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.
_____

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* STATEMENT OF MATIERIAL FACTS IN OPPOSITION AND MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS'/COUNTER-PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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 Federal Rule of Civil Procedure 56 and Local Rules 7.1 and 56.1, collectively submit the incorporated Statement of Disputed Material Facts and Memorandum of Law in Opposition to Defendants'/Counter-Plaintiffs' Motion for Summary Judgment (**ECF No. 203**).

STATEMENT OF MATERIAL FACTS IN OPPOSITION[1]

Third-Party Defendants hereby respond to the Defendants'/Counter-Plaintiffs' Statement of Material Facts in Support of Motion for Summary Judgment (**ECF No. 207**), and state as follows:

62. Disputed. On or about July 28, 2014, Johnson and Andrea Rossi ("Rossi") met with IH in North Carolina to discuss the proposal to relocate the Plant to Florida and how JM Products would utilize the Plant. *See* Johnson Depo. Tr. at 230:18-231:6. None of the documents that IH cites to supports the purportedly undisputed fact that any representation as to any affiliation between Johnson Matthey and JM Products. In fact, IH was informed that the only "affiliation" with Johnson Matthey was that JM Products would obtain materials from Johnson Matthey and process those materials. *See* Johnson Depo. Tr. at 237:13-22. IH knew that JM Products was a newly formed company and not yet operating. *See* Darden Depo. Tr. at 177:1-3, 177:8-10. JM Products used steam produced by the Plant to create platinum sponge and/or

[1] The relevant excerpts of the deposition testimony cited herein have either been attached as an exhibit to the Third-Party Defendants Combined Motion for Partial Summary Judgment (ECF No. .242), Counter-Plaintiffs' Statement of Material Facts (ECF No. 207) or to this Motion as a supplemental exhibit (Supp. Ex.) in the following manner: Rossi Depo. Tr. (ECF No. 207-2); Darden Depo. Tr. (ECF No. 207-9, Supp. Ex. A); Penon Depo. Tr. (ECF No. 207-10, Supp. Ex. H); Leonardo Depo. Tr. (ECF No. 207-17); IH Depo. Tr. (ECF No. 207-19, Supp. Ex. B); Vaughn Depo. Tr. (ECF No. 207-21, Supp. Ex. F); JM Products Depo. Tr. (ECF No. 207-36); Johnson Depo. Tr. (ECF No. 207-37); Bass Depo. Tr. (ECF No. 207-38, Supp. Ex. E); Stokes Depo. Tr. (ECF No. 207-52); Murray Depo. Tr. (ECF No. 207-57, Supp. Ex. G); Dameron Depo. Tr. (ECF No. 207-60, Supp. Ex. I); West Depo. Tr. (ECF No. 207-61, Supp. Ex. D); Mazzarino Depo. Tr. (Supp. Ex. C).

graphene based catalyzers for sale to Leonardo. *See* Leonardo Depo. Tr. at 214:23-215:3, 220:16-19, 225:5-10.

65. JM Products was intended to be established in the United Kingdom, but due to high costs associated with incorporation it was formed elsewhere. See Johnson Depo. Tr. at 240:16-20.

66. Disputed. At all relevant times prior to the execution of the Term Sheet, Counter-Plaintiffs knew that JM Products would be a newly formed company and not yet operating. *See* Darden Depo. Tr. at 177:1-3, 177:8-10.

67. IH knew that the only "affiliation" with Johnson Matthey was that JM Products would obtain materials from Johnson Matthey and process those materials. *See* Johnson Depo. Tr. at 237:13-22.

68. See ¶67, *supra*.

69. Disputed. Johnson and JM Products did not make any false representations with respect to JM Products. *See* Johnson Depo. Tr. at 237:13-22; Vaughn Depo. Tr. at 204:22-24, 270:18-20; IH Depo. Tr. at 227:21-228:3, 228:20-229:2. There is no evidence that established Johnson was present when any alleged representations regarding Johnson Matthey were made. *See id*. Furthermore, IH testified that it was "trying to be accommodative" and "trying to keep [Rossi] happy" when it allowed the Plant to move to Florida. *See* IH Depo. Tr. 214:15-19, 215:25-216:1; *see also* Vaughn Depo. Tr. at 272:9-10.

70. Disputed. IH entered into the Term Sheet because it was trying to accommodate Rossi. *See* IH Depo. Tr. 214:15-19, 215:25-216:1; *see also* Vaughn Depo. Tr. at 272:9-10. IH did not care about what the customer would be doing. *See* Vaughn Depo. Tr. at 196:8-11. In addition, Counter-Plaintiffs solicited and obtained $50 million in investment funds after IH

entered into the Term Sheet. *See* IH Depo. Tr. at 170:9-14, 204:25-205:5, 206:6-207:6. It is undisputed that JM Products, Leonardo, and IH entered into the Term Sheet on or about August 13, 2014. *See* ECF No. 132-17.

