UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 1:16-cv-21199-CIV-ALTONAGA/O'Sullivan

ANDREA ROSSI and LEONARDO CORPORATION,

Plaintiffs,

v.

THOMAS DARDEN; JOHN T. VAUGHN; INDUSTRIAL HEAT, LLC; IPH INTERNATIONAL B.V.; And CHEROKEE INVESTMENT PARTNERS, LLC,

Defendants.

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

Counter-Plaintiffs,

v.

ANDREA ROSSI and LEONARDO CORPORATION,

Counter-Defendants,

v.

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

Third-Party Defendants.

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THIRD-PARTY DEFENDANTS' *COMBINED* MOTION TO DISMISS COUNTS III, IV, AND V OF COUNTER-PLAINTIFFS' THIRD AMENDED COUNTERCLAIMS AND THIRD-PARTY CLAIMS, AND INCORPORATED MEMORANDUM OF LAW

Pursuant to this Court's Order [**ECF No. 62**], Third-Party Defendants, J.M. Products, Inc. ("JMP"), Henry Johnson ("Johnson"), James A. Bass ("Bass"), United States Quantum Leap,

LLC ("USQL"), and Fulvio Fabiani ("Fabiani") (collectively, the "Third-Party Defendants"), by and through their undersigned counsel and pursuant to Rule 12(b)(6), Fed. R. Civ. P., collectively move this Court for the entry of an Order dismissing Counts III, IV, and V of the Third Amended Counterclaims and Third-Party Claims (the "Counterclaims and Third-Party Claims," **ECF No. 78**) filed by Counter-Plaintiffs Industrial Heat, LLC ("IH") and IPH International, B.V. ("IPH") (collectively, "Counter-Plaintiffs"). In support thereof, Third-Party Defendants state as follows:

BRIEF PROCEDURAL HISTORY

1. On September 19, 2016, Counter-Plaintiffs filed their Second Amended Counterclaims and Third-Party Claims.

2. On October 20, 2016, Third-Party Defendants filed their Combined Motion to Dismiss Counts III, IV, and V of Counter-Plaintiffs Second Amended Counterclaims and Third-Party Claims [**ECF No. 60**], which was then fully briefed.

3. On November 23, 2016, Counter-Plaintiffs filed their Third Amended Counterclaims and Third-Party Claims [**ECF No. 78**] pursuant to this Court's Orders [**ECF Nos. 67, 76**] on Counter-Defendants' Motion to Strike [**ECF No. 54**].

4. On December 5, 2016, this Court entered its Order [**ECF No. 83**] denying Third-Party Defendants motion [**ECF No. 60**] as moot due to the filing of the Counter-Plaintiffs Third Amended Counterclaims and Third-Party Claims.

5. Count III of the Counterclaims and Third-Party Claims attempts to allege the fraudulent inducement into the Term Sheet.[1]

[1] All capitalized terms not otherwise defined herein shall have the same definitions assigned to them in the operative Complaint, or, if not defined therein, in the Counterclaims and Third-Party Claims.

6. Count IV attempts to allege a claim against the Counter-Defendants and Third-Party Defendants for violation of the Florida Deceptive and Unfair Trade Practices Act ("FDUTPA").

7. Count V attempts to allege a claim against Fabiani and USQL for the breach of a Technical Consulting Agreement.

8. Counter-Plaintiffs fail to state a claim upon which relief can be granted.

9. Third-Party Defendants respectfully move this Court to dismiss Counts III, IV, and V of the Counterclaims and Third-Party Claims for the reasons set forth below.

RELEVANT FACTUAL ALLEGATIONS IN THE COUNTERCLAIMS AND THIRD-PARTY CLAIMS AND EXHIBITS THERETO

10. In their Counterclaims and Third-Party Claims, Counter-Plaintiffs set forth over 100 paragraphs with allegations that purportedly support their claims, yet only a few of them involve or relate to Third-Party Defendants.

11. First, Counter-Plaintiffs allege that IH entered into a Technical Consulting Agreement with USQL and Fabiani that "required, among other things, that USQL and Fabiani promptly disclose to [IH] any and all improvements, inventions, developments, discoveries, innovations, systems, techniques, processes, formulas, programs and other things that may be of assistance to [IH] or its affiliates …." (**ECF No. 78**, ¶63.)

