UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 16-21199-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**; **FABIO PENON**; **UNITED STATES QUANTUM LEAP, LLC**; **FULVIO FABIANI**; and **JAMES A. BASS**,

Third-Party Defendants.

_____/

ORDER

THIS CAUSE came before the Court upon Plaintiffs/Counter-Defendants, Andrea Rossi ("Rossi") and Leonardo Corporation's ("Leonardo['s]," and together with Rossi, "Counter-

Defendants[']") Motion to Dismiss Defendant's Amended Counterclaims Against Plaintiffs ("Motion to Dismiss") [ECF No. 56], filed September 29, 2016. On October 17, 2016, Defendants/Counter-Plaintiffs, Industrial Heat, LLC ("Industrial Heat") and IPH International B.V. ("IPH," and together with Industrial Heat, "Counter-Plaintiffs") filed a Response . . . ("Response") [ECF No. 68]. Counter-Defendants filed their Reply . . . ("Reply") [ECF No. 72] on October 27, 2016. The Court has carefully considered the parties' written submissions, the record,[1] and applicable law.

I. BACKGROUND[2]

Industrial Heat and its affiliates, including IPH, are corporations involved in developing and investing in low energy nuclear reaction technologies. (*See* Countercl. ¶ 1). These technologies have the capacity to provide an alternative energy source without producing the harmful and toxic effects associated with nuclear energy. (*See id.*). As part of their business, Industrial Heat and IPH frequently collaborate with the inventors who develop the initial models and applications of these technologies. (*See id.*).

In June 2012, Industrial Heat's president, Defendant Thomas Darden ("Darden"), met with Rossi and representatives of AmpEnergo, Inc., a corporation then holding an exclusive right to market Counter-Defendants' technology in the Americas. (*See id.* ¶ 33). Rossi claimed he had developed an energy catalyzer ("E-Cat" or "Plant") which, when used with a catalyzer fuel or formula ("E-Cat fuel"), could produce six times the energy it consumed, without any of the harmful byproduct associated with the process. (*See id.* ¶¶ 2, 34). After months of discussions,

[1] The Court cites specific pages of record documents and submissions using the pagination provided in the CM/ECF database headers in lieu of the pagination provided in the documents or by the parties in their submissions.

[2] The factual allegations relevant to the counterclaims within the Second Amended Answer, Additional Defenses, Counterclaims . . . ("Counterclaims") [ECF No. 50] are accepted as true. *See Brooks v. Blue Cross & Blue Shield of Fla., Inc.*, 116 F.3d 1364, 1369 (11th Cir. 1997).

Industrial Heat and Counter-Defendants entered into a License Agreement ("License Agreement" or "Agreement") [ECF No. 1-2] on October 26, 2012. (*See* Countercl. ¶¶ 2, 35–36).[3]

The License Agreement granted Industrial Heat an exclusive license to use the E-Cat intellectual property and to manufacture and sell E-Cat products within a prescribed territory.[4] (*See* License Agreement preamble). It also included several other clauses, such as the "covenants and agreements" clauses (*id.* § 13), which defined the relationship of the parties for the duration of the Agreement.

The License Agreement provided the grant of the license and sale of the E-Cat would unfold in three phases, and it contemplated Leonardo and Rossi could earn three potential payments contingent on satisfying the conditions required at each phase. First, Industrial Heat would deliver $1.5 million to Counter-Defendants as "payment in full" for the E-Cat. (*See* Countercl. ¶ 4 (quoting License Agreement § 3.2(a))). Industrial Heat made the first payment in October 2012. (*See id.*). But the money was to be refunded in the event Counter-Defendants could not certify the E-Cat could produce at least six times the energy it consumed over a 24-hour period in a process referred to as "Validation." (*See id.*; *see also* License Agreement § 3.2(a)).

Second, if Validation were achieved, Industrial Heat would tender $10 million. (*See* Countercl. ¶ 4). Counter-Plaintiffs assert Rossi, on behalf of Leonardo, made false representations to Industrial Heat to circumvent some of the Validation requirements stipulated

[3] AmpEnergo, Inc. was also a party to the Agreement. (*See generally* License Agreement).