71. Disputed. See ¶70, *supra*.

72. Undisputed.

73. Disputed. JM Products used steam produced by the Plant to create platinum sponge and/or graphene based catalyzers for sale to Leonardo. *See* Leonardo Depo. Tr. at 214:23-215:3, 220:16-19, 225:5-10. Counter-Plaintiffs do not cite to any evidence that supports the "undisputed fact" that Rossi was acting on behalf of JM Products "at other times."

a. The entities and individuals are separate and distinct. In addition, Rossi distinguished JM Products from Rossi and Leonardo to respect corporate formalities. *See* ECF No. 238-4 (Plaintiffs' Supp. Ex. 46 ¶17).

b. Bass is in fact an engineer and he was the Director of Engineering during his time with JM Products. *See* Bass Depo. Tr. at 8:17-21, 157:2-15.

c. See ¶73, *supra*.

d. JM Products was in fact satisfied with the power that it was receiving from the Plant. *See* ECF No. 207-47 at Leonardo Corp. Dep. Ex. 20.

e. Counter-Plaintiffs knew that JM Products would be a newly formed company and not yet operating. *See* Darden Depo. Tr. at 177:1-3, 177:8-10. In addition, Rossi made clear to Defendants that JM Products would use Johnson Matthey as a supplier. *See* ECF No. 207-41.

74. Disputed. JM Products used steam produced by the Plant to create platinum sponge and/or graphene based catalyzers for sale to Leonardo. *See* Leonardo Depo. Tr. at 214:23-215:3, 220:16-19, 225:5-10.

a. Johnson was told that the steam from the Plant was being utilized. *See* Johnson Depo. Tr. at 50:16-23.

b. Johnson did not send letters to IH representing that JM Products was a derivative of Johnson Matthey. *See* Johnson Depo. Tr. at 124:5-19. Johnson believed that the caption on the letters ("Advanced Derivatives of Johnson Matthew Platinum Sponges") meant "a product that is produced using Johnson Matthey platinum sponge, a derivative of the sponge." *See id*.

75. Disputed. JM Products used steam produced by the Plant to create platinum sponge and/or graphene based catalyzers for sale to Leonardo. *See* Leonardo Depo. Tr. at 214:23-215:3, 220:16-19, 225:5-10.

a. Bass is in fact an engineer and he was the Director of Engineering during his time with JM Products. *See* Bass Depo. Tr. at 8:17-21, 157:2-15.

b. See ¶75, *supra*. In addition, Bass was told that JM Products was working with platinum sponge and graphene. *See* Bass Depo. Tr. at 27:9-29:10.

c. JM Products was in fact satisfied with the power that it was receiving from the Plant. *See* ECF No. 207-47 at Leonardo Corp. Dep. Ex. 20. In addition, Bass was told that JM Products was working with platinum sponge and graphene. *See* Bass Depo. Tr. at 27:9-29:10.

76. Disputed. As indicated above, JM Products, Johnson, and Bass did not engage in any wrongful activity. *See* ¶¶62, 65-75, *supra*. In addition, they did not represent to Counter-Plaintiffs the coefficient of performance ("COP") of the Plant. *See* IH Depo. Tr. at 286:20-287:5, 287:9-16, 288:10-21; Darden Depo. Tr. at 302:8-10. Lastly, Fabio Penon was responsible for measuring and reporting the operation and COP of the Plant to Counter-Plaintiffs. *See* ECF No. 214 at Ex. 3, 9, 10.

77. Disputed. JM Products used steam produced by the Plant to create platinum sponge and/or graphene based catalyzers for sale to Leonardo. *See* Leonardo Depo. Tr. at 214:23-215:3, 220:16-19, 225:5-10; *see also* Rossi Depo. Tr. at 185:23-186:20 (relevant portion found in ECF No. 238-3); *see also* ECF No. 238-16.

78. Disputed. At all material times, Counter-Plaintiffs knew that Rossi would direct the operations of JM Products' facility. *See* JM Products Depo. Tr. at 34:15-20. In addition, Leonardo paid JM Products' expenses pursuant to an agreement whereby JM Products would provide to Leonardo the catalysts that JM Products produced using the steam from the Plant. *See* Leonardo Depo. Tr. 208:3-209:21.

a. Bass is in fact an engineer and he was the Director of Engineering during his time with JM Products. *See* Bass Depo. Tr. at 8:17-21, 157:2-15. Vaughn testified that he had no reason to believe that Bass was not JM Products' Director of Engineering. *See* Vaughn Depo. Tr. at 294:20-295:2.

b. Johnson's and Bass' roles at JM Products did not entail the operation of the Plant. See Johnson Depo. Tr. 234:3-15, 237:23-238:1; Bass Depo. Tr. 113:13-17. Johnson and Bass were told what the operation of JM Products entailed. *See* Johnson Depo. Tr. at 50:16-23; Bass Depo. Tr. at 8:17-21, 157:2-15.

c. Undisputed.

79. IH was informed that the only "affiliation" with Johnson Matthey was that JM Products would obtain materials from Johnson Matthey and process those materials. *See* Johnson Depo. Tr. at 237:13-22. IH knew that JM Products was a newly formed company and not yet operating. *See* Darden Depo. Tr. at 177:1-3, 177:8-10. Counter-Plaintiffs were informed that "the operation of [JM Products] was going to be handled by Andrea Rossi." *See* Johnson Depo. Tr.

245:1-2. JM Products was intended to be established in the United Kingdom, but due to high costs associated with incorporation it was formed elsewhere. *See* Johnson Depo. Tr. at 240:16-20.

80. It is undisputed that Fabiani and USQL provided data to the Third-Party Plaintiffs and to Fabio Penon. The arguments made by the Third-Party Plaintiffs that the data was somehow fabricated, manipulated, incomplete or misleading is denied. Third-Party Plaintiffs fail to cite any record evidence whatsoever to substantiate their allegations and assertions that the data was somehow fabricated, manipulated, incomplete or misleading. Quite the contrary, there is no record evidence that Fabiani manipulated the E-Cat data provided to Industrial Heat. *See* Third-Party Defendants Statement of Undisputed Material Facts No. 29 (**ECF No. 242**).

