted Industrial Heat's access. Do you have any facts to support that allegation?
>
> A. That he restricted our access to the other side?
>
> Q. Yes, sir.
>
> A. I did not see him restrict our access or try to keep us from going over there. Maybe someone else.

John Thomas Vaughn, Vice President of Industrial Heat, made clear that he and his new engineer were turned away from the Doral facility by Rossi, with no mention of Fabiani. (Vaughn Depo. Tr. 240:7-10). When Mr. West was asked if Mr. Fabiani played a role in the denial of access to the new Industrial Heat engineer, Mr. Murray, his reply was that he did not "think [Fabiani] had anything to do with that". (West Depo Tr. 219:20-220:4). Mr. West followed that up by confirming that Rossi controlled who came in and out of the Doral facility. (West Depo Tr. 220:5-13).

The undisputed material facts presented demonstrate that Fabiani and USQL took no part and had no involvement in the substantive act or representations concerning the first part of the alleged FDUTPA claim.

The second part of the alleged scheme was the manipulation of the operation of the plant. (**ECF No. 132** at ¶142). In this regard the FDUTPA claim alleges that Leonardo, Rossi and Pennon were specifically responsible for the claims of the E-Cat plant's performance. *Id.* Pennon confirms that his report on the operation of the plant and the COP calculation did not utilize Fabiani's measurements. (Penon Depo. Tr. 140:24-141:8). Fabiani's alleged

participation in any manipulation is limited to allegations that the power input data he provided does not match or equal data obtained from FPL. (**ECF No. 132** at ¶142). This purported evidence, however, does not demonstrate any actual manipulation by Fabiani nor can any inference be drawn from the discrepancy in the numbers.

Mr. Joseph Murray, a former Vice President of Industrial Heat, has been tendered as an expert to specifically testify concerning the comparison of the power purchased from FPL and the power as reported by Fabiani and Penon. On this topic Mr. Murray testified in his deposition as follows:

> So all of the trends seem to be consistent except for this period of time when, in about from middle of November to the beginning of December where you have a power level absorbed into the building lower than the measured. So that would give -- to me, there are three potential explanations. Number one, Florida Power and Light could be wrong. Number two, the measurements made by Fabiani and Penon could be wrong. And number four or -- I'm sorry, number three, the data could have been manipulated.· On either part, on either party.
>
> Q.· · Do you have any evidence that the data has been manipulated --
>
> A. No, I don't.
>
> Q. -- by either one?
>
> A. Not by Florida Power and Light or by Fabiani or Penon.

(Murray Depo. Tr. 257:8-20). He was more specifically asked as follows:

> Q. And for lack of a better word, I think there were discrepancies between Fabiani's numbers versus the FP&L's numbers. Do you have any reason to believe that that is a result of Mr. Fabiani manipulating the data that he was putting into his spreadsheets?
>
> A. At this point, I have no evidence of that whatsoever.

While there may be record evidence presented by Industrial Heat that Fabiani's power input numbers did not coincide, these occurrences were minor. They only occurred approximately 17 times in a test lasting almost 350 days. (Murray Depo. Tr. 273:13-19). The

principal point being that there is no evidence beyond conjecture and speculation that Fabiani manipulated the operation of the plant. Furthermore, these power consumption numbers are not the same data that Industrial Heat complains Fabiani withheld. (Murray Depo. Tr. 366:14-24).

This Court has in the past applied a defendant-specific inquiry to determine whether there is evidence of an unfair or deceptive act by a particular Defendant; namely, whether evidence exists to hold each Defendant liable under FDUTPA. *See Barnext Offshore, Ltd. V. Ferretti Group USA, Inc.*, 2012 WL 1570057 (2012). Applying a defendant-specific inquiry into the FDUTPA claims against Fabiani and USQL must result in the granting of a summary judgment in favor of Fabiani and USQL. It is abundantly clear that neither Fabiani nor USQL participated in the substantive acts of the FDUTPA claim. Fabiani was at all times under the direct supervision and control of Rossi, Fabiani had no involvement with moving the plant to Florida, Fabiani had only limited involvement with J.M. Products during his one year working on the E-Cat plant and there is no evidence beyond conjecture and speculation that Fabiani manipulated the operation of the plant.

The actual claims as to the performance of the E-Cat plant were made by Rossi and Penon. At all times it was understood that Fabiani was Rossi's right hand man and a computer/electronics technician. Fabiani's duties were to assist Rossi in operating the plant the measurement of the operation of the plant was outside his scope. There can be no causation or directly flowing damages from the power input data provided by Fabiani.

IV. Conclusion

For the foregoing reasons, summary judgment is appropriate and the movants are entitled judgment in their favor with regard to Counts III and IV of the Fourth Amended Counterclaims and Third Party Claims.

Respectfully submitted this 22nd day of March, 2017.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on March 22, 2017, copies of the foregoing will be served upon all counsel on the service list below via e-mail.

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