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* REPLY IN SUPPORT OF THIRD-PARTY DEFENDANTS' *COMBINED* 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 this Reply in Support of the Third-Party Defendants' Combined Motion for Summary Judgment (**ECF No. 242**).

OPPOSITION TO THIRD-PARTY PLAINTIFFS STATEMENT OF ADDITIONAL FACTS [1]

Third-Party Defendants hereby respond to the Defendants'/Counter-Plaintiffs' Statement of Additional Facts in Opposition to Third-Party Defendants' Motion for Summary Judgment (**ECF No. 245**), and state as follows:

Counter-Plaintiffs set forth "Additional Facts" in their Opposition to Third-Party Defendants' Statement of Undisputed Material Facts (ECF No. 245). Counter-Plaintiffs set forth each of these "additional facts" and supporting exhibits in their Statement of Material Facts in Support of their Motion for Summary Judgment (ECF No. 207) and cited to same in their Motion for Summary Judgment (ECF No. 203). To the extent that such facts were related to Third-Party Defendants, Third-Party Defendants responded to such facts and argument in their combined statement of material facts and response in opposition to Counter-Plaintiffs' Motion for Summary Judgment (ECF No. 243). However, the sequence and numbering of the "additional facts" is different and Third-Party Defendants will address them herein for ease of reference.

30. This purportedly undisputed fact does not pertain to any of the Third-Party Defendants. To the extent that Counter-Plaintiffs are attempting to ascribe the actions of Rossi or Leonardo as that of any Third-Party Defendant, Third-Party Defendants dispute such fact as Counter-Plaintiffs have not provided any record evidence to support same or any inference that Third-Party Defendants were aware of such fact. *See also* ECF No. 238 at SOFO, ¶56.

31. See ¶30, *supra*. *See also* ECF No. 238 at SOFO, ¶57.

32. See ¶30, supra. See also ECF No. 238 at SOFO ¶58.

33. See ¶30, *supra*. *See also* ECF No. 238 at SOFO ¶59.

34. 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

[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), Third-Party Defendants Combined Response in Opposition to Counter-Plaintiffs' Motion for Summary Judgment (ECF No. 243) and Counter-Plaintiffs' Opposition to Third-Party Defendants' Statement of Undisputed Material Facts (ECF No. 245). Accordingly, no additional exhibits are being filed with this Reply.

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

35. See ¶30, *supra*. *See also* ECF No. 238 at SOFO ¶63.

36. 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.

37. 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.

38. 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.

39. See ¶38, *supra*.

40. 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.

41. 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.

42. Disputed. See ¶41, *supra*.

43. Undisputed.

44. 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 ¶44, *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.

45. 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.*

46. 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 ¶46, *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.

47. Disputed. As indicated above, JM Products, Johnson, and Bass did not engage in any wrongful activity. *See* ¶¶34, 36-46, *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.

48. 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.

49. 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. 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.

b. Undisputed.

50. 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.

51. Admitted.

52. Disputed. Counter-Plaintiffs attempt to lump each Third-Party Defendant together with Rossi into a purported "undisputed fact" without any evidence to support such statement of fact. None of the documents cited by Counter-Plaintiffs support their "undisputed fact" that any of the Third-Party Defendants 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. Lastly, Counter-Plaintiffs did not care about what the customer would be doing. *See* Vaughn Depo. Tr. at 196:8-11; ECF No. 245-22 at IH-00090895 ("let him know you do not really care one way or the other"; "I think there is little if any gain in credibility from having the test in an independent factory… Having it in a factory near [Rossi] probably harms credibility").

53. 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 at 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.*

54. Disputed. This asserted statement of fact is nothing more that a conclusory allegations as to the ultimate merits of the claim by Dr. Rossi against the Counter-Plaintiffs.

