IN THE CIRCUIT COURT, 15TH
JUDICIAL CIRCUIT, IN AND FOR
PALM BEACH COUNTY, FLORIDA

CASE NO.: 50-2012-CA-023358-XXXX-MB
DIVISION: AG

JAMES TODD WAGNER, SUPERCAR ENGINEERING, INC., a Florida corporation,

Plaintiffs,

vs.

WARREN MOSLER, MOSLER AUTO CARE CENTER, INC., a Florida corporation, d/b/a Mosler Automotive,

Defendants.
_____/

DEFENDANTS' MOTION FOR DIRECTED VERDICT

Defendant Warren Mosler ("**Defendant Warren Mosler**") and Defendant Mosler Auto Care Center ("**Defendant MACC**") (collectively, "**Defendants**"), by and through their undersigned counsel, and pursuant to Fla. R. Civ. P. 1.480(a), hereby file this Defendants' Motion For Directed Verdict (the "**Motion**") against Plaintiffs James Todd Wagner ("**Plaintiff Wagner**") and Supercar Engineering, Inc. ("**Plaintiff SEI**") (collectively, "**Plaintiffs**").

STANDARD FOR A DIRECTED VERDICT

"A trial court should grant a motion for directed verdict when the evidence, viewed in the light most favorable to the non-moving party, shows that a jury could not reasonably differ about the existence of a material fact and the movant is entitled to judgment as a matter of law." *Meruelo v. Mark Andrew of Palm Beaches, Ltd.*, 12 So. 3d 247, 250 (Fla. 4th DCA 2009); *Demchak v. Davia*, 89 So. 3d 253, 255 (Fla. 3rd DCA 2012) ("A directed verdict is proper when the evidence

and all inferences from the evidence, considered in the light most favorable to the non-moving party, support the movant's case as a matter of law and there is no evidence to rebut it."). "A party moving for a directed verdict admits the truth of all facts in evidence and every reasonable conclusion or inference which can be drawn from such evidence favorable to the non-moving party." *Demchak*, 89 So. 3d at 255 (*citing Wald v. Grainger,* 64 So.3d 1201, 1205 (Fla. 2011); *Williamson v. Superior Ins. Co.,* 746 So.2d 483, 485 (Fla. 2d DCA 1999)). Where evidence is not in conflict and there is no evidence adduced that could in law support verdict for nonmoving party, trial court can and should direct verdict in favor of movant. *See Nat'l Car Rental Sys., Inc. v. Bostic*, 423 So. 2d 915, 917 (Fla. 3rd DCA 1982).

"A party who moves for a directed verdict at the close of the evidence offered by the adverse party may offer evidence in the event the motion is denied without having reserved the right to do so and to the same extent as if the motion had not been made." Fla. R. Civ. P. 1.480(a)."The denial of a motion for a directed verdict shall not operate to discharge the jury." *Id.*

ARGUMENT

I. DEFENDANTS ARE ENTITLED TO A DIRECTED VERDICT ON ALL EQUITABLE CLAIMS BECAUSE THE EVIDENCE SHOWS THAT EXPRESS AGREEMENTS BAR THESE CLAIMS.

"[I]t is well settled that a plaintiff 'cannot pursue an equitable theory, such as unjust enrichment or quantum meruit, to prove entitlement to relief if an express contract exists.'" *Doral Collision Ctr., Inc. v. Daimler Tr.*, 341 So. 3d 424, 430 (Fla. 3rd DCA 2022); *Fulton v. Brancato*, 189 So. 3d 967, 969 (Fla. 4th DCA 2016). "Further, the existence of a valid legal remedy against one party will bar recovery in equity against another party." *Doral Collision*, 341 So. 3d at 430 (quotations and citations omitted); *Abdullatif Jameel Hosp. v. Integrity Life Scis., LLC*, 2016 WL 9526457, at *3 (M.D. Fla. Sept. 23, 2016) ("[A plaintiff] may not receive recovery under both a

breach of contract theory and unjust enrichment for damages stemming from the same underlying facts.").

This case involves three claims based on equitable theories of contract recovery: Count I for unjust enrichment, asserted by Plaintiff SEI against Defendant MACC; Count II for Quantum Meruit, asserted by Plaintiff SEI against Defendant MACC; and Count IV for unjust enrichment, asserted by Plaintiff Wagner against Defendant Warren Mosler. A directed verdict must be entered as to these claims because Plaintiffs' evidence at trial was that express agreements govern the same subject matter and underlying facts of these claims.