[4] The License Agreement states the "License is valid for . . . North America, Central America and [the] Caribbean, South America, China, Russia, Saudi Arabia, [and the] Arabian Emirates." (License Agreement § 2 (alterations added)).

in the License Agreement and to secure this second payment.[5] (*See id.* ¶¶ 50–57). Validation would be deemed successful if an expert responsible for Validation ("ERV") could certify the Plant had consistently produced six times the energy consumed over a 24-hour period. (*See* License Agreement § 4). Rossi ensured a friend and colleague, Third-Party Defendant Fabio Penon ("Penon"), would serve as the ERV, and vetoed Industrial Heat's request for "one of the big testing companies" to work alongside Rossi and Penon during Validation. (Countercl. ¶ 56 (internal quotation marks omitted)). The testing occurred under the modified protocol from April 30 through May 1, 2013. (*See id.* ¶ 57). Penon's May 7, 2013 report indicated the 18 E-Cat reactors tested had produced over ten times the energy consumed. (*See id.*).

Persuaded by this report, as well as by another seemingly reputable study of the E-Cat productivity provided by Rossi (*see id.* ¶ 58), Industrial Heat made the second payment of $10 million to a designated escrow agent (*see id.* ¶¶ 49, 59). Upon release of the $10 million from escrow on June 9, 2013, Rossi and Leonardo were to immediately transfer all E-Cat intellectual property and have the E-Cat delivered to Industrial Heat. (*See id.* ¶¶ 3, 60; *see also* License Agreement § 3.2(b)). That same day, Rossi and Darden met to exchange the last piece of the E-Cat intellectual property, the formula for the E-Cat Fuel. (*See* Countercl. ¶ 60). The Plant itself was not delivered to the Industrial Heat facility in North Carolina until August of 2013. (*See id.* ¶ 61).

The third and final phase of the License Agreement involved completion of a "Guaranteed Performance" test. (*See* License Agreement § 3.2(c)). If Counter-Defendants were able to demonstrate the E-Cat could consistently produce at least four times the energy it consumed for 350 out of 400 days, the final payment of $89 million would be due. (*See*

[5] The parties executed a First Amendment to the License Agreement [ECF No. 1-3] memorializing these modifications to the Validation protocol on April 29, 2013. (*See id*; *see also* Countercl. ¶¶ 51–54).

Countercl. ¶ 3 (citing License Agreement § 3.2(c))). Per the terms of the License Agreement, Counter-Defendants were required to initiate Guaranteed Performance in 2013, but they made no effort to do so. (*See id.* ¶ 64). Indeed, E-Cat testing conducted in Industrial Heat's North Carolina facility was never able to reproduce the energy levels reported by Penon during Validation, even with Rossi's presence and participation. (*See id.* ¶¶ 65, 67).

In 2014, Rossi and Leonardo lobbied Counter-Plaintiffs to allow the Plant to be moved to Florida for operations. (*See id.* ¶¶ 71–74). Rossi urged moving the Plant to Florida would allow the E-Cat to service J.M. Products, Inc. ("J.M. Products"), "a real Customer" (*id.* ¶ 72 (quoting Countercl., Ex. 16 ("July 5 Email") [ECF No. 50-16])), and thereby provide a "real-world demonstration" for potential commercial users while simultaneously allowing relevant "Authorities" to conduct tests needed for future approvals (*id.*). At an August 2014 meeting in North Carolina, Rossi and Henry Johnson ("Johnson"), a representative of J.M. Products, further represented J.M. Products was wholly owned by Johnson Matthey, a U.K. corporation interested in using the E-Cat technology for a confidential manufacturing process in Florida. (*See id.* ¶ 74). As a result of these statements, Industrial Heat, J.M. Products, and Leonardo executed a Term Sheet [ECF No. 50-17], which provided for delivery of the Plant to Miami, Florida. (*See* Countercl. ¶ 75). Counter-Plaintiffs later uncovered the purpose for moving the Plant and all representations made regarding J.M. Products were complete fabrications. (*See id.*).