55. Disputed. Fabiani asserts that the February 23, 2016 email speaks for itself. Fabiani denies the inference that the information referenced in the email was required by the USQL Agreement. Both Joseph Murray and J.T. Vaughn testified that this information was offered by Fabiani, not necessarily required by the USQL Agreement. (Vaughn Depo. Tr. at

270:7-22; Murray Depo. Tr. at 362:8-18). Furthermore, Fabiani and USQL assert that certain promised data and a report were provided to Third-Party Plaintiffs (Murray Depo. Tr. 364:12-14; 366:14-24). For example a report showing the "plant stop periods" was provided to Industrial Heat. (Murray Depo. Tr. 366:18-22).

56. Admitted to the extent that Industrial Heat was requesting a report and certain data. Fabiani denies the inference that the information referenced in the email was required by the USQL Agreement. The Joseph Murray email (Exhibit 38) states that some of the data was "unofficial" and concedes that even before this litigation Mr. Fabiani informed Industrial Heat that the log data was not readily available and had to be found. The Exhibit cited by the Third-Party Plaintiffs does not support the contention that Fabiani represented anything to Industrial Heat.

57. Admitted to the extent that Industrial Heat was requesting documents and data. Fabiani denies the inference that the information referenced in the email was required by the USQL Agreement.

58. Disputed. The J.T. Vaughn deposition testimony cited as support for this paragraph fails to establish as undisputed Fabiani's refusal to provide requested documents and data. Fabiani and USQL assert that certain promised data and a report were provided to Third-Party Plaintiffs (Murray Depo. Tr. 363:25-364:18; 366:11-22). The citation to Fabiani's deposition shows that his testimony was that he did in fact provide the promised electrical and thermal data. (Third-Party Plaintiff's Ex. 19. at 142:5-10). Between the testimony of Mr. Murray and Mr. Fabiani, the record demonstrates that Fabinai did in fact provide the promised "electrical and thermal data" as well as the "plant stop periods".

59. Disputed. The testimony of Fabiani cited by the Third-Party Plaintiffs only refers to the deletion of emails not data. Also, Fabiani clearly testifies that the data he obtained during his work in Doral was indeed turned over to Industrial Heat. (Third-Party Plaintiff's Ex. 19. at 48:2-9; 88:4-7). There is no testimony cited by the Third-Party Plaintiffs that any data was deleted.

60. Disputed. As set forth in the Third-Party Defendants' Combined Motion for Summary Judgment and the record citations therein, Fabiani had no involvement in inducing Industrial Heat to enter into the Term Sheet and the citations in this paragraph lend no support to the Third-Party Plaintiffs asserted undisputed facts. Third-Party Defendants did not orchestrate

or participate in any scheme to induce Counter-Plaintiffs to do anything. *See* ¶¶ 30-59, *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* ¶¶ 30-59, *supra*.

MEMORANDUM OF LAW

I. JM Products and Johnson are entitled to partial summary judgment as to the fraudulent inducement claim

As noted in JM Products' and Johnson's motion partial for summary judgment, "[i]t is established law in Florida that a party cannot justifiably rely on representations not contained in a subsequent agreement … where the party participated in drafting the agreement and did not reduce the representations to writing." *Corporate Fin., 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)). IH argues that JM Products and Johnson misstate and misapply the law on fraudulent inducement (i.e. the Term Sheet does not have a merger and integration clause and therefore IH's fraudulent inducement claim can be based on representations not contained in the Term Sheet). However, IH ignores the remaining portions of the sentence to which it cites. In *Corporate Fin., Inc.*, the Court held that

> it cannot be said as a matter of law that CFI could not have justifiably relied on representations made by Principal Life that are not contained in the 2003 Group Compensation Agreement because the representations regarding bonuses do not contradict the terms of the agreement, the agreement does not contain a merger clause, ***and*** **there is no indication that CFI or O'Day participated in the drafting of the agreement**.

