UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

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.

CASE NO. 1:16-cv-21199-CMA

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

Counter-Plaintiffs,

v.

ANDREA ROSSI and LEONARDO CORPORATION,

Counter-Defendants,

and

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

Third-Party Defendants.

INDUSTRIAL HEAT, LLC AND IPH INTERNATIONAL B.V.'S OPPOSITION TO THIRD-PARTY DEFENDANTS' COMBINED MOTION FOR PARTIAL SUMMARY JUDGMENT AND MEMORANDUM OF LAW IN SUPPORT THEREOF

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STATUTES

Counter-Plaintiffs Industrial Heat, LLC ("IH") and IPH International, B.V. ("IPH") (collectively, "Counter-Plaintiffs") hereby oppose the Combined Motion for Partial Summary Judgment (the "SJ Motion") of Third-Party Defendants Henry Johnson, J.M. Products, Inc. ("J.M. Products"), James Bass, Fulvio Fabiani, and United States Quantum Leap, LLC ("USQL") as to Counts III and IV of Counter-Plaintiffs' Fourth Amended Counterclaims and Third-Party Claims ("AACT") as follows:

ARGUMENT

I. J.M. Products and Johnson Are Not Entitled to Partial Summary Judgment as to Count III of the AACT (Fraudulent Inducement).

J.M. Products and Johnson's argument for partial summary judgment in their favor on Count III of the AACT is without merit. There is ample evidence in the record that Johnson was present when Plaintiffs Andrea Rossi ("Rossi") and Leonardo Corporation ("Leonardo") (collectively, "Plaintiffs") made representations that J.M. Products[1] was affiliated with Johnson Matthey, plc ("Johnson Matthey"), a well known United Kingdom specialty chemicals and precious metals company. *See* Counterpls.' Opp. to 3d Party Defs.' Statement of Undisputed Material Facts ("Counterpl. SOMF") ¶¶ 31, 34. There is also ample evidence that Johnson acquiesced with and failed to correct such representations at the time Plaintiffs made them, even though he had undertaken to make other disclosures about J.M. Products, and that he subsequently reinforced such representations. *Id.* ¶¶ 34, 36; *see also Hauben v. Harmon*, 605 F.2d 920, 924 (5th Cir. 1979) ("[A]n affirmative duty to disclose exists in Florida if . . . some trick or artifice has been employed to prevent an independent investigation by the representee" (citing *Ramel v. Chasebook Const. Co., Inc.*, 135 So.2d 876, 882 (Fla. Dist. Ct. App. 1962))) (applying Florida law); *Friedman v. Am. Guardian Warranty Servs., Inc.*, 837 So.2d 1165, 1165 (Fla. Dist. Ct. App. 2003) ("Where a party in an arm's-length transaction undertakes to disclose information, all material facts

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[1] At the time, J.M. Products was known as J.M. Chemical Products, Inc. It later changed its name to J.M. Products. Counterpl. SOMF ¶ 32.

must be disclosed" (citing *Gutter v. Wunker*, 631 So.2d 1117, 1118 (Fla. Dist. Ct. App. 1994))); *Ramel*, 135 So.2d at 882 ("[N]ondisclosure of a material fact may be deemed fraudulent where the other party does not have equal opportunity to become apprised of the fact.").[2]

Furthermore, J.M. Products and Johnson ignore other evidence directly supporting IH's fraudulent inducement claim. Tom Darden testified to a meeting with Johnson, the President of J.M. Products, in North Carolina where Johnson made a host of misrepresentations: (a) that he would be running the operations of J.M. Products, (b) that J.M. Products would be using the steam produced by the 1 MW Plant operated by Leonardo in Florida to produce products, and (c) that "they were going to move products from another plant into this plant" in Florida. Darden Dep. (Counterpl. SOMF Ex. 4) 175:16, 176:4-9, 180:10-12, 181:7-17. All of this was false: Johnson was never going to have any involvement in J.M. Products' operations. Johnson Dep. (Counterpl. SOMF Ex. 8) 19:13-21:17, 22:24-23:8, 50:16-23, 53:7-11, 56:7-10, 198:9-21, 217:5-12. J.M. Products also had no use for the steam power to be provided by the 1 MW Plant, and it had no products to produce; in fact, at the time of this meeting J.M. Products had no operations at all. *Id.* at 31:19-25, 35:13-15, 90:25-91:3, 219:19-221:15, 222:3-24, 235:19-236:2. And it was all part of Rossi and Johnson's effort to lead IH to believe that a Johnson Matthey affiliated company would be operating the Florida facility where the 1 MW Plant would be placed. Darden Dep. (Counterpl. SOMF Ex. 4) 179:21-180:3.