After the Plant's move to Miami, J.M. Products, Penon, Leonardo, and Rossi allegedly obstructed Counter-Plaintiffs' access to the Plant and misrepresented the actual goings-on at the Miami facility. (*See id.* ¶¶ 77–93). Counter-Defendants' actions included: enlisting a person to pose as director of engineering for J.M. Products (*see id.* ¶¶ 78–79); blocking entry to the testing site for Industrial Heat's Vice President of Engineering (*see id.* ¶¶ 80–81); generally restricting

access to the facility (*see id.* ¶ 83); and using "fatally flawed" methodologies to measure Plant operations in a building ill-equipped to handle the steam byproduct that would have been produced if Counter-Defendants' claims regarding the E-Cat were true (*id.* ¶ 82). These deceptive acts were all aimed at hiding the Plant's failure to perform to the levels specified in the License Agreement. (*See id.* ¶ 84).

Aside from these breaches related to the E-Cat testing and transfer, Counter-Defendants also allegedly violated several other provisions of the Agreement, including a confidentiality provision; a non-compete provision; provisions regarding disclosure of information between the contract parties; and provisions related to payment of taxes associated with the E-Cat products. (*See id.* ¶¶ 39–43).

On March 29, 2016, Leonardo demanded payment of $89 million corresponding to the amount due in the event of successful Guaranteed Performance. (*See* Compl. ¶ 74). Counter-Plaintiffs refused (*see id.*), and Rossi and Leonardo filed the Complaint (*see generally id.*). In their Answer, Counter-Plaintiffs asserted ten affirmative defenses, and five counterclaims and third-party claims against Counter-Defendants and Third-Party Defendants, J.M Products; Johnson; Penon; United States Quantum Leap, LLC; and James A. Bass (collectively "Third-Party Defendants"). (*See generally* Countercl.).

With regard to Rossi and Leonardo, Counter-Plaintiffs allege: (1) breach of contract for failure to achieve Validation and failure to transfer all E-Cat intellectual property ("Count I"); (2) breach of contract for violation of various provisions of the License Agreement ("Count II"); (3) fraudulent inducement to enter into the Term Sheet ("Count III"); and (4) violation of the Florida Deceptive and Unfair Trade Practices Act ("FDUTPA"), Florida statute section 501.204 ("Count IV"). (*See generally* Countercl.). Counter-Defendants seek dismissal of each claim for relief.

II. LEGAL STANDARD

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). To meet this "plausibility standard," a plaintiff must "plead[] factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (alteration added) (citing *Twombly*, 550 U.S. at 556). "[I]t simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal [behavior]." *Twombly*, 550 U.S. at 556 (alterations added). The mere possibility a defendant acted unlawfully is insufficient to survive a motion to dismiss. *See Chaparro v. Carnival Corp.*, 693 F.3d 1333, 1337 (11th Cir. 2012) (citing *Iqbal*, 556 U.S. at 678).

III. ANALYSIS

A. Industrial Heat's Standing

As a preliminary matter, Counter-Defendants argue Industrial Heat lacks standing to obtain relief under Count I, for non-delivery of the E-Cat intellectual property. (*See* Mot. to Dismiss 10–11).

To satisfy the requirements for constitutional standing, a plaintiff must show: (1) a "concrete and particularized" injury in fact which is "actual or imminent"; (2) "a causal connection between the injury and the conduct complained of"; and (3) a likelihood "the injury will be redressed by a favorable decision." *Bochese v. Town of Ponce Inlet*, 405 F.3d 964, 980 (11th Cir. 2005) (internal quotation marks omitted) (quoting *Dillard v. Baldwin Cty. Comm'rs*, 225 F.3d 1271, 1275 (11th Cir. 2000)). To demonstrate an injury in fact for the purpose of standing under a contract, a plaintiff must show a defendant has violated a "legally protected

interest" vested in that contract. *See id.* at 980–81. Under Florida law, only parties to or intended third-party beneficiaries of a contract have legally protected interests therein. *See id.* at 981–84.