Id. at 1291 (emphasis supplied). Unlike the facts before the Court in *Corporate Fin., Inc.*, it is undisputed that, in this case, IH and its attorneys participated in the drafting of the Term Sheet. *See* ECF No. 242 (at Statement of Undisputed Material Facts, ¶¶ 5, 9); ECF No. 245 ¶¶ 5, 9. Accordingly, IH cannot, as a matter of law, have justifiably relied on representations made by JM Products or Johnson as to any affiliation with Johnson Matthey as it is undisputed that IH and its attorneys "participated in the drafting of the agreement and did not reduce the representations

to writing." *See Corporate Fin., Inc.*, 461 F.Supp.2d at 1291.

Partial summary judgment in favor of JM Products and Johnson is proper as to the alleged representations concerning Johnson Matthey.

II. Third-Party Defendants are entitled to Summary Judgment as to Count IV of the Counterclaims and Third-Party Claims (FUDTPA)

a. JM Products and Johnson are entitled to summary judgment as a matter of law

There is no record evidence that JM Products or Johnson was involved in any scheme to deceive or manipulate Counter-Plaintiffs as to the operations and performance of the Plant in Florida and summary judgment as to JM and Johnson is proper.

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. Counter-Plaintiffs cannot overcome that fact by gratuitously lumping Johnson in with statements allegedly made by Rossi at some point in time. *See* Darden Depo. Tr. at 174:21-23 ("Again, I'm kind of mixing together different conversations and what we talked about at which time."). In fact, Johnson did not even know what Johnson Matthey was at the time. *See* Johnson Depo. Tr. at 237:5-7. As such, Johnson 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 the OFAC representation to imply that JM Products was owned by or affiliated with Johnson Matthey. *See* ¶36, supra. 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.

Counter-Plaintiffs did not care about what the customer would be doing, did not feel that the customer would add any credibility (in fact, they believed it would hurt it), and felt early on that the operation of the Plant in Florida was a fraud. *See* IH Depo. Tr. at 191:23-24, 217:6-10; Vaughn Depo. Tr. at 196:8-11; ECF No. 245-22 at IH-00090895; Darden Depo. Tr. at 188:1-10.

Despite the fact that Counter-Plaintiffs could have required additional monitoring and control measures, they did not take any action to provide themselves with the ability to double check the measurements and data being provided to them from Rossi, Penon, and others. *See* ECF No. 132-17; ECF No. 207-39; Vaughn Depo. Tr. at 274:5-9; IH Depo. Tr. at 241:6-10; ECF No. 207 at ¶ 84; Darden Depo. Tr. at 188:1-10. Counter-Plaintiffs cannot now cry foul because they are not satisfied with the results of the test. *See City First Mortg. Corp. v. Barton*, 988 So.2d 82, 86 (Fla. 4th DCA 2008) (FDUTPA does not provide for recovery for subjective feelings of disappointment); *see also Hall v. Burger King Corp.*, 912 F. Supp. 1509, 1524 (S.D. Fla. 1995) ("Where a hostile and antagonistic relationship exists between the parties, reliance on any alleged misrepresentations is unreasonable as a matter of law.")

As noted in the motion for summary judgment (ECF No. 242), Counter-Plaintiffs have to meet an extremely high burden in order to establish their FDUTPA claim. Counter-Plaintiffs must establish sufficient evidence of an unfair or deceptive act by JM Products and Johnson and such evidence must establish *probable*, not possible deception. *See Garcia v. Kashi Co.*, 43 F.Supp.3d 1359, 1384 (S.D. Fla. 2014) (internal citations omitted); *see also Barnext Offshore, Ltd. v. Ferretti Group USA, Inc.*, 2012 WL 1570057 (S.D. Fla. 2012). There is no evidence to suggest that Johnson was present or aware of any alleged representations concerning any affiliation with Johnson Matthey, misrepresented the amount of steam that JM Products was receiving, misrepresented the operations of JM Products, or provided any data regarding the operation of the Plant (let alone manipulated such data). Accordingly, Counter-Plaintiffs have failed to establish probable deception by JM Products or Johnson and JM Products and Johnson are entitled to summary judgment as a matter of law.