Darden further recalled both Rossi and Johnson representing that J.M. Products was affiliated with Johnson Matthey:

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[2] Indeed, "where failure to disclose a material fact is calculated to induce a false belief, the distinction between concealment and affirmative misrepresentations is tenuous. Both proceed from the same motives and are attended with the same consequences; both are violative of the principles of fair dealing and good faith; both are calculated to produce the same result; and, in fact, both essentially have the same effect." *Johnson v. Davis*, 480 So.2d 625, 628 (Fla. 1985).

> Q. Did you -- do you have anything in writing that you asked, whether it be J.M. Chemical Products, Inc., or Dr. Rossi or Henry Johnson, where they stated specifically, "We represent that J.M. Chemical Products, Inc., is, in fact, the subsidiary of Johnson Matthey"?
>
> A. I don't remember that specifically. ***And whether it was subsidiary or affiliate or part of the group or some of the language, clearly they represented that***.

Id. at 186:9-18 (emphasis added).

Finally, there is the certification that Johnson, on behalf of J.M. Products, executed before the Term Sheet was executed. Early term sheet drafts reflected that one of the contracting parties was to be Johnson Matthey. Counterpl. SOMF ¶ 5. Rossi insisted that this be removed because Johnson Matthey wanted to act through its U.S. company (J.M. Products). *Id.* IH respected this demand, but then requested that J.M. Products at least provide information on its ownership. Thereafter, Johnson – as President of J.M. Products – represented and warranted that J.M. Products was "owned by an entity formed in the United Kingdom." *Id.* ¶ 36. This, of course, was to further the deception that J.M. Products was owned by the United Kingdom company of Johnson Matthey. But, as Johnson well knew, it was completely false – J.M. Products was owned by a U.S. trust over which Johnson had control as trustee. *Id.* ¶ 38.

Contrary to J.M. Products and Johnson's contentions, the foregoing evidence is more than sufficient to demonstrate that they made false statements to induce IH to enter into the Term Sheet. Furthermore, J.M. Products and Johnson misstate and misapply the law on fraudulent inducement. They claim that a fraudulent inducement claim cannot be based on misrepresentations not contained in the Term Sheet. If the Term Sheet had a merger and integration clause as the License Agreement does, their claim would have merit, but the Term Sheet does not contain such a clause. *Corporate Fin., Inc. v. Principal Life Ins. Co.*, 461 F.Supp.2d 1274, 1291 (S.D. Fla. 2006) (declining to hold as a matter of law that appellant could not have justifiably relied on prior oral representations when final written agreement

did not contain a merger clause). Furthermore, J.M. Products and Johnson consciously ignore the recitals in the Term Sheet that do reflect various false representations they, Rossi, and Leonardo used to induce IH to sign the Term Sheet – namely, that J.M. Products "operates a production facility in Miami, FL" and that this facility "require[d] low temperature steam" for its production process. Term Sheet (Counterpl. SOMF Ex. 2) ¶ 2 . Both of these representations were patently false: At the time of entering the Term Sheet, J.M. Products did not have any facility in Florida, let alone a production facility, and it had no production process at all, let alone a process that required "low temperature steam." Johnson Dep. (Counterpl. SOMF Ex. 8) 19:13-21:17, 22:24-23:8, 50:16-23, 53:7-11, 198:9-11, 224:20-226:10.[3]

J.M. Products and Johnson cannot escape the fraud they perpetrated on IH. Their motion for summary judgment on Count III should be denied.

II. Third-Party Defendants Are Not Entitled to Summary Judgment as to Count IV of the AACT (Violations of the Florida Deceptive and Unfair Trade Practices Act or "FDUTPA").

Third-Party Defendants' arguments for summary judgment in their favor on Count IV of the AACT fall into three categories: (1) there is insufficient evidence that each Third-Party Defendant engaged in deceptive or unfair conduct; (2) even if there is sufficient evidence of this kind, it should not be considered in establishing liability because it is either irrelevant or unrelated to a contractual agreement involving Counter-Plaintiffs; and (3) Third-Party Defendants' conduct did not cause Counter-Plaintiffs to suffer damages. None of these arguments is meritorious.