12. Counter-Plaintiffs allege that "Rossi and Johnson made a number of false representations to [IH], most notably that JMP (at the time called J.M. Chemical Products, Inc.) was a confidential subsidiary of Johnson Matthey p.l.c. ("Johnson Matthey"), and that Johnson

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The Term Sheet (**ECF No. 78-17**) was an agreement between Leonardo, IH, and JMP for the rental of the Plant and purchase of energy for a period of two years, wherein IH would maintain and monitor the Plant and Counter-Defendants (and others designated by IH) would operate the Plant.

Matthey was interested in using the E-Cat technology in connection with a confidential manufacturing process it wanted to operate in Florida." (**ECF No. 78**, ¶74.)

13. Counter-Plaintiffs allege that JMP (a) "was not operating or planning to operate any manufacturing process in Florida, and was in fact owned by persons whom Johnson represented in writing did not have any ownership interest in JMP," (b) had "no commercial use for the steam power generated by the Plant," and (c) was "sending falsified invoices to [IH] stating the amount of energy or steam JMP was purportedly receiving and using from the Plant during a given month." Counter-Plaintiffs attach a "selection" of the alleged invoices as Exhibit 18. (**ECF No. 78**, ¶¶74, 76, 77.)

14. Then, Counter-Plaintiffs allege that JMP's involvement increased when "Leonardo, Rossi, JMP, Johnson and Fabiani enlisted Bass to pretend to be a JMP employee serving as its Director of Engineering to make JMP appear to be a real manufacturing company" and to "meet with IH at JMP's Doral facility and express JMP's satisfaction with the steam power JMP was receiving" and with "others, falsely claiming that JMP was using steam from the Plant." (**ECF No. 78**, ¶¶78, 79.)

15. Counter-Plaintiffs allege that "Leonardo, Rossi, JMP, Johnson, USQL, Fabiani and Bass also restricted access to the JMP area at the Doral location." (**ECF No. 78**, ¶83.)

16. Counter-Plaintiffs allege that USQL and Fabiani failed to promptly disclose information related to their work, which is alleged to be the property of IH. (**ECF No. 78**, ¶¶85, 86, 87, 88.)

17. Lastly, Counter-Plaintiffs allege that Leonardo, Rossi, JMP, Johnson, and USQL are all interconnected in a number of ways (**ECF No. 78**, ¶89) and that Third-Party Defendants were engaged in a common scheme against Counter-Plaintiffs (**ECF No. 78**, ¶141).

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).

MEMORANDUM OF LAW

I. Count III: Fraudulent Inducement

Count III of the Counterclaims and Third-Party Claims alleges that Rossi, Leonardo, JMP, and Johnson fraudulently induced IH into entering into the Term Sheet. (**ECF No. 78**, ¶¶134-139.) Counter-Plaintiffs' allegations fail to comply with the heightened requirements of Rule 9(b), F.R. Civ. P., and the specificity necessary to properly plead a claim for fraudulent inducement.

"To state a cause of action for fraudulent inducement, 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.*, 14-21819-CIV, 2014 WL 4260853, at *12 (S.D. Fla. Aug. 28, 2014) (internal citations omitted).

"Under [Rule 9(b)], a plaintiff must also plead the circumstances constituting fraud with particularity." *Id.* "To comply with Rule 9(b), the Eleventh Circuit requires a complaint to set forth (1) precisely what statements were made in what documents or oral representations or what omissions were made, (2) the time and place of each such statement and the person responsible for making (or, in the case of omissions, not making) same, (3) the content of such statements and the manner in which they misled the plaintiff, and (4) what the defendants obtained as a consequence of the fraud." *W. Coast Life Ins. Co. v. Life Brokerage Partners LLC*, 08-80897-CIV, 2009 WL 2957749, at *7 (S.D. Fla. Sept. 9, 2009) (citing *Ziemba v. Cascade Int'l. Inc*., 156 F.3d 1994, 1202 (11th Cir. 2001)). "It is a serious matter to charge a person with fraud and hence no one is permitted to do so unless he is in a position and is willing to put himself on record as to what the alleged fraud consists of specifically." *Leisure Founders, Inc. v. CUC Intern., Inc., 833 F. Supp. 1562, 1575 (S.D. Fla. 1993).*