b. Bass is entitled to summary judgment as a matter of law

Counter-Plaintiffs seem to take issue with the fact that Bass was an independent contractor of JM Products and provide that as evidence that Bass was not the Director of Engineering for JM Products. Counter-Plaintiffs provide no evidence or argument to support their argument that Bass was not a "real" Director of Engineering due to this fact (because such fact does not preclude Bass from being the JM Products' director of engineering). Furthermore, Counter-Plaintiffs provide no evidence or argument to establish that because Rossi (as the technical director of JM Products) hired and directed Bass, Bass was not the Director of Engineering.

Counter-Plaintiffs also mischaracterize Bass' testimony and state that Bass "knew [JM Products] was not operating a manufacturing facility." *See* ECF No. 244 at p. 10. In his deposition, Bass testified that he was not aware of what JM Products was doing "other than whatever was going on inside that container," which he testified was a process involving platinum sponge and graphene. *See* Bass Depo. Tr. at 136:12-15, 27:19-21, 28:15-29:3.

Counter-Plaintiffs conclusively state (with no evidence) that the alleged representations made by Bass were false. In addition, Counter-Plaintiffs ignore the simple fact that even if such representations were false, Bass was under the impression that his representations were accurate and Counter-Plaintiffs provide no evidence to establish that Bass knew such alleged representations were false. There is no evidence to suggest that Bass misrepresented his title as Director of Engineering, JM Products' satisfaction with the steam it was receiving, or the operations of JM Products, or provided any data regarding the operation of the Plant (let alone manipulated such data). Counter-Plaintiffs attempt to lump Bass into an alleged scheme orchestrated by Plaintiffs to obtain payment of $89 million with no evidence to establish his involvement or knowledge of such alleged scheme. Bass is nothing more than an innocent bystander doing his job. Accordingly, Counter-Plaintiffs have failed to establish probable deception by Bass and Bass is entitled to summary judgment as a matter of law. *See Garcia; see also Barnext Offshore*.

c. <u>USQL and Fabiani are Entitled to Summary Judgment in their Favor as to the FDUTPA Claim</u>

The Counter-Plaintiffs argue in their opposition to the summary judgment motion filed by the Third-Party Defendants that there is ample record evidence that each Third-Party Defendant was directly involved in the alleged scheme. With regard to Fabiani and USQL, this position is without merit.

Counter-Plaintiffs claim that there is "substantial evidence that Fabiani and USQL provided false measurement" data to the Counter-Plaintiff. This supposed substantial evidence as to Fabiani and USQL is limited to discrepancies between the power absorption data provided by Fabiani/USQL and the meter readings by Florida Power and Light ("FPL") that occurred during "certain time periods". The undisputed record evidence runs counter to this argument. Mr. Murray, a former Vice President of Industrial Heat, tendered as an expert to specifically testify concerning this issue testified that the discrepancies with the FPL data occurred on only

14 or 17 days. (Murray Depo. Tr. 273:13-19). These few days of discrepancy between the FPL readings and the Fabiani data must be taken into the context of a test that was conducted and measured for over 350 days.

The following exchange took place during Mr. Murray's deposition:

> Q. Okay. And now my question relates -- I think you made an analysis that his power consumption numbers for the plant don't match the readings from Florida Power and Light; is that correct?
>
> A. No, which just incidentally we would not anticipate that they match. We would anticipate that the building would absorb more power than just the reactor because there was other, there were other electrical devices in the building. The primary concern is where the value goes negative, where the building is actually absorbing less, less energy per day than the, than reported by Mr. Fabiani and Mr. Penon.
>
> Q. Okay. And how many times did that happen?
>
> A. How many times? There was a 14-day period. I think cumulative number of days where it was below zero was 14 days, and that's just pure absolute negative. And, you know, and that's just assuming that nothing else in the building absorbed power.
>
> Q. Okay. So that was 14 out of, I think it was 350 or almost a year, correct?
>
> A. I believe the number in the final report was total of 357 days, and then Mr. Penon deducted 5 or 6 days. I don't remember the exact number. And so there was a cumulative number of maybe 352 days of, of operational days.