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[3] These factors demonstrate the stark contrast between Rossi and Leonardo's claim to being fraudulently induced to enter the License Agreement *versus* IH's claim to being fraudulently induced to enter the Term Sheet. The License Agreement contained a merger and integration clause disavowing any party's reliance on alleged prior oral promises; the Term Sheet did not. No provision of the License Agreement supports Rossi and Leonardo's claim that Cherokee Investment Partners, LLC ("Cherokee") would guarantee payments under the Agreement; the Term Sheet's recitals referenced above reflect the false representations made to IH that J.M. Products was a bona fide company with bona fide production operations. No document entered in connection with the License Agreement supports Rossi and Leonardo's claim that Cherokee was a party to or guarantor of the Agreement; the certification Johnson signed for J.M. Products falsely representing it was owned by a U.K. entity verifies IH's claim that it was told J.M. Products was owned by the U.K. company Johnson Matthey.

A. Each Third-Party Defendant Engaged In Deceptive and Unfair Conduct.

There is ample record evidence that each Third-Party Defendant was directly involved in the scheme identified in Count IV to deceive and manipulate Counter-Plaintiffs as to the operations and performance of the 1 MW Plant in Florida (including to have the 1 MW Plant moved to Florida), precluding summary judgment in favor of Third-Party Defendants.

First, as addressed in the preceding section, the evidence clearly demonstrates that Johnson and J.M. Products defrauded Counter-Plaintiffs into agreeing to relocate the 1 MW Plant to Florida. *See* Section I *supra*. These representations were made to induce IH to enter into the Term Sheet and allow the 1 MW Plant to be moved from its facilities in North Carolina (where it obviously could closely monitor any operation of, and any output from, the 1 MW Plant) to an alleged J.M. Products location in Florida, removed from IH's immediate oversight. Counterpl. SOMF ¶¶ 40, 41.

Second, the evidence establishes that Johnson and J.M. Products created the intentionally false illusion that J.M. Products was a "real customer" of Leonardo using the steam produced by the 1 MW Plant in order to falsely substantiate the reliability and independence of the 1 MW Plant's operations and performance. Johnson and J.M. Products falsely represented J.M. Products as receiving, measuring, and being satisfied with the power it was purportedly receiving from the 1 MW Plant by sending monthly letters to IH stating the amount of power it was receiving and offering to pay for such power. *Id.* ¶ 45a.[4] Johnson and J.M. Products also continued falsely to portray J.M. Products as being affiliated with Johnson Matthey, deceptively describing J.M. Products as handling "Advanced Derivatives of Johnson

[4] The Johnson/J.M. Products monthly letters on the power J.M. Products was allegedly receiving from the 1 MW Plant were drafted and the information contained therein provided by Rossi. Counterpl. SOMF ¶ 49b.

Matthew Platinum Sponges." *Id.* ¶ 45b. At no time did J.M. Products or Johnson disclose that, in reality, Rossi and Leonardo entirely controlled and funded J.M. Products. *Id.* ¶ 49.[5]

Third, for his part, Bass lied to IH about the J.M. Products operations in Florida, furthering the falsehood that J.M. Products was a real company engaged in a real manufacturing process using the steam provided by the 1 MW Plant. Bass told Darden that the 1 MW Plant:

> … was producing lots of steam. He said their utility bills have been reduced compared to what they were before because they weren't having to use so much electric energy and now they were using this energy. He said the form of the steam was great. You know, the temperature or whatever, the nature of it, and production was going well.

Darden Dep. (Counterpl. SOMF Ex. 4) 228:17-24. Bass also "represented to us [IH] that there was a manufacturing plant there and that it was operating nicely." *Id.* 298:15-17; *see also id*. at 300:7-10, 300:23-301:3, 301:16-21 ("He represented by saying that the plant was performing spectacularly or consistent with expectations in terms of output, the amount of steam they were getting. He represented half of the equation that it was getting enough steam that it must have had that high COP."). All of this was false: Bass knew nothing about the quality, or even quantity, of steam being produced by the 1 MW Plant,[6] knew J.M. Products was not operating a manufacturing facility (but simply had a container through which the output of the 1 MW Plant was circulated), and had no basis to claim J.M. Products' utility bills were reduced because of the steam it was receiving from the 1 MW Plant (since J.M. Products had no prior operations before being set up as the fake customer to receive the output from the

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[5] In fact, at its Rule 30(b)(6) deposition, J.M. Products' corporate representative (Rossi) testified that Rossi was J.M. Products' "scientific and technical director" and in complete control of all its operations at the Florida warehouse facility. *See* J.M. Products Dep. (Counterpl.'s SOMF Ex. 7) 6:18-23, 22:16-23:4.