As noted above, Counter-Plaintiffs allege that in August 2014, Rossi, Leonardo, JMP, and Johnson falsely represented to IH that JMP was a manufacturing company with a real commercial use for the steam power generated by the Plant. (*See* **ECF No. 50**, ¶135.) However, IH fails to specify when, specifically, or to whom, specifically, such statements were made. Similarly, IH alleges that in August 2014, Johnson, on behalf of JMP, "warranted in writing that JMP '[was] owned by an entity formed in the United Kingdom, and none of Leonardo, Dr. Andrea Rossi, Henry W. Johnson nor any of their respsective subsidiaries, directors, officers, agents, employees, affiliates, significant others, or relatives by blood or marriage [had] any ownership interest' in JMP." (**ECF No. 78**, ¶74.) The allegations that certain statements were

made in August 2014, generally, are insufficient as a matter of law due to the simple fact that the Term Sheet was entered into effective as of August 13, 2014. (*See* **ECF No. 78-17**, Pg. 3.) Therefore, IH must allege that such representations were made before the date that the Term Sheet was entered into.

Furthermore, IH has failed to allege that JMP or Johnson knew the statements were false when made or were without knowledge of their truth or falsity. As such, IH has not pleaded all of the necessary elements to state a cause of action for fraud in the inducement.

Accordingly, JM and Johnson respectfully submit that Counter-Plaintiff IH has failed to meet the heightened pleading requirements necessary to properly plead a claim for fraud and has failed to plead all of the elements necessary to state a cause of action for fraud in the inducement, and that Count III should therefore be dismissed.

II. Count IV: FDUTPA

Counter-Plaintiffs allege that Counter-Defendants, Third-Party Defendants, and Fabio Penon violated FDUTPA as part of a common scheme against Counter-Plaintiffs arising from, in large part, the same alleged facts and circumstances set forth in Count III. (*See, e.g.*, **ECF No. 78**, ¶140-148.) Notably absent from such allegations are any unfair or deceptive trade practices, nor are there any specific allegations as to what underlying acts of fraud were allegedly undertaken to Counter-Plaintiffs' detriment. Accordingly, this claim therefore must be dismissed as an improper contract claim masquerading as a tort claim and because it has not been pleaded with the requisite particularity.

A. Count IV Sounds in Contract, Not Tort

Each of the allegations contained in Count IV arises from the terms of the License Agreement, Term Sheet and/or USQL Agreement (**ECF No. 78-11**), *see* **ECF No. 78**, ¶146, and the allegations rely solely on the alleged breach of the parties' agreements. But parties to a

contract may not recast their breach of contract claims as tort claims. *Kaye v. Ingenio, Filiale De Loto-Quebec, Inc.,* No. 13-61687-CIV, 2014 WL 2215770, at *4 (S.D. Fla. May 29, 2014); *Rebman v. Follett Higher Educ. Grp., Inc.,* 575 F.Supp.2d 1272, 1279 (M.D. Fla.2 008) ("Florida law permits a FDUTPA claim to travel with a related breach of contract claim if the FDUTPA claim challenges the acts underlying or "giving rise" to the breach, and does not "rely solely on a violation of the Agreement as a basis for assertion of a FDUTPA claim.") (citing *PNR, Inc. v. Beacon Prop. Mgmt., Inc.,* 842 So.2d 773, 777 (Fla. 2003) (granting summary judgment to defendant)); *accord Kenneth F. Hackett & Associates, Inc. v. GE Capital Info. Tech. Sols., Inc.,* 744 F. Supp. 2d 1305, 1312 (S.D. Fla. 2010).