Standing to sue under a contract can be transferred via assignment. An assignment of a contract is "a transfer of all the interests and rights to the thing assigned. Following an assignment, the assignee 'stands in the shoes of the assignor' and the 'assignor retains no rights to enforce the contract' at all." *Sierra Equity Grp., Inc. v. White Oak Equity Partners, LLC*, 650 F. Supp. 2d 1213, 1227 (S.D. Fla. 2009) (quoting *Leesburg Cmty. Cancer Ctr. v. Leesburg Reg'l Med. Ctr., Inc.*, 972 So. 2d 203, 206 (Fla. 5th DCA 2007)).

On April 29, 2013, Industrial Heat assigned its rights under the License Agreement to IPH. (*See* Assignment and Assumption of the License Agreement ("First Assignment") [ECF No. 50-7]). Subsequently, Industrial Heat and IPH executed an Amended and Restated Assignment . . . ("Amended Assignment") [ECF No. 50-27], to "clarify the agreement between them regarding the assignment of the License Agreement." (*Id.* preamble). The crux of the parties' dispute as to standing is the scope of the assignment from Industrial Heat to IPH. Counter-Defendants argue Industrial Heat transferred the entirety of its interest in the License Agreement, including the right to enforce its provisions. (*See* Mot. to Dismiss 10–11). Citing the Amended Assignment, Counter-Plaintiffs contend Industrial Heat "may still enforce the License Agreement as it pertains to Industrial Heat's property and ownership rights in the Plant," since Industrial Heat retained ownership of the Plant by excluding it from transfer. (Resp. 8).

As with any other contract, interpretation of the scope of an assignment begins with the plain text. *See Slip-N-Slide Records, Inc. v. TVT Records, LLC*, No. 05-CIV-21113, 2007 WL 3232270, at *3 (S.D. Fla. Oct. 31, 2007). The First Assignment "transfer[red] and assign[ed] to

[IPH] all right, title[,] and interest of [Industrial Heat] in and to the [License] Agreement." (First Assignment § 2 (alterations added)). The Amended Assignment's analogous provision adds language regarding purchase price and clarifies "the Plant is excluded from such transfer and assignment and shall remain the property of [Industrial Heat]." (Amended Assignment § 2 (alteration added)). While Counter-Defendants portray this retention as one of ownership only (*see* Reply 2 ("Clearly the purported Amended Assignment reserved the ownership interest in the Plant to IH, but transferred all interest in the License Agreement to IPH.")), the plain language of the Amended Assignment is more fairly read as a carve-out from the License Agreement, whereby Industrial Heat retains "all right, title, and interest" in the Plant. This being the case, Industrial Heat may still sue under the License Agreement to vindicate rights related to the Plant.

In Count I, Industrial Heat alleges breach of clause 3.2(b) of the License Agreement due to Counter-Defendants' failure to deliver all the E-Cat intellectual property or failure to achieve Validation. Counter-Plaintiffs articulate damages including the $1.5 million sum "deemed to include payment in full for the Plant." (License § 3.2(a); *see also* Countercl. ¶ 99). This breach and these damages pertain to the ownership and property interests in the Plant, and thus Industrial Heat has standing to sue on Count I.

B. Counts I and II: Breach of Contract

The Court considers the sufficiency of Counter-Plaintiffs' breach of contract claims together despite the fact the parties separate their discussion of alleged breaches into what Counter-Plaintiffs designate as Counts I and II. (*See* Countercl. ¶¶ 93–133; Mot. to Dismiss 10–18). Count I focuses on breach due to non-delivery of the E-Cat intellectual property and/or failure to achieve Validation. (*See* Countercl. ¶¶ 93–99). In Count II, IPH specifies five other

breaches of the License Agreement.[6] (*See id.* ¶¶ 100–33). In either event, to maintain a breach of contract action, a plaintiff must allege: "(1) the existence of a contract; (2) a material breach of that contract; and (3) damages resulting from the breach." *Burger King Corp. v. Huynh*, No. 11-22602-CIV, 2011 WL 6190163, at *5 (S.D. Fla. Dec. 5, 2011) (quoting *Vega v. T–Mobile USA, Inc.*, 564 F.3d 1256, 1272 (11th Cir. 2009)).