COUNT 4 is removed

Shoehorns the jury

A. COUNTS I AND II.

Specifically, Counts I and II both seek an equitable remedy for alleged unpaid EPA approval work that Plaintiff SEI performed for MACC. As to these claims, Plaintiff SEI's owner, Plaintiff Wagner, testified that there was an express agreement, a "binding contract," which was memorialized over emails,[1] and which set forth the hourly rate SEI was to be compensated for work performed for MACC. Among other things, Plaintiff Wagner testified

Agreement & Pleadings Granted

> Q Okay. What is the -- what was your hourly rate?
> A At the time I was earning the equivalent of 75,000 a year.
> Q Okay. And what does that equate to?
> A 6,250 per month.
> Q And do you recall the breakdown of that?
> A It was about five and a half months that I hadn't been paid, so I believe it's like $34,000.
> Q Okay.
> A Something in that range.
> Q And then the vacation time?
> A That's $1,809, I believe.
> Q Okay. Now, what does fairness have to do with

[1] Florida has enacted the Uniform Electronic Transactions Act and thus recognizes that email communications may form a legally, binding contract. *See* Fla. Stat. Ann. § 668.50.

this? Well, let me back up.
Did you have a written contract for this?
A It was in emails *which I consider to be a written contract*. Mr. Mosler trades hundreds of millions of dollars in securities via emails.
Q Okay.
A So I consider this to be a *binding contract.*

Day 6 Tr. at 99:25-100:19 (emphasis added).

This testimony proves, beyond dispute, that an express agreement governs the claims. Thus, because there is a contract concerning the same subject matter that is at issue in the unjust enrichment and quantum meruit claims, a directed verdict against Plaintiff SEI, as to these claims in Counts I and II, must be entered. *See Kovtan v. Frederiksen*, 449 So. 2d 1, 1 (Fla. 4th DCA 1984) (affirming a directed verdict on a claim of quasi-contract theory of contract recovery where the existence of an express agreement had been proved through testimony and the law would not imply a contract where an express contract exists concerning the same subject matter).

B. COUNT VI.

Similarly, in Count VI, Plaintiff Wagner alleges that he conferred a benefit in the form of a $100,000.00 refundable deposit upon Defendant Warren Mosler. As to this claim, Plaintiff Wagner testified as to the existence of an express agreement that governs the subject matter of the claim. Specifically, Plaintiff Wagner testified that there was a "meeting of the minds" about the $100,000.00 and that its terms are in a written document, specifically the e-mails between Plaintiff Wagner and Defendant Warren Mosler:

A Yes. He made the offer.
Q And that's in the documents, right?
A Absolutely.
Q And then later on up in the chain you did clarify what that meant, right?
A I immediately clarified it.
Q Okay.
A And he said yes. So we had a clear meeting of

> the minds that my $100,000 deposit bought me three months of exclusivity, and if I didn't close within the three months and someone else bought it, I got my money back. I felt comfortable with that. That's why --
> Q By the way, you keep saying me, bought "me" exclusivity. Who was doing the buying?
> A Well, it was me or my company.
> . . .
> Q Okay. Now Mr. Mosler testified that there were a lot of different negotiations and different permutations of the purchase attempts by you or your companies. Is that true?
> A I think that's a bit misleading. It also tries to -- it tries to meld -- the agreement about the $100,000 deposit was clear.

Day 6, Tr. at 125:11-18, 19-25.

Plaintiff Wagner reiterated that the refundability of the $100,000.00 was the subject of an agreement that was never changed:

> This, what you're showing on the screen, was never renegotiated. So there are two things, one is how the $100,000 deposit is refundable. That was never changed. We had an agreement for him to sell the whole company for $1 million, but he sold off $600,000 of assets during my exclusivity period.

Day 7, Tr. at 135:13-18.

Thus, again, because there is an express agreement governing the subject matter of Count VI, the claim of unjust enrichment in Count VI fails and a directed verdict in favor of Defendants must be entered. This is true regardless of the parties' dispute as to what the terms of any agreement were. What matters for purposes of this Motion, is that Plaintiffs have testified there was an express agreement, a contract, that governs the claims.

II. DEFENDANTS ARE FURTHER ENTITELD TO A DIRECTED VERDICT ON THE EQUITABLE CLAIMS IN COUNTS I, II, AND VI BECAUSE PLAINTIFFS FAILED TO PROVIDE EVIDENCE TO PROVE THEIR *PRIMA FACIE* CASE.