Counter-Plaintiffs specifically alleged that Counter-Defendants and Third-Party Defendants collectively "engaged in unconscionable, unfair and deceptive acts and practices" by "refusing to provide other information properly requested by Counter-Plaintiffs, and to which Counter-Plaintiffs were entitled pursuant to the License Agreement, the Term Sheet, the USQL Agreement…" (**ECF No. 78**, ¶146(e)). Then, Counter-Plaintiffs impermissibly attempt to recast such contract claims as tort claims. But "a breach of contract claim without significant allegations of unfair or deceptive conduct is insufficient to state a cause of action under FDUTPA. Mere allegations of intentional breach of contract are insufficient to state a claim under the statute." *Hache v. Damon Corp.,* No. 8:07CV1248T30EAJ, 2008 WL 912434, at *2 (M.D. Fla. Apr. 1, 2008) (quoting *PNR, Inc. v. Beacon Prop. Mgmt., Inc.,* 842 So.2d 773, 777 n. 2 (Fla.2003)).

Accordingly, Counter-Plaintiffs' claims must be dismissed as Counter-Plaintiffs are attempting improperly to recast their contract claims as claims in tort under FDUTPA.

B. Failure to State a Cause of Action

"To establish a claim for damages under FDUTPA a plaintiff must show three elements: 1) a deceptive act or unfair practice; 2) causation; and 3) actual damages." *Casey v. Florida Coastal Sch. of L., Inc.*, 3:14-CV-01229, 2015 WL 10818746, at *2 (M.D. Fla. Sept. 29, 2015). In pleading a claim under FDUTPA, Counter-Plaintiffs must plead not only the alleged wrongdoing, but also facts to establish the causation between the alleged wrongdoing and the alleged damages. "[C]ausation must be direct, rather than remote or speculative." *Hennegan Co. v. Arriola*, 855 F.Supp.2d 1354, 1361 (S.D.Fla.2012) (King, J.); *see also* Fla. Stat. § 501.211(2) (A "person who has suffered a loss *as a result of* a violation of this part ... may recover actual damages.") (emphasis added). Further, Counter-Plaintiffs must show actual damages, which *necessarily* result from the allegedly deceptive act or unfair practice. *See e.g.*, *Bishop v. VIP Transp. Grp., LLC*, No. 615CV2118ORL22KRS, 2016 WL 4435700, at *5 (M.D. Fla. Aug. 2, 2016), *report and recommendation adopted*, No. 615CV2118ORL22KRS, 2016 WL 4382694 (M.D. Fla. Aug. 17, 2016).

Counter-Plaintiffs allege that Third-Party Defendants were part of an overall scheme orchestrated by Counter-Defendants to: move "the Plant's operations away from the oversight and control of Counter-Plaintiffs," defraud Counter-Plaintiffs by manipulating the operation and measurement of the Plant, request payment in the amount of $89 million upon the successful completion of a performance test, and obtain various payments from Counter-Plaintiffs. (**ECF No. 78**, ¶¶141-145.) However, Counter-Plaintiffs have failed to set forth any allegations against Third-Party Defendants that give rise to a claim under FDUTPA.

With respect to JMP and Johnson, Counter-Plaintiffs allegations that JMP and Johnson misrepresented the ownership of JM and its operations to induce Counter-Plaintiffs to move the

Plant to Florida, away from their oversight and control (**ECF No. 78**, ¶¶74, 76, 142), provided false invoices stating amount of energy received by JM (**ECF No. 78**, ¶77), enlisted Bass to pretend to be JMP's Director of Engineering (**ECF No. 78**, ¶78), and restricted access to JMP's facility and operation (**ECF No. 78**, ¶83) are devoid of any facts supporting any of these conclusions and do not constitute a deceptive act or unfair practice. First, the ownership of an entity or the operations conducted thereby is irrelevant and immaterial to the lease of an E-Cat plant or purchase of energy. Furthermore, the allegations concerning Counter-Plaintiffs lack of oversight and control are belied by the License Agreement and the Term Sheet as it was contemplated in the Term Sheet, and even in the License Agreement, that Leonardo and Rossi would operate the Plant during the Guaranteed Performance test. "Each of Leonardo and Rossi will use their commercially reasonably (sic) best efforts to cause Guaranteed Performance to be achieved, including making repairs, adjustments and alterations to the Plant as needed to achieve Guaranteed Performance." (**ECF No. 1-2**, pg. 24, License Agreement Section 5.) Similarly, the Term Sheet expressly provided that Leonardo and Rossi would operate the Plant with the assistance of "any others designated by IH" at no additional cost to IH, IH would maintain the Plant, and IH "may provide whatever security, monitoring and control measures it deems appropriate to protect and monitor the 1MW Plant and related equipment." (**ECF No. 78-17**, pg. 2.)