Counter-Plaintiffs first allege a breach of clause 3.2(b) of the License Agreement, which requires "immediate[] transfer" and delivery of all E-Cat intellectual property. (License § 3.2(b) (alteration added)). Counter-Plaintiffs provide factual accounts of their inability to replicate the Validation testing results after numerous attempts, even with Rossi's involvement. (*See* Countercl. ¶¶ 65–68, 86). From this, they conclude Counter-Defendants failed to deliver all the E-Cat intellectual property or failed to achieve Validation (or both), in material breach of the License Agreement. (*See id.* ¶ 98). Counter-Plaintiffs' damages include the $1.5 million and $10 million payments to Counter-Defendants; payments for incidental expenses; and multi-million dollar payments made to AmpEnergo, Inc. under clause 16.6 of the License Agreement. (*See id.* ¶ 99).

Accepted as true, Counter-Plaintiffs' allegations adequately state a claim of breach and raise the right to relief "above the speculative level." *Twombly*, 550 U.S. at 555. Notwithstanding the objection Counter-Plaintiffs' statements are "merely consistent with [Counter-Defendants'] liability," *Iqbal*, 556 U.S. at 678 (alteration added) (quoting *Twombly*, 550 U.S. at 557); (*see also* Mot. to Dismiss 12), Counter-Plaintiffs have stated facts allowing the

[6] Specifically, Counter-Plaintiffs allege breaches of: (1) confidentiality obligations; (2) the requirement to assign licensed patents; (3) duties to inform or consult on patent applications; (4) the covenant not to compete; and (5) provisions requiring compliance with tax obligations. (*See* Countercl. ¶¶ 100–33). Counter-Defendants do not seek to dismiss, or at all contest, three of the five alleged breaches, although they assert Count II is "replete with misstatements and factual inaccuracies" (Mot. to Dismiss 13).

Court to infer "more than a sheer possibility" Counter-Defendants have acted improperly, *Iqbal*, 556 U.S. at 678. Particularly in light of repeated failures in testing despite Rossi's involvement, Counter-Plaintiffs raise a "reasonable expectation that discovery will reveal evidence of [improper behavior]." *Twombly*, 550 U.S. at 556 (alteration added).

Counter-Defendants next seek dismissal of "claims" related to breach of the non-compete covenant (*see* Mot. to Dismiss 13–15), and breach of contractual duties to pay taxes (*see id.* 16–18). In order to survive the motion to dismiss on Counts I and II, Counter-Plaintiffs need only satisfy the three elements of a claim of breach of contract. As stated, Counter-Plaintiffs do not address three of the five alleged actions that give rise to the breach-of-contract claim stated in Count II. The Court will not strike alleged breaches from the Counterclaims in line-by-line fashion.[7] *See Holguin v. Celebrity Cruises, Inc.*, No. 10-20215-CIV, 2010 WL 1837808, at *1 (S.D. Fla. May 4, 2010) (declining to dismiss allegations of unspecified duties from a negligence count on a motion to dismiss after finding plaintiff specified sufficient facts to support a duty of care existed). It is sufficient Counter-Plaintiffs allege facts supporting the existence of a breach of contract.

C. Count III: Fraudulent Inducement

Counter-Plaintiffs claim Rossi, Leonardo, J.M. Products, and Johnson fraudulently induced Industrial Heat to enter into the Term Sheet by falsely representing J.M. Products was a manufacturing company with real commercial use for the steam power generated by the Plant. (*See* Countercl. ¶¶ 136–37). Counter-Defendants argue Counter-Plaintiffs fail to allege their

[7] With regard to the alleged failure to pay taxes, IPH explicitly states it is not currently asserting that failure as a basis to recover damages. (*See* Countercl. ¶ 133). Counter-Defendants nevertheless request the Court "dismiss" the allegations as "immaterial, impertinent and improper." (Mot. to Dismiss 17–18). The Court previously declined to strike paragraphs 126–133 under Rule 12(f). (*See* Order [ECF No. 67]). Since Counter-Plaintiffs sufficiently state a claim for breach of contract, it is unnecessary to reconsider eliminating these paragraphs under Rule 12(b)(6).

claims of fraud with sufficient specificity. (*See* Mot. to Dismiss 18–19).