81. Fabiani and USQL assert that the 1 MW Plant's power absorption measurement data speaks for itself. The arguments made by the Third-Party Plaintiffs that the data was somehow fabricated, manipulated, incomplete or misleading is denied. Third-Party Plaintiffs fail to cite any record evidence whatsoever to substantiate their allegations and assertions that the data was somehow fabricated, manipulated, incomplete or misleading. Quite the contrary, there is no record evidence that Fabiani manipulated the E-Cat data provided to Industrial Heat. *See* Third-Party Defendants Statement of Undisputed Material Facts Nos. 15, 16 & 29 (**ECF No. 242**).

82. Fabiani and USQL assert that the discrepancies between the 1 MW Plant's power absorption measurement data provided by Fabiani and the FPL readings are not probative of the claim that Fabiani's data was somehow fabricated, manipulated, incomplete or misleading. Fabiani and USQL deny that any data was somehow fabricated, manipulated, incomplete or misleading. Mr. Joseph Murray, a former Vice President of Industrial Heat and expert witness

tendered by the Third-Party Plaintiffs, testified that he had "no evidence whatsoever" that the discrepancy between Fabiani's power absorption data and the FPL readings were the result of manipulation. (Murray Depo. Tr. 257:8-20; 368:8-14).

85. Disputed. None of the documents cited by Counter-Plaintiffs support their "undisputed fact" that Johnson and JM Products prohibited IH personnel from entering the JM Products side of the facility or learning about JM Products' operations. Furthermore, it was understood that, pursuant to the Term Sheet, IH would not have access to JM Products' facility. *See* JM Depo. Tr. 38:17-25, 40:24-41:2.

86. Disputed. Again, Counter-Plaintiffs attempt to lump Johnson and JM Products into a purported "undisputed fact" without any evidence to support such statement of fact. None of the documents cited by Counter-Plaintiffs support their statement with respect to Johnson and JM Products. Furthermore, it was understood that, pursuant to the Term Sheet, IH would not have access to JM Products' facility. *See* JM Depo. Tr. 38:17-25, 40:24-41:2.

87. Disputed. Counter-Plaintiffs mischaracterize the testimony to which they cite. The letter Johnson sent to IH clearly states that JM Products "will be happy to comply with any agreement between [IH] and [Leonardo] regarding access to the [facility] to inspect the [Plant]." *See* ECF No. 207-64 [Johnson Depo. Ex. 41]. Furthermore, the letter states that it is not the intent of JM Products to interfere with any dispute between IH and Leonardo as to the Plant and the related intellectual property. *See id*.

89. Fabiani and USQL deny that they were involved in any scheme or caused Third-Party Plaintiffs to pay for anything. There is no evidence that the power absorption data

provided by Fabiani was manipulated. *Id.* Fabiani and USQL also deny the causal connection alleged by the Third-Party Plaintiffs. Fabiani provided the complained of data after Industrial Heat incurred the expenses set forth in paragraph 89. Mr. Murray testified that the complained of discrepancies between Fabiani's power absorption data and the FPL readings occurred between mid-November 2015 and early December 2015, almost a year after the E-cat was transported to Florida. (Murray Depo. Tr. 273:13-19).

Disputed. Third-Party Defendants did not orchestrate or participate in any scheme to induce Counter-Plaintiffs to do anything. *See* ¶¶ 62, 65-82, 85-87, *supra*. Counter-Plaintiffs new that JM Products was a newly formed company, would operate a new facility, and was not affiliated with Johnson Matthey. *See* Johnson Depo. Tr. at 237:13-22; Darden Depo. Tr. at 177:1-3, 177:8-10. Counter-Plaintiffs involvement with Rossi and Leonardo began long before Third-Party Defendants met Counter-Plaintiffs and any alleged damages are not the result of any wrongdoing by Third-Party Defendants. *See* ECF No. 207 ¶1; *see also* ¶¶ 62, 65-82, 85-87, *supra*.

90. It is undisputed that USQL and Fabiani executed the Technical Consulting Agreement.

91. It is undisputed that USQL and Fabiani executed the Technical Consulting Agreement.

92. It is undisputed that the Technical Consulting Agreement was renewed and extended by the respective parties.

93. It is undisputed that the Technical Consulting Agreement was renewed and extended by the respective parties.

94. It is undisputed that the Technical Consulting Agreement was again renewed and extended by USQL and Fabiani.

95. It is undisputed that the Technical Consulting Agreement was again renewed and extended by USQL and Fabiani.

96. Fabiani and USQL assert that the February 23, 2016 email speaks for itself. Fabiani and USQl assert that this paragraph is disputed because the promised data and report were provided to Third-Party Plaintiffs (Murray Depo. Tr. 363:25-367:7). Fabiani and USQL further assert that the Third-Party Plaintiffs committed a precedent breach of the USQL Agreement by virtue of their failure to make full payment for the work conducted by Fabiani and USQL. (Fabiani Affirmative Defense No. 4).

97. Fabiani and USQl assert that this paragraph is disputed because a portion of the promised data and report were provided to Third-Party Plaintiffs (Murray Depo. Tr. 363:25-367:7). Fabiani and USQL further assert that the Third-Party Plaintiffs committed a precedent breach of the USQL Agreement by virtue of their failure to make full payment for the work conducted by Fabiani and USQL. (Fabiani Affirmative Defense No. 4).