Second, providing falsified "invoices", which were in fact simply requests for invoices based on JMP's belief of the amount of energy received in any given month, is not a deceptive act or unfair practice. The crux of the scheme alleged by Counter-Plaintiffs is the manipulation of the Guaranteed Performance test, which required that the Plant operate at a certain level of efficiency or coefficient of performance ("COP") – meaning that the Plant had to generate a

certain amount of energy over the energy consumed by the Plant. The amount of energy being received and used by JMP is not related to and does not allow the inference that the Plant is operating at the requisite COP, only that JMP is receiving such amount of energy. As noted above, Counter-Plaintiffs had the express ability to implement any measures it deemed necessary to monitor the Plant. Despite this fact, Counter-Plaintiffs would have this Court believe that IH and IPH, companies dedicated to investing in alternative energy and with the ability to monitor the Plant, whose sole relationship with JMP is to provide energy to it, relied on JMP's breakdown of energy consumed when determining the amount of energy and COP produced by the Plant.

Lastly, the purported hiring of a fake engineer and restriction of access to JMP's facility and operation are also not deceptive or unfair because pursuant to the Term Sheet, JMP, Johnson, and Bass did not have a business relationship with Counter-Plaintiffs for anything other than the rental of the Plant (in fact, pursuant to the Term Sheet, JMP, Johnson, and Bass were not even allowed access to the Plant) and access to JMP's facility or operation was never promised or required. Moreover, the Term Sheet does not require JMP, Johnson, or Bass to provide Counter-Plaintiffs with any details concerning JMP's facility or its operations therein. It is clear that the alleged conduct by JMP and Johnson does not rise to the level of a "deceptive act or unfair practice" as contemplated by FDUTPA. Furthermore, Counter-Plaintiffs have failed to set forth actual damages that necessarily resulted from the allegedly deceptive or unfair conduct.

With respect to Bass, Counter-Plaintiffs allege that Bass was not the Director of Engineering, met with IH and expressed JMP's satisfaction with the steam energy, met with others, falsely claiming that JMP was using steam from the Plant, and restricted access to the JMP area at the Doral location. (**ECF No. 78**, ¶¶78, 79, 83.) To start, the allegations of

wrongdoing alleged by Counter-Plaintiffs arise well after Counter-Plaintiffs entered into the License Agreement and Term Sheet and were not the result of any business relationship between Bass and Counter-Plaintiffs. Counter-Plaintiffs fail to set forth any facts to support the conclusion that Bass was not the Director of Engineering or that JMP was not satisfied with the steam energy or that it was not using the steam energy. Furthermore, Bass' representation that JMP was satisfied with the steam energy being received has no bearing on the performance or COP of the Plant, which was being measured and monitored in connection with the testing. Furthermore, restricting access to areas of a private facility, especially when under no contractual obligation to do so, is not deceptive or unfair. These allegedly false statements are in no way, shape, or form deceptive within the ambit of FDUTPA. Lastly, Counter-Plaintiffs do not set forth any damages that directly resulted from Bass' alleged wrongdoing.

Counter-Plaintiffs have failed to plead any allegations that establish causation as part of their FDUTPA claim against JMP, Johnson, or Bass. This is because Counter-Plaintiffs did not, and cannot, establish causation between any of JMP, Johnson, or Bass' allegedly deceptive acts and any actual damages. As mentioned above, it was not only contemplated from the inception of the License Agreement that Leonardo and Rossi would operate the Plant, but the Term Sheet provides IH with the obligation to maintain the Plant and the ability to designate any individual or security, monitoring or control measures deemed necessary. Furthermore, the role of Bass as an employee of JMP or Bass' statements as to JMP's satisfaction with the steam power JMP was receiving and using to run its operations are irrelevant to the grand scheme that Counter-Plaintiffs are alleging. Simply put, Bass is mentioned in merely 5 out of 156 paragraphs and the alleged acts occur well after License Agreement and Term Sheet were entered into, and well after the Plant was already in operation. As a result, Counter-Plaintiffs cannot establish the *direct*

causation of the alleged wrongdoing and the alleged damages. *See Hennegan Co. v. Arriola*, 855 F.Supp.2d 1354, 1361 (S.D.Fla.2012) (King, J.).