[6] Bass also deceived IH by holding himself out as J.M. Products' "Director of Engineering." Bass claims this was not false because Rossi did bestow this title on him. Bass Dep. (Counterpl. SOMF Ex. 13) 157:2-10. But Bass was hired as an independent contractor (not employee) of J.M. Products, was hired by Rossi, and worked under the direction of Rossi. Counterpl. SOMF ¶ 11. He was not a real "Director of Engineering" for J.M. Products, which had no need for such an individual, but was just provided a sham title.

1 MW Plant). Bass Dep. (Counterpl. SOMF Ex. 13) 27:15-28:16, 41:17-42:18, 71:1-15, 133:23-135:12, 136:12-19.[7]

Fourth, the evidence establishes that Fabiani and USQL deceived Counter-Plaintiffs as to the accuracy and success of the 1 MW Plant's operations and performance. Specifically, there is substantial evidence that Fabiani and USQL (themselves and through Fabio Penon) provided false measurement data on the 1 MW Plant to Counter-Plaintiffs. Counterpl. SOMF ¶¶ 16, 51. The power absorption data that Fabiani and Penon provided Counter-Plaintiffs (which were nearly identical to each other, *see id.* ¶ 16) materially conflicted with the data provided by Florida Power and Light ("FPL"). Indeed, during certain time periods, this data from Fabiani and Penon reflected that the 1 MW Plant used more power than FPL was providing to the entire warehouse facility where the 1 MW Plant was located. *See id.* Even if one accepts Third-Party Defendants' argument that this evidence does not conclusively establish that Fabiani and USQL fabricated or manipulated data (*see* SJ Motion at 24), such evidence is at least sufficient to create a genuine issue of material fact such as to preclude summary judgment in their favor on this issue.

Fifth, the evidence establishes that Johnson, J.M. Products, Fabiani, and USQL prevented or blocked Counter-Plaintiffs from verifying the 1 MW Plant's operations and performance. For example:

- Johnson and J.M. Products complied with and enforced Plaintiffs' refusal to grant IH personnel access to the Doral facility in at least December 2015, *see* Counterpl. SOMF ¶ 53, so that IH and

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[7] The record is clear that J.M. Products had no manufacturing process to use the steam allegedly produced by the 1 MW Plant. Counterpl. SOMF ¶ 48. This ample record evidence goes directly against Third-Party Defendants' argument that there is no evidence J.M. Products did not have a manufacturing process taking place. *See* SJ Motion at 17. It also goes directly against their argument that Bass never made any deceptive statements to Counter-Plaintiffs. *See id.* at 14.

IPH could not assess the operation of the 1 MW Plant while the alleged "Guaranteed Performance" test was being conducted, *see id.* ¶ 54;[8] and

- Following the completion of the purported "Guaranteed Performance" test, Fabiani and USQL refused to provide IH with data that they had collected during the purported test, despite IH's entitlement to, and repeated requests for, that data, *see id.* ¶¶ 56-58;[9] instead, Fabiani and USQL intentionally destroyed their data and their emails relating to the 1 MW Plant's performance in Florida, *see id.* ¶ 59.

All told, there is ample evidence of Third-Party Defendants' deceptive and unfair conduct. Their claim to the contrary is disingenuous.

B. Each Third-Party Defendant's Deceptive and Unfair Conduct Was Material.

J.M. Products, Johnson, and Bass argue that their deceptive conduct should be forgiven because it was irrelevant to whether the 1 MW Plant was performing as Plaintiffs claimed in order to justify Plaintiffs' subsequent demand to IH and IPH that they be paid $89 million under the License Agreement.[10] They are wrong. Rossi told IH that having a "real Customer" with a need for steam would be an independent check on how the 1 MW Plant was operating because the customer could confirm the level of steam the Plant was producing. Counterpl. SOMF ¶¶ 33, 47. Darden and J.T.