98. Fabiani and USQl assert that this paragraph is disputed because a portion of the promised data and report were provided to Third-Party Plaintiffs (Murray Depo. Tr. 363:25-367:7). Fabiani and USQL further assert that the Third-Party Plaintiffs committed a precedent breach of the USQL Agreement by virtue of their failure to make full payment for the work conducted by Fabiani and USQL. (Fabiani Affirmative Defense No. 4).

99. Fabiani and USQL assert that this paragraph is disputed because a portion of the promised data and report were provided to Third-Party Plaintiffs (Murray Depo. Tr. 363:25-367:7). Fabiani and USQL further assert that the Third-Party Plaintiffs committed a precedent

breach of the USQL Agreement by virtue of their failure to make full payment for the work conducted by Fabiani and USQL. (Fabiani Affirmative Defense No. 4).

100. It is undisputed that the Technical Consulting Agreement was extended through March 31, 2016.

101. It is undisputed that a final invoice was issued by USQL/Fabiani to Industrial Heat. Counter-Plaintiffs have failed to refute the allegation by Fabiani that this final payment was never made by Industrial Heat. (Fabiani Affirmative Defense No. 4).

102. It is undisputed that Industrial Heat made the payment for services through February 2016. Counter-Plaintiffs have failed to refute the allegation by Fabiani that this final payment was never made by Industrial Heat. (Fabiani Affirmative Defense No. 4).

103. It is undisputed that Industrial Heat made payment to Fabiani for his rental expenses in Miami. Counter-Plaintiffs have failed to refute the allegation by Fabiani that his final expense payment was never made by Industrial Heat. (Fabiani Affirmative Defense No. 4).

104. It is undisputed that certain email communications were deleted by Fabiani following the termination of the USQL Agreement and the turnover of the final data and report to Industrial Heat. The USQL Agreement does not impose a requirement that Fabiani retain and turn over all communications dealing in any respect with the his work for Rossi or on the E-Cat. Fabiani denies that any data was destroyed or erased and the citations provided by Counter-Plaintiffs do not support this asserted undisputed fact.

105. It is undisputed that Rossi, on behalf of Leonardo, dismantled a heat exchanger on the JM Products side of the facility. *See* Rossi Depo. Tr. at 236:10-237:18; Leonardo Depo. Tr. 271:14-16, 271:25-272:10; JM Depo. Tr. at 82:7-14, 152:12-20. However, Rossi did not do so on

behalf of JM Products as it was after the business of JM Products closed and the materials were repurposed for a project that did not involve JM Products. *See id*.

STATEMENT OF ADDITIONAL MATERIAL FACTS IN OPPOSITION

108. IH and its attorneys participated in the negotiation of the terms of the Term Sheet. *See* Vaughn Depo. Tr. at 274:5-9; IH Depo. Tr. at 241:6-10; ECF No. 207-39.

109. IH did not contact Johnson Matthey or otherwise conduct any due diligence as to its affiliation with JM Products, if any. *See* Vaughn Depo. Tr. at 271:7-10.

110. Bass was not involved in any discussion with IH related to moving the Plant to Florida. *See* Rossi Affidavit ¶9.

111. Bass was not involved in any discussion with IH related to the Term Sheet. *See* Rossi Affidavit ¶10.

112. 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, 23:5-9; Darden Depo. Tr. at 298:18-25.

113. IH never sought to collect any payments from JM Products in relation to the Term Sheet. *See* Darden Depo. Tr. at 187:23-25.

114. Joseph Murray did not meet or speak with Johnson or Bass. *See* Murray Depo. Tr. 350:2-12.

115. Joseph Murray testified that there was no evidence the data he reviewed was manipulated. *See* Murray Depo. Tr. 257:15-17.

116. Anything purportedly hidden from Barry West did not matter to him and he further recalled an agreement between the parties hereby JM Products operation was to stay apart from IH. *See* West Depo. Tr. 158:9-17, 159:4-20.

MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS/COUNTER-PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

I. Summary Judgment Standard

The Third-Party Defendants do not oppose the summary judgment standard presented in the Defendants/Counter-Plaintiffs' Motion for Summary Judgment. In addition, Third-Party Defendants would emphasize that the movant has a heavy burden because "the 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)).

II. Industrial Heat is not entitled to Summary Judgment as to Count III of the Counterclaims and Third-Party Claims

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 that Rossi, on behalf of Leonardo, and Johnson, on behalf of JM Products, made numerous false statements or omissions of material fact to IH prior to the execution of the Term Sheet by representing that

> (a) [JM Products] was affiliated with a well known (sic) United Kingdom specialty chemicals and precious metals company called Johnson Matthey, see SOMF ¶¶ 57, 60-64, and (b) [JM Products] had a need for, and was going to use, the steam Leonardo could produce from the 1 MW Plant in a chemical manufacturing process, see SOMF ¶¶56, 59, & 62.

See Counter-Plaintiffs' Motion at p. 22. Interestingly, the majority of the purportedly uncontroverted facts that Counter-Plaintiffs refer to in their Statement of Material Facts ("Counter-Plaintiffs' SOMF") pertain only to representations made by Rossi and do not include Johnson. *See*, e.g. ECF No. 207 ¶¶56-61, 63-64. Accordingly, those representations will not be addressed in this Response.