Counter-Plaintiffs have failed to plead actual damages as part of their FDUTPA claim. The harms that Counter-Plaintiffs allege – the transfer of the Plant from North Carolina to Florida, the instant litigation, and payment for contractual services that purportedly conferred no benefit on Counter-Plaintiffs – are more akin to consequential damages that "are not recoverable under FDUTPA." *QSGI, Inc. v. IBM Glob. Fin.*, No. 11-80880-CIV, 2012 WL 1150402, at *5 (S.D. Fla. Mar. 14, 2012). Furthermore, Counter-Plaintiffs do not attribute any of the alleged damages to the alleged wrongdoing by JMP, Johnson or Bass. Because Counter-Plaintiffs cannot and have not alleged sufficient facts to support their conclusory allegation that Counter-Plaintiffs "have suffered and continue to suffer actual damages," they logically cannot show that JMP, Johnson, or Bass caused actual damages. As such, Counter-Plaintiffs' FDUTPA claim fails as a matter of law and the count must be dismissed. *See Prunty v. Sibelius*, No. 2:14-CV-313-FTM-29, 2014 WL 6676951, at *5 (M.D. Fla. 2014), *report and recommendation adopted as modified*, No. 2:14-CV-313-FTM-29CM, 2014 WL 7066430 (M.D. Fla. 2014).

With respect to Fabiani and USQL, the only allegations of wrongdoing alleged by Counter-Plaintiffs are solely related to Fabiani and/or USQL's failure to provide information and/or materials to Industrial Heat as required by the parties Consulting Agreement. "Florida law permits a FDUTPA claim to travel with a related breach of contract claim if the FDUTPA claim challenges the acts underlying or "giving rise" to the breach, and does not "rely solely on a violation of the Agreement as a basis for assertion of a FDUTPA claim." *Rebman v. Follett Higher Educ. Grp., Inc.*, 575 F.Supp.2d 1272, 1279 (M.D.Fla.2008) (citing *PNR, Inc. v. Beacon Prop. Mgmt., Inc.*, 842 So.2d 773, 777 (Fla.2003) (granting summary judgment to defendant)).

Kenneth F. Hackett & Associates, Inc. v. GE Capital Info. Tech. Sols., Inc., 744 F. Supp. 2d 1305, 1312 (S.D. Fla. 2010). It goes without saying that the alleged failure to provide information pursuant to the terms of the Consulting Agreement falls well short of a "deceptive act or unfair practice" as contemplated by FDUTPA. To allow such claims, based upon nothing more than an alleged breach of contract, even if it is alleged that such breach was part of a greater scheme, would open the floodgates to litigating every breach of contract action under the FDUTPA statute.

The common scheme alleged by the Counter-Plaintiffs to state a claim under FDUTPA was accomplished by: (1) manipulating the Counter-Plaintiffs into moving the Plant to Florida [**ECF No. 78**, ¶142]; (2) manipulating the results of the Plant's operation to create the false appearance the Plant was performing at exceptional levels [**ECF No. 78**, ¶143]; (3) demanding payment of $89 million based on the deceptive results of the Plant's operation [**ECF No. 78**, ¶144); and (4) obtain payments for work that was completed to Counter-Plaintiffs' detriment [**ECF No. 78**, ¶145]. There can be no dispute that pursuant to the allegations in the Third-Party Claim, USQL and Fabiani were not involved in any acts that caused the Plant's move to Florida. The allegations also make clear that Leonardo, Rossi and Penon were the ones providing the operation results to the Counter-Plaintiffs. No allegation is made that USQL or Fabiani had any involvement in the negotiation of the Licensing Agreement or the demand for the final payment under that agreement. Yes, USQL and Fabiani received compensation and reimbursement of expenses from IH in accordance with their contract and any dispute about the propriety of such payments are to be resolved through Count V of the Third-Party Claim.