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[8] This evidence refutes Third-Party Defendants' argument that they never restricted access to the Florida facility. *See* SJ Motion at 12.

[9] Third-Party Defendants' argument that the data Fabiani and USQL withheld from Counter-Plaintiffs was not the false power data that Fabiani and USQL provided IH (*see* SJ Motion at 25) does not aid their case. The data Fabiani and USQL provided IH was false, and they withheld other data from IH. Two wrongs, as they say, do not make a right.

[10] Third-Party Defendants' extensive reliance on the Court's Order on their Motion to Dismiss Counts III, IV, and V of the Third Amended Answer, Additional Defenses, Counterclaims, and Third-Party Claims [D.E. 120] is misplaced, as Counter-Plaintiffs subsequently filed the AACT that cured any deficiencies identified in the Court's Order. [D.E. 124, 132]. The Court so held in its Order of February 1, 2017. [D.E. 130].

Vaughn agreed, not knowing that J.M. Products was not a fake customer: "We felt that having a bona fide customer would be an additional way of being able to measure energy output. That if someone credible was receiving the energy then that would be one added way to ratify the power production." Darden Dep. (Counterpl. SOMF Ex. 4) 159:1-5, 159:21-22 ("having a very credible customer would be beneficial in terms of verification"); Vaughn Dep. (Counterpl. SOMF Ex. 5) 182:24-183:5 (IH wanted to know that the customer would be "accurately assessing the energy that [it] consumed" because "that's a check on whether or not it's a – how much energy is actually being produced").[11]

J.M. Products, Johnson, and Bass maintained the ruse that J.M. Products was a legitimate company with an actual need for the steam allegedly being produced by the 1 MW Plant to deceive and manipulate IH and IPH into believing that the 1 MW Plant was, or at least might have been, working as claimed by Rossi and Leonardo. IH and IPH would have known to the contrary had they known J.M. Products was a shell company with no manufacturing process or customers, solely under the control of (and solely funded by) Rossi and Leonardo.[12]

Fabiani and USQL's like claim that their deceptive and unfair conduct was harmless also rings hollow. They provided IH and IPH with false data that was directly related to the performance of the 1 MW Plant in Florida. Counterpl. SOMF ¶¶ 16, 51. They destroyed other data that also directly related to the performance of the 1 MW Plant in Florida, as well as related emails. *See id.* ¶ 59. Clearly depriving IH and IPH of full and accurate data on the 1 MW Plant's operation perpetuated and enabled the deception and manipulation of IH and IPH. Furthermore, Fabiani and USQL's contention that even

[11] *See also* Darden Dep. (Counterpl. SOMF Ex. 4) 160:20-25, 162:4-5, 165:7-11 ("We wanted to be sure that they measured it and that we could use them as a way of knowing how much steam was produced. So to have a third-party sophisticated, you know, technical company that needed steam and that could measure it was important to us."), 191:21-23 ("[T]he nature of the customer and the measurement of the steam were core issues for us in deciding how the technology worked[.]").

[12] As noted above, Johnson and J.M. Products also blocked IH and IPH's access to the Florida warehouse to prevent them from checking themselves on how the 1 MW Plant was operating.

if they provided false data, it was not material because the data used for the "Guaranteed Performance" test measurements came from Penon, not Fabiani and USQL, is misguided. According to Penon, he received data for his measurements from Fabiani, thinking it was data collected by Penon's equipment. *See id.* ¶ 28. But Fabiani testified that the data he sent to Penon was data from Fabiani's equipment, not Penon's. *See id.* And in any event, that the data Fabiani was providing IH and IPH matched the data Penon was providing them gave the intended misimpression to IH and IPH that both data sets were reliable (since they matched) when in fact they were unreliable (since discovery revealed that they are out of line with the power actually provided by FPL). *See id.* ¶ 16, 51.

To the extent Third-Party Defendants suggest that the role of each, viewed in isolation, was not substantial in the larger picture or was minor compared to the roles of Rossi and Leonardo, that suggestion is without substance. 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). "[I]t 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). FDUPTA also does not require proof of actual reliance. *See Fitzpatrick v. General Mills, Inc.,* 635 F.3d 1279, 1283 (11th Cir. 2011). Thus, that Third-Party Defendants may not have been as involved in the scheme as Rossi and Leonardo, or that their involvement amongst themselves may have varied, does not defeat Counter-Plaintiff's FDUTPA claim against them.