It is true that on or about July 28, 2014, Johnson met with Rossi, Darden, and Vaughn in North Carolina to discuss moving the Plant to Florida. *See* HJ000021; Darden Depo. Tr. at 171:14-18, 173:22-24. However, Johnson did not make any representations to IH concerning any alleged affiliation with Johnson Matthey. *See* Johnson Depo. Tr. at 237:13-22; Vaughn Depo. Tr. at 204:22-24 and 270:18-20; IH Depo. Tr. at 227:21-228:3, 228:20-229:2. Furthermore, Johnson was not present when any statements were allegedly made by Rossi concerning any affiliation with Johnson Matthey. *See* Johnson Depo. Tr. at 237:13-22; Vaughn Depo. Tr. at 204:22-24, 270:18-20; IH Depo. Tr. at 227:21-228:3, 228:20-229:2. In fact, Johnson did not even know what Johnson Matthey was at the time. *See* Johnson Depo. Tr. at 237:5-7. In addition, IH was told that JM Products was a newly formed company and would be operating in a new facility.

See Darden Depo. Tr. at 177:1-3, 177:8-10. Further, Johnson informed IH that he did not have anything to do with the operational side of JM Products. *See* Johnson Depo. Tr. at 244:20-245:2, 245:8-9. Lastly, there is no record evidence that JM Products did not intend to use the steam produced by the Plant or that JM Products was not using the steam in a manufacturing process.

After the meeting, a term sheet was prepared and there was some back and forth between IH and Rossi as to the terms of the agreement. *See* Vaughn Depo. Tr. at 274:5-9; Johnson Depo. Ex. 49; ECF No. 207-39. In fact, IH had its attorneys review and revise the term sheet prior to its execution. *See* IH Depo. Tr. at 241:6-10; ECF No. 207-39. On the other hand, Johnson did not make any comments or revisions to the term sheet. *See* Johnson Depo. Tr. at 236:7-16. Ultimately, JM Products, Leonardo, and IH entered into a Term Sheet on August 13, 2014. *See* ECF No. 132-17.

In its motion, IH states that Johnson further backed up the representation that JM Products was affiliated with Johnson Matthey by signing a compliance certificate, which stated, in part, that JM Products was owned by an entity formed in the United Kingdom. The document in question is titled Compliance with OFAC and generally such a certificate is used to represent that the entity and its affiliates are in compliance with the rules and regulations of the Office of Foreign Asset Control ("OFAC") and are not subject to any sanctions or otherwise a blocked person by OFAC. Given that Johnson did not know who Johnson Matthey was at the time (s*ee* Johnson Depo. Tr. at 237:5-7), he could not have known that it was a United Kingdom entity and he could not have had the requisite intent to induce IH to rely on such representation to imply that JM Products was owned by or affiliated with Johnson Matthey. *See* ¶ 65, supra. In addition, as stated above, Johnson was not aware that IH was under the impression that JM Products was affiliated with Johnson Matthey. Furthermore, without any mention of Johnson Matthey in the

Term Sheet or the Compliance with OFAC, IH could not have justifiably relied on the latter for the contention that JM Products was affiliated with Johnson Matthey.

As noted above, 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. *See* Johnson Depo. Tr. at 237:13-22; Vaughn Depo. Tr. at 204:22-24, 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 included into the Term Sheet. Further, it is uncontroverted that IH participated in the drafting of the Term Sheet. *See*, e.g., IH Depo. Tr. at 241:6-10; ECF No. 207-39. 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.

Furthermore, IH testified that it did not care about there being a customer, but that it was important to Rossi. *See* IH Depo. Tr. at 191:23-24. Similarly, IH testified that it was "trying to be accommodative" and "trying to keep [Rossi] happy" when it allowed the Plant to move to Florida. *See* IH Depo. Tr. 214:15-19, 215:25-216:1. In addition, IH did not conduct any due diligence into whether JM Products had a facility at the time. *See* IH Depo. Tr. at 232:10-16. IH did not conduct any due diligence into any affiliation between Johnson Matthey and JM Products. *See* Vaughn Depo. Tr. at 199:20-201:6. At the very least, there is a disputed issue of material fact surrounding whether or not IH justifiably relied on any representations actually made by Johnson or JM Products. *See* Darden Depo. Tr. at 178:3-14.

Accordingly, IH is not entitled to summary judgment as Count III and IH's motion should be denied; JM Products and Johnson, however, are so entitled.

III. Counter-Plaintiffs are not entitled to Summary Judgment as to Count IV of the Counterclaims and Third-Party Claims (FUDTPA)

Counter-Plaintiffs seek a summary judgment against the Third-Party Defendants under Count IV, alleging that Counter-Defendants and Third-Party Defendants violated FDUTPA as part of a common scheme against Counter-Plaintiffs. (*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, '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). FDUTPA does not provide for the recovery of nominal damages, speculative losses, or compensation for subjective feelings of disappointment. *City First Mortg. Corp. v. Barton*, 988 So.2d 82, 86 (Fla. 4th DCA 2008)

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) Fraudulently induce the Counter-Plaintiffs to move the E-Cat Plant to Florida;

(ii) Deceive the Counter-Plaintiffs as to "the reliability, independence, accuracy, success, and benefit of the 1 MW Plant's operations and performance in Florida"; and

(iii) request payment in the amount of $89 million under the License Agreement based on the scheme in which all the FDUTPA Defendants participated.