"The elements of a cause of action for unjust enrichment are that: (1) the plaintiff has conferred a benefit on the defendant; (2) the defendant has knowledge of the benefit; (3) the defendant has accepted the benefit conferred; and (4) the circumstances are such that it would be inequitable for the defendant to retain the benefit without paying fair value for it." *F.H. Paschen, S.N. Nielsen & Assocs. LLC v. B&B Site Dev., Inc.*, 311 So. 3d 39, 48 (Fla. 4th DCA 2021).

Similarly, "[t]o satisfy the elements of quantum meruit, the plaintiff must prove that the plaintiff provided, and the defendant assented to and received, a benefit in the form of goods or services under circumstances where, in the ordinary course of common events, a reasonable person receiving such a benefit normally would expect to pay for it." *F.H. Paschen, S.N. Nielsen & Assocs. LLC v. B&B Site Dev., Inc.*, 311 So. 3d 39, 48 (Fla. 4th DCA 2021). (internal quotations and citations removed)

To succeed a trial, a plaintiff must prove each and every element of these claims. All three elements of unjust enrichment are "essential" and "must be proven." *Jackson-Jester v. Aziz*, 48 So. 3d 88, 90-91 (Fla. 2d DCA 2010). In other words, the failure to prove even just one of the elements is fatal to the claim. In the same way, "the plaintiff must prove" each element of a quantum meruit. *B&B Site Dev., Inc.*, 311 So. 3d at 48. Plaintiffs here failed to provide evidence at trial to satisfy each element of its *prima facie* case and, therefore, for this additional reason, a directed verdict is proper as to these claims.

a. PLAINTIFF SEI FAILED TO PROVE ALL ELEMENTS OF ITS UNJUST ENRICHMENT CLAIM AGAINST DEFENDANT MACC.

The fourth element of an unjust enrichment claim addresses damages. "Damages for unjust enrichment may be valued based on either (1) the market value of the services; or (2) the value of the services to the party unjustly enriched. Because unjust enrichment damages are economic damages, the amount of damages must be measurable and quantifiable[. I]t has long been accepted

in Florida that a party claiming economic losses must produce evidence justifying a definite amount." *Merle Wood & Assocs., Inc. v. Frazer*, 307 So. 3d 773, 776 (Fla. 4th DCA 2020) (internal quotations and citations removed). A directed verdict must be entered in this case as to SEI's claim of unjust enrichment against MACC in Count I because the evidence presented by Plaintiffs at trial failed to prove the fourth requirement element of the claim, *i.e.,* that the defendant did not pay "fair value" for the alleged benefit conferred. Plaintiffs did not offer any evidence regarding the value of the EPA work that SEI allegedly performed for MACC.

In particular, at trial, none of the witnesses called by Plaintiff testified to a specific value for the EPA work to MACC. Plaintiff Wagner merely made a cursory mention of this value when he said

> Q And how should this jury calculate that damage?
> A Well, two possible ways. One is just an hourly rate that I was being paid, and the other is what is the value of what was created.

Day 6, Tr. at 99:19-23. This testimony is insufficient to establish damages for several reasons.

First, Plaintiff Wagner never mentioned "the value of what was created", much less the amount of value that was created. Neither James Dennis Wagner, Sylvia Klaker, Defendant Warren Mosler, Sally Apgar, nor Jonathan Frank testified to the amount of this value. It was also not contained within the deposition designation. Nor did any witness testify to the claims "market value of the services." 307 So. 3d at 776. Without evidence on the value, the jury cannot reasonably return an award of damages on unjust enrichment. Therefore, MACC is entitled to a directed verdict on Count I.

Second, as to the argument that value might be set based on Plaintiff Wagner's hourly rate, Plaintiff Wagner was unable to identify the number of hours that Plaintiff SEI worked on the EPA

certification. Instead, Plaintiff Wagner only testified to his own yearly pay, without differentiating between work he performed as an employee of MACC, and work he or anyone else performed of MACC on behalf of SEI, and then divided it by the number of months that were covered.

No testimony that I did anything else.

I mention referring to the RATE shown on Invoice

Q Okay. What is the -- what was your hourly rate?
A At the time I was earning the equivalent of 75,000 a year.
Q Okay. And what does that equate to?
A 6,250 per month.
Q And do you recall the breakdown of that?
A It was about five and a half months that I hadn't been paid, so I believe it's like $34,000.
Q Okay.
A Something in that range.
Q And then the vacation time?