Plainly stated, if IH and IPH's claims against Fabiani and USQL are based solely upon the alleged failure to provide information in breach of the Consulting Agreement, then they have failed to state a cause of action under FDUTPA as they have failed to identify any deceptive act or unfair practice. If, on the other hand, IH and IPH claim that such failure was part of some greater fraudulent scheme, then IH and IPH have failed to state, with the requisite specificity, the alleged underlying fraud perpetrated by Fabiani and/or USQL. Either way, the FDUTPA claim should be dismissed.

In sum, Counter-Plaintiffs must plead not only some alleged wrongdoing, but also facts to establish the causation between the alleged wrongdoing and the alleged damages. Counter-Plaintiffs have not met their burden. Similarly, since Counter-Plaintiffs were required to plead damages as an element of their FDUTPA claim, their unsupported allegation that they "have suffered and continue to suffer actual damages…" lacks the requisite specificity and is insufficient as a matter of law.

For the foregoing reasons, Count IV of the Counterclaims and Third-Party Claims should be dismissed.

III. Count V: Breach of Contract

Count V of the Counterclaims and Third-Party Claims alleges that Third-Party Defendants Fabiani and USQL breached the terms of the Technical Consulting Agreement (referred to in Count V as the "USQL Agreement"). (**ECF No. 78**, ¶¶149-156.) Specifically, IH alleges that IH, Fabiani and USQL entered into the USQL Agreement on September 1, 2013. (**ECF No. 78**, ¶63.) In support thereof, IH attached a copy of the Technical Consulting Agreement to the Counterclaims and Third-Party Claims as Exhibit 11 thereto. (**ECF No. 78**, ¶61, Ex. 11.) As grounds for its claim, IH alleges that Fabiani and USQL (1) "disregarded their

contractual obligations to [IH] in order to assist Leonardo and Rossi in their deceptive operations" (**ECF No. 78**, ¶153.); (2) "failed to provide [IH] with information relating to the scheme to manipulate the operation and testing of the Plant (**ECF No. 78**, ¶154); (3) "refused to provide other information to [IH], as alleged above" (although no "other information" is identified in the Counterclaims and Third-Party Claims) (**ECF No. 78**, ¶154); and lastly, (5) "failing to provide [IH] with information, including reports and data, relating to the operation of the Plant" (**ECF No. 78**, ¶155). For the reasons set forth below, this claim must be dismissed.

A. Failure to State a Cause of Action

As discussed above, IH bases its claims in Count V upon Fabiani and USQL's alleged breach of the Technical Consulting Agreement (referred to by IH as the "USQL Agreement"). Such alleged breaches, as described more fully above, all pertain to Fabiani and USQL's actions (or inactions) during the operation and testing of the Plant while it was located in Doral, Florida. (**ECF No. 78**, ¶¶153-155.) Notably, the Plant was operated in Doral, Florida in 2015 and 2016. (*See* **ECF No. 78**, ¶71.) Accordingly, it follows that the alleged breaches of the agreement would have had to occur in 2015 or 2016 while the Plant was in Doral, Florida. Notwithstanding, the Technical Consulting Agreement upon which IH's claims are based provides, in relevant part, that:

> This Agreement shall commence as of September 1, 2013 and shall continue in effect for an initial term through and including August 31, 2014 (the "Initial Term"). This Agreement shall terminate upon the expiration of the Initial Term unless the parties agree in writing to extend it.

(**ECF No. 78-11**, §8). The agreement further provides that:

> USQL shall not be obligated under this Agreement nor otherwise liable to Industrial Heat for any further payments following termination of this Agreement…

Id.

Although the Technical Consulting Agreement provides that it may be extended if the parties agree in writing (*id.*), IH has not alleged that any extension occurred nor has IH attached a copy of any written agreement extending such contract. Accordingly, based solely upon the allegations contained in the Counterclaims and Third-Party Claims, and exhibits thereto, IH's claim for breach of contract fails. Clearly, any actions and/or inactions occurring after the stated termination of the Technical Consulting Agreement on August 31, 2014, cannot give rise to a claim for breach of contract. Moreover, by the plain and unambiguous terms of the Technical Consulting Agreement, upon termination of the Agreement, USQL and/or Fabiani had no further obligations to IH. For the foregoing reason, IH's claim for breach of contract fails.