(**ECF No. 203**, pg. 23-27.). The Statement of Material Facts in Opposition and Statement of Additional Material Facts set forth above demonstrate that Counter-Plaintiffs fail to establish

beyond dispute that that there are no genuine issues to be tried concerning the FDUTPA claim against the Third-Party Defendants and are not entitled to judgment as a matter of law.

b. Counter-Plaintiffs are not entitled to Summary Judgment as to JM Products and Johnson

In their motion, Counter-Plaintiffs state that JM Products and Johnson defrauded IH and IPH into agreeing to relocate the Plant to Florida. The undisputed facts as to this allegation are described in detail in Section II, *supra*, and the Statement of Material Facts in Opposition, *supra*.

As noted in Section II, *supra*, JM Products and Johnson did not make any representations to Counter-Plaintiffs suggesting that Johnson Matthey was in any way affiliated with JM Products. *See* Johnson Depo. Tr. at 237:13-22. It is clear that Johnson Matthey does not appear anywhere in the Term Sheet or the Compliance with OFAC document. *See* ECF No. 132-17; ECF No. 207-43 at Johnson Depo. Ex. 51. Despite Counter-Plaintiffs contention that JM Products and Johnson "continued" to portray that JM Products was affiliated with Johnson Matthey, they cite to no record evidence that supports their statement. To the extent that Counter-Plaintiffs rely on the letters sent by Johnson, on behalf of JM Products, to Counter-Plaintiffs, such reliance is misplaced. As explained in the Statement of Material Facts in Opposition ¶ 74(b), the caption on the letters simply means a product that is produced using Johnson Matthey platinum sponge. *See* Johnson Depo. Tr. at 124:5-19. Such a statement does not an affiliation represent.

It is also clear that JM Products was not to have access to the Plant and IH was not to have access to the JM Products area of the facility. *See* ECF No. 132-17. 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 Counter-Plaintiffs' 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). In addition, IH's corporate representative testified that Counter-Plaintiffs "could care less about a customer." *See* IH Depo. Tr. at 191:23-24, 217:6-10.

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. 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.

It is undisputed that IH negotiated the terms of the Term Sheet, which ultimately provided IH with the ability to implement whatever "monitoring and control measures it deems appropriate" to monitor the Plant. *See* ECF No. 132-17; ECF No. 207-39; Vaughn Depo. Tr. at 274:5-9; IH Depo. Tr. at 241:6-10. Despite this fact, Counter-Plaintiffs did not take any action to require additional measurement or different protocol when Rossi and Leonardo allegedly altered the Plant's setup. *See* ECF No. 207 at ¶ 84; Darden Depo. Tr. at 188:1-10. Instead, Counter-Plaintiffs took the stance that the operation of the Plant in Florida would not be credible and was potentially a fraud that they did not want to be involved with. *See* Darden Depo. Tr. at 188:1-10. It is not reasonable that Counter-Plaintiffs would rely on information provided by persons believed to be part of a fraud instead of requiring additional controls or a more robust test protocol. *See Garcia* at 1384. To be sure, Counter-Plaintiffs could have, pursuant to the Term

Sheet, requested that JM Products provide records of the operation of the Plant. However, Counter-Plaintiffs never made such a request from JM Products or Johnson. *See* Darden Depo. Tr. at 293:20-294:4, 294:9-17. This supports the fact that Counter-Plaintiffs did not believe any such records would be credible and thus reinforces the conclusion that Counter-Plaintiffs did not rely on any information provided by JM Products or Johnson as to the operation or COP of the Plant. Alternatively, if Counter-Plaintiffs maintain that they did rely on such information, it would not be reasonable as a matter of law. *See Garcia* at 1384 (there must be "a showing of *probable, not possible* deception that is likely to cause injury to a *reasonable relying* consumer.")(emphasis supplied; internal citations omitted).

Furthermore, Counter-Plaintiffs have failed to establish any actual damages that necessarily resulted from JM Products' or Johnson's allegedly deceptive or unfair conduct. *See City First*, 988 So. 2d at 86 ("FDUTPA does not provide for the recovery of nominal damages, speculative losses, or compensation for subjective feelings of disappointment.")

For the foregoing reasons, Counter-Plaintiffs are not entitled to Summary Judgment as to JM Products or Johnson; however, JM Products and Johnson are entitled to judgment as a matter of law.

c. Counter-Plaintiffs are not entitled to Summary Judgment as to Bass

The allegations involving Bass are scarce, to say the least. In fact, Counter-Plaintiffs, in large part, lump Bass together with other Third-Party Defendants and/or Counter-Defendants. *See generally* ECF No. 207. 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. There is no record evidence that Bass made any deceptive or unfair statements or acts during those limited contacts.

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 Bass did not have any interaction with Counter-Plaintiffs until the Plant was already in Florida. *See* Darden Depo. Tr. at 298:18-25. 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.

In the deposition of IH, its corporate representative admitted that IH does not have any evidence to support the allegation that Bass represented to Counter-Plaintiffs the amount of steam that JM Products was receiving or whether it was sufficient or good enough. *See* 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. *See* IH Depo. Tr. at 288:18-21. Similarly, when Darden was asked in his deposition whether Bass had on any statements allegedly made by Bass as to the operation of the Plant because no such statements 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." *See* Darden Depo. Tr. at 95:9-24. Furthermore, Darden testified that Bass did not report the COP measurement of the Plant to him. *See* Darden Depo. Tr. at 302:8-10. Accordingly, it is clear that Counter-Plaintiffs did not rely exist.