Finally, Third-Party Defendants' argument that conduct underlying a FDUTPA claim must arise out of a contractual relationship is erroneous. For example, Third-Party Defendants argue that Bass was not involved in the negotiation of the License Agreement and that Bass, Fabiani, and USQL were not involved in the negotiation of the Term Sheet. *See* SJ Motion at 14, 21. However, FDUTPA claims can

encompass a broad variety of conduct, and are not limited to parties' contractual relationships. *See* Fla. Stat. § 401.204(1); *Nature's Prods., Inc. v. Natrol, Inc.*, 990 F.Supp.2d 1307, 1322 (S.D. Fla. 2013); *Deere Constr., LLC v. Cemex Constr. Materials Fla., LLC*, 198 F.Supp.3d 1332, 1342 (S.D. Fla. 2016) (quoting *Galstaldi*, 637 F.Supp.2d at 1058). Thus, whether Third-Party Defendants' deceptive or unfair conduct arises out of the License Agreement or the Term Sheet is irrelevant to establishing their liability under FDUTPA.

C. Counter-Plaintiffs Suffered Actual Injury.

Lastly, Third-Party Defendants assert, at least in passing, that Counter-Plaintiffs did not suffer actual injury relating to their FDUTPA violations. To the extent this is just a different way of arguing that Counter-Plaintiffs' injuries flowed from the conduct of Rossi and Leonardo, not the conduct of Third-Party Defendants, the response is the same as above: Third-Party Defendants' deceptive and manipulative conduct misled Counter-Plaintiffs as to the basis for moving the 1 MW Plant from North Carolina (where they could directly oversee its performance) to Florida (where they could not) as well as to the performance of the 1 MW Plant in Florida. Counter-Plaintiffs need not prove reliance on particular deceptive acts by particular Third-Party Defendants, *see Fitzpatrick*, 635 F.3d at 1283, and they need not prove that each or any Third-Party Defendant was a principal actor in the scheme against IH. *See Galstaldi*, 637 F.Supp.2d at 1056. They all clearly and directly participated in the scheme to deceive Counter-Plaintiffs, and therefore are all liable for the injuries flowing from that scheme. *See Sundance Apts. I, Inc.*, 581 F.Supp.2d at 1222; *KC Leisure, Inc. v. Haber*, 972 So.2d 1069, 1074 (Fla. Dist. Ct. App. 2008).

As to the actual damages caused by this scheme and suffered by Counter-Plaintiffs, the damages are extensive. Counter-Plaintiffs incurred expenses on their own behalf – as well as reimbursed Third-Party Defendants, Rossi, and Leonardo for their expenses – in connection with the 1 MW Plant's

operations in Florida that they would not have paid or incurred if they knew the truth. For example, Counter-Plaintiffs paid for (1) the 1 MW Plant's transportation to Florida; (2) the procurement and delivery of equipment for the 1 MW Plant's reassembly in Florida; and (3) the procurement and transportation of personnel to assemble the 1 MW Plant in Florida. *See* Counterpl. SOMF ¶ 60. Counter-Plaintiffs also paid for, among other things, (1) repairs and maintenance to the 1 MW Plant while in Florida; (2) new equipment for the Doral warehouse facility; and (3) personnel to work at the warehouse and on maintenance of the 1 MW Plant (such as Barry West and Fabiani). *See id.* Furthermore, Counter-Plaintiffs clearly incurred actual damages arising from this litigation, as Rossi and Leonardo would have had no basis to sue Counter-Plaintiffs if they had not been able to use J.M. Products and the 1 MW Plant's relocation to Florida as a cover for conducting their purported Guaranteed Performance test and then thereafter suing Counter-Plaintiffs.

CONCLUSION

For the foregoing reasons, Third-Party Defendants' Combined Motion for Partial Summary Judgment should be denied in its entirety.

Dated: April 5, 2017

Respectfully submitted,

/s/ Christopher R. J. Pace

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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 by using the CM/ECF system which will send a notice of electronic filing to all counsel or parties of record.

/s/ Christina T. Mastrucci
Christina T. Mastrucci