B. The Technical Consulting Agreement as to Fabiani is Void as a Matter of Law

As evidenced by the Technical Consulting Agreement attached to the Counterclaims and Third-Party Claims as Exhibit "11," the parties to the agreement are listed as USQL and IH. (**ECF No. 78-11**.) According to the terms set forth in the agreement, USQL and IH executed the agreement on September 1, 2013, and the agreement was effective on that date. *Id.* Pursuant to the terms of the agreement, IH was to pay USQL for consulting services during the term of the agreement. *Id.* As such, USQL and Fabiani do not contest that there was consideration for the agreement between USQL and IH.

As further evidenced by the Technical Consulting Agreement, Fabiani executed a joinder to the agreement, agreeing to be bound by certain provisions thereof, more than a week later on September 9, 2013. *Id* at 9. No consideration was given or promised to Fabiani at any time in exchange for his agreement to be bound by the terms of IH and USQL's agreement. "Under Florida law, the elements of a contract are offer, acceptance, and consideration." *2P Com. Agency S.R.O. v. Familant*, 2:11-CV-652-FTM-29, 2012 WL 6615889, at *5 (M.D. Fla. Dec. 19,

2012)(citing *Air Products and Chemicals, Inc. v. Louisiana Land Exploration Co.*, 806 F.2d 1524, 1529 (11th Cir.1986)).

Here, the alleged Joinder fails to describe any consideration given to Fabiani in exchange for his agreement to be bound by the terms of the agreement between USQL and IH. Similarly, IH does not allege, nor could it, that any consideration was given to Fabiani in exchange for his agreeing to be bound by the terms of the agreement between USQL and IH. Moreover, IH cannot argue that the consideration was the execution of the agreement with USQL because it is clear that the agreement had already been executed and became effective well before Fabiani executed the Joinder provision. Accordingly, the entry into such agreement could not have served as consideration to Fabiani to execute the Joinder, as IH was already bound by the terms of the agreement.

Accordingly, as to Third-Party Defendant Fabiani, the Joinder to the agreement was Void and therefore unenforceable. Therefore, Count V as to Fabiani must be dismissed with prejudice.

C. Alternatively, Fabiani Is Not a Party to the Entire "USQL Agreement"

Assuming, arguendo, that there had been consideration provided to Fabiani in exchange for his agreeing to be bound by certain terms of the agreement (there was not), the "Joinder" provision did not bind Fabiani to all of the terms of the agreement. Specifically, the "Joinder" provision executed by Fabiani provides, in relevant part, that:

> The undersigned, Fulvio Fabiani, the sole member and the sole manager of USQL United States Quantum Leap LLC ("USQL"), hereby joins in the foregoing Agreement for the purpose of agreeing to be bound by the provisions thereof relating to confidentiality, rights to materials, and new developments to the same extent as USQL is bound by such provisions.

Id.

Contrary to the plain and unambiguous terms of the "Joinder" provision set forth above, IH attempts to impose an obligation on Fabiani to be bound by terms of the agreement unrelated to "confidentiality, rights to materials, and new developments." Specifically, IH alleges that Fabiani breached §3 of the agreement, which requires the parties to act in "a manner reasonably believed by USQL to be in or not opposed to the best interests of Industrial Heat." *Id.* It is clear that the "Joinder" executed by Fabiani, even if valid, was clearly limited to those certain provisions of the agreement enumerated in the "Joinder" provisions and IH has provided no basis to attempt to expand the application of such "Joinder" provision to all terms of the agreement against Fabiani. Accordingly, all claims for breach of contract arising from any provision other those enumerated in the "Joinder," including any violation of §3 of the agreement, must be dismissed as Fabiani is clearly not a party to such provisions of the contract.

IV. Conclusion

For the foregoing reasons, this Court should dismiss Counts III, IV, and V of the Counterclaims and Third-Party Claims filed against Third-Party Defendants, as applicable.

Respectfully submitted this 19th day of December, 2016.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on December 19, 2016, 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.

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