Next is the allegation that Bass represented himself as the Director of Engineering for JM Products. There is no record evidence that Bass was not the Director of Engineering for JM Products at the time such representations were allegedly made. *See* 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. *See* Bass Depo. Tr. at 8:17-21, 157:5-6.

Lastly, Counter-Plaintiffs allege that Bass represented that JM Products had its own operations and a use for the Plant's steam. JM Products used steam produced by the Plant to create platinum sponge and/or graphene based catalyzers for sale to Leonardo. *See* Leonardo Depo. Tr. at 214:23-215:3, 220:16-19, 225:5-10. 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. Bass was told that JM Products was working with platinum sponge and graphene. *See* Bass Depo. Tr. at 27:9-29:10. In addition, Bass' role at JM Products did not include the operation of its facility; it was primarily the design of a control system. *See* Bass Depo. Tr. at 113:13-17.

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. *See* e.g. 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. Counter-Plaintiffs did not take any action to require additional measurement or different protocol when Rossi and Leonardo allegedly altered the Plant's setup. *See* ECF No. 207 at ¶ 84; Darden Depo. Tr. at 188:1-10. Instead, Counter-Plaintiffs took the stance that the operation of the Plant in Florida would not be credible and was potentially a fraud that they did not want to be involved with. *See* Darden Depo. Tr. at 188:1-10. It is not reasonable that Counter-Plaintiffs would rely on information provided by persons believed to be part of a fraud instead of requiring additional controls or a more robust test protocol. *See Garcia* at 1384.

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

For the foregoing reasons, Counter-Plaintiffs are not entitled to Summary Judgment as to Bass; however, Bass is entitled to judgment as a matter of law.

d. Summary Judgment Against USQL and Fabiani Pursuant to the FDUTPA Claim (Count IV) Must be Denied

The FDUTPA claim involves a multi-tiered elaborate scheme involving a variety of alleged deceptive acts. It is undisputed that the alleged roles of Fabiani and USQL are minor in comparison to the other participants. Counter-Plaintiffs argue that a FDUTPA claim does not require "show[ing] [that] [a] defendant was the principal actor involved in the violative acts, or

that [a] defendant initiated those acts." *Galstaldi v. Sunvest Cmtys. USA, LLC*, 637 F.Supp.2d 1045, 1056 (S.D. Fla. 2009). Instead the Counter-Plaintiffs argue that "it is sufficient to allege that a party directly participated in a violation of the FDUTPA, even if that violation was initiated by another." Sundance Apartments I, Inc. v. Gen. Elec. Capital Corp., 581 F.Supp.2d 1215, 1222 (S.D. Fla. 2008).

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 individual Defendant liable under FDUTPA. *See Barnext Offshore, Ltd. V. Ferretti Group USA, Inc.*, 2012 WL 1570057 (2012). In *Barnext* this Court analyzed whether there was evidence of a deceptive act by one specific defendant that occurred prior to the damages incurred by the plaintiff. *Id*. at pg. 7. In this case the Counter-Plaintiffs have clearly identified their claim for actual damages under FDUTPA as related to and in connection with the E-Cat plant's move to Florida. (**ECF No. 203**, pg. 27-28.).

Paragraph 89 of the Counter-Plaintiffs Statement of Material Facts sets forth the actual damages sustained by Counter-Plaintiffs, namely: "(1) the Plant's transportation to Florida; (2) the procurement and delivery of equipment for the Plant's reassembly in Florida; (3) the procurement and transportation of personnel to assemble the Plant in Florida; (4) repairs and maintenance of the 1 MW Plant; (5) new equipment for the Doral Facility; and (6) personnel to work at the Doral Facility". All of these costs and expenses to the Counter-Plaintiffs were incurred prior to the alleged deceptive act of manipulating data by Fabiani and USQL. The alleged manipulation of data occurred after the plant was already up and running in Florida. (Murray Depo. Tr. 257:8-20). Therefore, the essential element of causation is missing for FDUTPA liability to extend to Fabiani and USQL.

Applying this type of defendant-specific inquiry into the FDUTPA claims against Fabiani and USQL compels this Court to deny the Counter-Plaintiffs' Motion for Summary Judgment. It is abundantly clear from the lack of any evidence that neither Fabiani or USQL directly participated in the substantive acts of the FDUTPA claim involving the inducement to move the E-Cat plant to Florida or the alleged deception involving JM Products. 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 in Doral and there is no evidence beyond conjecture and speculation that Fabiani manipulated the operation of the plant.

This last point not only requires denial of the Counter-Plaintiffs' Motion for Summary Judgment but requires this Court to grant a partial summary judgment in favor of Fabiani and USQL pursuant to the Third-Party Defendants' Combined Motion for Partial Summary Judgment. Paragraphs 80 through 82 of the Counter-Plaintiffs' Statement of Material Facts cite to undisputed evidence that Fabiani/USQL provided data to the Industrial Heat. These same paragraphs, however, are cited by the Counter-Plaintiffs in the body of their motion for the proposition that certain data provided by Fabiani/USQL was "fabricated, obtained as the result of manipulating the 1 MW Plant's operations, or incomplete such as to render it misleading". *See* (**ECF No. 203**, pg. 26). There is no record evidence cited in Paragraphs 80 through 82 of the Counter-Plaintiffs' Statement of Material Facts that support this contention, let alone warrant granting summary judgment in Counter-Plaintiffs favor.