To state a claim for fraudulent inducement in Florida, a plaintiff must plead: "(1) the defendant made a false statement about a material fact; (2) the defendant knew the statement was false when he made it or was without knowledge of its truth [or] falsity; (3) the defendant intended that the plaintiff rely and act on the false statement; and (4) the plaintiff justifiably relied on the false statement to his detriment." *Persaud v. Bank of Am., N.A.*, No. 14-21819-CIV, 2014 WL 4260853, at *12 (S.D. Fla. Aug. 28, 2014) (alteration added) (quoting *Barrett v. Scutieri*, 281 F. App'x 952, 953 (11th Cir. 2008)). Additionally, Rule 9(b) requires Counter-Defendants to plead the circumstances constituting fraud with particularity. *See* FED. R. CIV. P. 9(b). To wit, a plaintiff alleging fraud must set forth the precise oral and written statements made, when and where these statements were made, to whom and by whom they were made, and/or what was obtained as a result. *See Ziemba v. Cascade Int'l, Inc.*, 256 F.3d 1194, 1202 (11th Cir. 2001) (quoting *Brooks*, 116 F.3d at 1371).

Counter-Plaintiffs rely on three specific statements to support their fraudulent inducement claim: (1) Rossi's July 5 Email, urging Industrial Heat to rent the Plant to J.M. Products, a "real customer" in Florida (Countercl. ¶ 71); (2) Rossi's oral representations J.M. Products was a subsidiary of Johnson Matthey at the August 2014 meeting in North Carolina (*see id.* ¶ 74); and (3) Rossi's statement at the same meeting indicating Johnson Matthey was interested in using the E-Cat technology in connection with a confidential manufacturing process it wanted to operate in Florida (*see id.*). Counter-Defendants concede Counter-Plaintiffs have satisfied Rule 9(b)'s pleading standard with the July 5 Email (*see* Reply 11), but argue the other allegations fail.

Counter-Plaintiffs' pleadings with respect to the oral communications made at the August 2014 meeting are not vague or overly general — the allegations essentially paraphrase the

precise statements made by the speakers. Counter-Plaintiffs provide the time frame and location of the statements. They identify to whom the statements were made — Industrial Heat representatives, the only other people present at the meeting (*see* Countercl. ¶ 74), and what Counter-Defendants secured as a result — executing the Term Sheet to move the Plant operation to Miami, Florida (*see id.* ¶ 75). Counter-Plaintiffs have adequately pleaded their claim of fraudulent inducement with respect to the meeting statements. *See Colonial Penn Ins. Co. v. Value Rent–A–Car Inc.*, 814 F. Supp. 1084, 1092–93 (S.D. Fla. 1992) (finding particularity satisfied when Counter-Defendants provided general time frame, described scheme in detail, and included specific allegations about related correspondence).

Counter-Defendants' primary criticism seems to be Counter-Plaintiffs collectively attribute statements to Rossi, Johnson, Leonardo, and J.M. Products without distinguishing the person speaking or in what capacity he is speaking. (*See* Mot. to Dismiss 19 (quoting *Leisure Founders, Inc. v. CUC Int'l, Inc.*, 833 F. Supp. 1562, 1575 (S.D. Fla. 1993)); Reply 11). Yet, Counter-Plaintiffs state "Rossi, both in his individual capacity and as a representative of Leonardo, and Johnson, both in his individual capacity and as the representative of J.M. Products" were present at the meeting, and immediately explain "Rossi and Johnson" made the statements (Countercl. ¶ 74). It is plausible Rossi and Johnson, present at the meeting as both individuals and corporate representatives, made the same or similar statements regarding J.M. Products's affiliation with Johnson Matthey and Johnson Matthey's intentions for the E-Cat technology. Counter-Plaintiffs are not required to repeat every allegation in a separate sentence so that Counter-Defendants understand each person and entity that made the statements.