(Murray Depo. Tr. 367:8-368:7). While the Counter-Plaintiffs attempt to persuade the Court that the discrepancy in the power absorption numbers are material, clearly the evidence demonstrates that the discrepancy was *di minimis*.

More importantly for the Court's consideration is that Mr. Murray clearly testified several times during his deposition that there was no evidence of manipulation of the data by Mr. Fabiani. (Murray Depo. Tr. 257:8-20; 368:8-14). Despite this testimony from the Counter-Plaintiffs' expert, the opposition asserts that "there is substantial evidence that Fabiani and USQL provided false measurement data". The evidence cited by the Counter-Plaintiffs only pertains to the undisputed facts that Fabiani did in fact provide data and that there were the above referenced discrepancies. Counter-Plaintiffs disregard

the substantial testimony by Mr. Murray cited herein and in the Third-Party Defendants' summary judgment motion that he found no evidence of manipulation.

To conclusively dispel the notion that the Counter-Plaintiffs have provided the Court with any evidence of manipulation by Fabiani another quote from the deposition of Mr. Murray is helpful:

> A. . . . If Florida Power and Light's data was inaccurate, then it's, it's, there are equal probability of which source of data was incorrect.
>
> Q. Okay. So it doesn't tell you one way or another whether there's been manipulation or, or otherwise with respect to any set of data?
>
> A. No.

(Murray Depo. Tr. 285:6-12). The Counter-Plaintiffs have cleverly utilized the discrepancy in the power absorption data to assert a deceptive and unfair act on the part of Fabiani. However, the record evidence before this Court is devoid of any actual or even probable manipulation on the part of Fabiani and there is no disputed issue for a jury to decide upon.

Another purported deceptive and unfair act alleged against Fabiani and USQL is the failure to provide data collected during the plant's operation in Doral. Obviously, Fabiani did provide data concerning the operation of the plant because such data was used for the comparison with the FPL readings for the Doral warehouse. The testimony of Mr. Murray demonstrates that in fact certain promised data and a report were provided to Third-Party Plaintiffs (Murray Depo. Tr. 363:25-364:18; 366:11-22). Exhibit 37 to the Counter-Plaintiffs' opposition response is an email from Fabiani stating that he will provide electrical and thermal data as well as a report indicating the stop periods for the plant. Far from refusing to provide this data, Fabiani testified that he did in fact provide the promised electrical and thermal data. (Third-Party Plaintiff's Ex. 19. at 142:5-10). Mr. Murray confirmed that Fabiani also provided the data relating to the stop periods for the plant, "[a]nd he provided us with a, a log that kind of showed dates and events when things were turned on and the power went off". (Murray Depo. Tr. 366:18-20).

There is record evidence that Fabiani refused to provide a final report and certain raw data, however, such data was not material to the FDUTPA claim and beyond a doubt did not cause the Counter-Plaintiffs to suffer any actual damages. Summary judgment would not be appropriate if evidence existed that Fabiani's data was manipulated and that such deception

resulted in actual damages such as the payment to Dr. Rossi of the sought after $89 million. This is not the case. Fabiani's data was collected during the plant's operation in Doral. Assuming evidence existed of data manipulation by Fabiani, the plant was already moved to Florida with all the associated costs and expenses. Counter-Plaintiffs incurred no additional costs or expenses because of the data provided (or not provided) to them by Fabiani. Summary judgment must be granted to Fabiani and USQL as to Count IV.

A. **Conclusion**

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

Respectfully submitted this 12th day of April, 2017.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on April 12, 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