Fabiani's alleged participation in any manipulation is limited to evidence that the power absorption data he provided does not match or equal data obtained from FPL. (**ECF No. 207** at ¶82). This purported evidence, however, does not demonstrate any actual manipulation by

Fabiani nor can any inference be drawn from the discrepancy in the numbers in favor of the Counter-Plaintiffs. Instead, any inference must be applied in favor of Fabiani and USQL that any discrepancies were the result of instrument malfunction that should be attributed to the FPL meter. *See Haves*, 52 F.3d at 921.

The record evidence does not support the claim that Fabiani or USQL manipulated data provided to Industrial Heat. 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.

(Murray Depo. Tr. 368:8-14).

While there may be record evidence presented by Industrial Heat that Fabiani's power input numbers did not coincide with the FPL readings, these occurrences were also minor in nature. 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 power absorption data of the plant. This lack of evidence to prove data manipulation requires that the Counter-Plaintiffs request for summary judgment be denied and conversely, the partial summary judgment requested by Fabiani and USQL must be granted.

For the foregoing reasons, Counter-Plaintiffs are not entitled to Summary Judgment as to Fabiani and USQL pursuant to Count IV; however, Fabiani and USQL are entitled to judgment as a matter of law.

e. Summary Judgment Against USQL and Fabiani Pursuant to the Breach of Contract Claim (Count V) Must be Denied

Counter-Plaintiffs argue that they are entitled a summary judgment against Fabiani and USQL because of the failure to turn over all data and documents to which Industrial Heat was contractually entitled. Counter-Plaintiffs point to Section 6 of the USQL Agreement for the contractual provision breached by Fabiani and USQL. Summary Judgment must be denied because the alleged breach was not a material breach, Industrial Heat has not avoided the affirmative defenses alleged by Fabiani and USQL and Industrial Heat suffered no damages.

As the Court previously noted, the USQL Agreement and the subsequent identical renewal agreements all provided that the contract would be governed by North Carolina law. (**ECF No. 120,** pg. 12; *see also* Exhibits 67 through 69 to the Counter-Plaintiffs Statement of Material Facts). Under North Carolina law, "[i]n interpreting a contract the intent of the parties is [the] polar star[.]" *Davis v. Woodlake Partners, LLC*, 748 S.E. 2d 762, 768 (N.C. App. 2013)

(alterations added; citation omitted). The intent of the parties is inferred from the words of the contract if the plain language of the contract is clear. *See Tyndall-Taylor v. Tyndall*, 580 S.E. 2d 58, 60–61 (N.C. App. 2003). Whether a breach is material or immaterial is ordinarily a question of fact. *Millis Construction Co. v. Fairfield Sapphire Valley*, 358 S.E.2d 566, 570 (1987).

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 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. 203** at Exh. 67). The intent of the parties was that Fabiani would continue his prior work and 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).

According to the testimony of the Industrial Heat corporate representative, Fabiani was not the "data capturing expert". (IH Depo. Tr. at 266:15-21). The USQL Agreement was never modified or amended to increase Mr. Fabiani's responsibilities concerning providing test data to Industrial Heat. ". (IH Depo. Tr. at 275:19-25). Mr. Joseph Murray testified that the data not provided by Mr. Fabiani was offered up by him, not necessarily required by the Contract between the parties. (Murray Depo. Tr. 362:8-13). Mr. Murray also testifies that Mr. Fabiani, in a meeting at the offices of counsel for Industrial Heat turned over the majority of all the data sought by the Counter-Plaintiffs. (Murray Depo. Tr. 363:25-367:7). It certainly appears that certain data or information was not provided by Fabiani, however, such data production was a

minor part of his duties and responsibilities to Industrial Heat. The trier of fact must determine if the asserted breach of not providing certain data is material or not. This is not an issue that can be resolved through a motion for summary judgment.

Fabiani and USQL filed an affirmative defense that the Counter-Plaintiffs committed a precedent breach of the USQL Agreement by the failure to make the final payment due and thus excusing Fabiani's performance of his data production responsibilities. Counter-Plaintiffs have failed to address this affirmative defense and a genuine issue thereby exists precluding the entry of a summary judgment against Fabiani and USQL on the breach of contract claim.

Finally, Counter-Plaintiffs claim for breach of contract must fail because there have been no actual damages suffered by the Counter-Plaintiffs. The testimony of the corporate representative for IPH testified that some amount of the funds paid by Industrial Heat to Fabiani and USQL were reimbursed to Industrial Heat by IPH. (IPH Depo. Tr. at 225:9-226:15). Industrial Heat having been reimbursed all or part of the payments made to Fabiani and USQL for services and reimbursements results in no injury or damage in fact. Any reimbursements made by IPH would have to be accounted for before a judgment for a specific amount of damages can be calculated. Moreover, the fact finder would be in position to determine the measure of damages based on the breach predicated on the failure to turn over data at the end of a three year working relationship.

For the foregoing reasons, Counter-Plaintiffs are not entitled to Summary Judgment as to Fabiani and USQL pursuant to Count V.

IV. Conclusion

Counter-Plaintiffs Motion for Summary Judgment fails to establish entitlement to a judgment in their favor with regard to Counts III, IV and V of the Fourth Amended

Counterclaims and Third Party Claims and conversely Third-Party Defendants are entitled to summary judgment on their previously filed Combined Motion for Partial Summary Judgment.

Respectfully submitted this 5th day of April, 2017.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on April 5, 2017, I electronically filed the foregoing with the Clerk of the Court using CM/ECF. Copies of the foregoing document will be served on all counsel of record via transmission of Notice of Electronic Filing generated by CM/ECF.

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

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