Further, Counter-Plaintiffs do attribute particular actions apart from these meeting statements to one or the other Counter-Defendant: Rossi sent the July 5 Email (*see id.* ¶ 71), and

Johnson "on behalf of [J.M. Products]" warranted in writing J.M. Products was wholly owned by a U.K. entity (*id.* ¶ 74 (alteration added)). The more concrete allegations provided here are a far cry from the overbroad allegation in the case Counter-Defendants cite for support, which charged two named defendants "and, perhaps, others, who are not named as defendants herein" with "joining [an] existing conspiracy to defraud." *Leisure Founders*, 833 F. Supp. at 1575 (alteration added) (quoting the plaintiff's complaint). Unlike the *Leisure Founders* plaintiffs, Counter-Plaintiffs sufficiently "distinguish among defendants and specify their respective roles in the fraud." *Id.*

D. Count IV: FDUTPA

Finally, Counter-Plaintiffs allege all Counter-Defendants and Third-Party Defendants violated the FDUTPA by engaging in a common scheme to: (1) manipulate Counter-Plaintiffs into moving the Plant to Florida (*see* Countercl. ¶ 142); (2) doctor the results of the Plant's operation to create the false appearance the Plant was performing at exceptional levels (*see id.* ¶ 143); (3) demand payment of $89 million based on the deceptive results of the Plant's operation (*see id.* ¶ 144); and (4) obtain payments for work that was completed to Counter-Plaintiffs' detriment (*see id.* ¶ 145). Counter-Defendants launch a three-pronged rebuttal, arguing: (1) Counter-Plaintiffs lack standing (*see* Mot. to Dismiss 20); (2) they have impermissibly recast their breach of contract claims as tort claims (*see id.* 21); and (3) they fail to satisfy Rule 9(b)'s heightened pleading requirement (*see id.* 21–22).

The Court begins with the threshold issue of standing. Reiterating their Count I argument, Counter-Defendants first attack Industrial Heat's standing to raise claims arising out of the License Agreement, since Industrial Heat allegedly assigned all its rights and interests thereunder to IPH. (*See id.* 20). Similarly, Counter-Defendants contend IPH lacks standing to

raise claims related to the Term Sheet as it was neither a party to the agreement nor a third-party beneficiary. (*See id.*).

"In order to prevail under a claim for violation of FDUTPA, a plaintiff must establish the following: 1) a deceptive act or unfair practice; 2) causation; and 3) actual damages." *Medimport S.R.L. v. Cabreja*, 929 F. Supp. 2d 1302, 1319 (S.D. Fla. 2013) (quoting *Blair v. Wachovia Mortg. Corp.*, No. 5:11-CV-566-OC-37TBS, 2012 WL 868878, at *3 (M.D. Fla. Mar. 14, 2012)). "[A] claim under FDUTPA is not defined by the express terms of a contract, but instead encompasses unfair and deceptive practices arising out of business relationships." *Siever v. BWGaskets, Inc.*, 669 F. Supp. 2d 1286, 1293 (M.D. Fla. 2009) (alteration added). A plaintiff need not be a party to or intended beneficiary of a contract to state a FDUTPA claim related to a breach of that contract. *See Rebman v. Follett Higher Educ. Grp., Inc.*, 575 F. Supp. 2d 1272, 1279 (M.D. Fla. 2008) (entertaining, although ultimately rejecting, plaintiffs' FDUTPA claims despite determining defendants lacked standing to sue for breach of the related contract). Reading the facts in the light most favorable to the non-movants, the Court finds Counter-Plaintiffs have adequately demonstrated injury in fact under the FDUTPA, and therefore have standing.

Related to the question of standing is the issue of whether Counter-Plaintiffs' FDUTPA claim impermissibly recasts a breach of contract as a claim in tort. In and of itself, that the "allegations contained in Count IV . . . arise from the parties[']dealings pursuant to the [contracts]" (Mot. to Dismiss 21 (alterations added)), is not fatal to the pleadings. Although the FDUTPA is not intended to convert every breach of contract claim into a claim under the statute, "[t]o the extent an action giving rise to a breach of contract . . . may also constitute an unfair or deceptive act, such a claim is and has always been cognizable under the FDUTPA." *PNR, Inc. v.*

Beacon Prop. Mgmt., Inc., 842 So. 2d 773, 777 n.2 (Fla. 2003).

In Count IV, Counter-Plaintiffs describe deceptive and unfair behavior related to but separate from their breach of contract claims. (*Compare* Countercl. ¶¶ 140–48, *with id.* ¶¶ 93–133). Counter-Defendants point out one problematic allegation, where Counter-Plaintiffs charge Counter-Defendants with "[r]efusing to provide other information . . . to which Counter-Plaintiffs were entitled pursuant to the License Agreement, the Term Sheet, [and] the USQL Agreement . . . ." (Mot. to Dismiss 21 (alterations added) (quoting Countercl. ¶ 146(e))). With respect to this allegation only, the Court agrees with Counter-Defendants; Counter-Plaintiffs do not allege a deceptive or unfair practice so much as a breach of contract. This factual allegation is more appropriately included in Count I or II.

Otherwise, Counter-Plaintiffs do not "rely solely on violation of the [contracts] as a basis for assertion of a FDUTPA claim." *Rebman*, 575 F. Supp. 2d at 1279 (alteration added) (rejecting FDUTPA claim where defendants did not challenge the act underlying the breach *per se*, but instead only challenged the breach itself as unfair or deceptive). Therefore Counter-Plaintiffs have not impermissibly recast their contract claims in tort under the FDUTPA.

Counter-Defendants' final perceived deficiency regarding the FDUTPA claim lies in Counter-Plaintiffs' failure to plead with particularity under Rule 9(b). (*See* Mot. to Dismiss 21–22). As the parties are well aware, the undersigned has previously stated "[t]he requirements of Rule 9(b) do not apply to claims under the FDUTPA. . . . '[T]he plaintiff need not prove the elements of fraud to sustain an action under the statute.'" *Deere Constr., LLC v. Cemex Constr. Materials Fla., LLC*, No. 15-24375-CIV, 2016 WL 4374970, at *8 (S.D. Fla. July 26, 2016) (alterations added) (quoting *Galstaldi v. Sunvest Cmtys. USA, LLC*, 637 F. Supp. 2d 1045, 1058 (S.D. Fla. 2009)). FDUTPA claims can be premised on deceptive or unfair practices other than

fraud; such is the case here, where Counter-Plaintiffs nowhere make an allegation of fraud as a basis for their FDUTPA claim. *Cf. Llado-Carreno v. Guidant Corp.*, No. 09-20971-CIV, 2011 WL 705403, at *5 (S.D. Fla. Feb. 22, 2011) (requiring FDUTPA claim comply with Rule 9(b) where plaintiff appeared to be claiming defendant committed fraud by deceptively inducing plaintiff's action).

Rule 9(b) being inapplicable, IPH need only provide "a short and plain statement of the claim[.]" Fed. R. Civ. P. 8(a)(2). Taking the factual allegations of the Counterclaims as true, and given IPH's detailed enumeration of unfair and deceptive acts supporting the "common scheme" (*see* Countercl. ¶¶ 140–146), Rule 8 is satisfied.

IV. CONCLUSION

For the foregoing reasons, it is

ORDERED AND ADJUDGED that the Motion to Dismiss **[ECF No. 56]** is **DENIED**.

DONE AND ORDERED in Miami, Florida this 16th day of November, 2016.

CECILIA M. ALTONAGA
UNITED STATES DISTRICT JUDGE

cc: counsel of record