Day 6, Tr. 99:24-100:7. Again, Plaintiff Wagner did not identify the number of hours that *SEI* worked but rather provided an estimate of what he believed Wagner might have been owed for work, while, at the same time, not differentiating between work by Wagner as an employee of MACC and that done on behalf of SEI. Nor did he testify how many hours the work he did on behalf of SEI for MACC took. In fact, Plaintiff Wagner admitted that they couldn't testify as to the exact number of hours that SEI worked on the EPA approval, the alleged "benefit" for the equitable claims, and Plaintiffs failed to put any of alleged invoices showing the amount of hours he worked, in any capacity, into evidence:

"Value of What was Created"

Q The fact of the matter is you have no idea exactly how many hours you allegedly worked, even assuming that you did do work from April to September, correct?
A I don't know how many hours I worked. I can look at my invoice and figure it out.
Q Sitting here today, what is the exact amount of hours that you allege that SEI worked on this EPA approval work from April to September?
A I can't pull it out of my straight memory. I have to look at the documents.

Day 8, Tr. 131:2-12.

> Q Well, the fact is you don't know whether SEI submitted invoices for work, correct?
> A Well, I -- since SEI is my company, I don't remember sending any invoice in after April 15th because I knew Mr. Mosler wouldn't pay them.

Day 8: 125:18-22.

Plaintiff SEI has not entered evidence as to the hours worked by Plaintiff SEI, and it has not provided any evidence as the value that the EPA certification had to MACC. Because Plaintiffs have failed to meet their burden of proof on this claim, the Defendants are entitled to a directed verdict as to unjust enrichment claim in Count I.

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b. PLAINTIFF SEI FAILED TO PROVE ALL ELEMENTS OF ITS QUANTUM MERUIT CLAIM AGAINST DEFENDANT MACC.

The Florida Supreme court has held that "quantum meruit [is] the reasonable worth of the services at the time measured by the rate for like work prevailing in the particular community" *Moncrief v. Hall*, 63 So. 2d 640, 642 (Fla. 1953). The Plaintiffs here have entered no evidence whatsoever as to "the rate for like work in" Rivera Beach or Palm County Florida, or Florida, or any other community, and therefore a directed verdict is warranted. More specifically, Plaintiffs have failed to provide any evidence as to the rate for like work in the community for the relevant time period, *i.e.* April 2011 to September 2011, or even for any other period of time. The only alleged evidence provided was the annual earnings by SEI. This does not establish the rate for like work in the area during the relevant time period, but merely shows what SEI made in a year that is not even at issue.

As set forth in section II.a above, SEI has failed to provide evidence regarding its hourly rate or the number of hours that it worked on the EPA certification for the vehicle. Even if such

amount had been established (and it has not), it wouldn't amount to competent evidence as to "rate for like work prevailing in the particular community," *Monchief*, 63 So. 2d at 642, and a directed verdict on the quantum meriut claim would still be warranted.

c. PLAINTIFF WAGNER FAILED TO PROVE HIS UNJUST ENRICHMENT CLAIM AGAINST DEFENDANT MOSLER.

Unjust enrichment requires that a party prove "at trial that [the defendant] had not made payment to any party for the benefits conferred... This is not an affirmative defense, but an essential element of a quasi-contract claim," *Com. P'ship 8098 Ltd. P'ship v. Equity Contracting Co.*, 695 So. 2d 383, 390 (Fla. 4th DCA 1997), *as modified on clarification* (June 4, 1997), such as unjust enrichment, *id.* at 386. "When a defendant has given adequate consideration to someone for the benefit conferred, a claim of unjust enrichment fails." *Am. Safety Ins. Serv., Inc. v. Griggs,* 959 So. 2d 322, 331–32 (Fla. 5th DCA 2007). Under Florida law, when "both parties promised to do something in the future that they were not obligated to do...[, s]uch mutual promises constitute adequate consideration." *DiMauro v. Martin*, No. 4D22-524, 2023 WL 2505778, at *3 (Fla. 3d DCA Mar. 15, 2023).

In this case, Plaintiff Wagner's claim fails under every set of facts that may be ascertained from the evidence presented. More precisely, Plaintiff Wagner testified that the consideration for the $100,000.00 deposit was that he was to receive three months of exclusivity to purchase MACC, and also that the deposit would be return should he failed to close during those three months and another person or entity purchased MACC:

> A Yes. He made the offer.
> Q And that's in the documents, right?
> A Absolutely.
> Q And then later on up in the chain you did clarify what that meant, right?
> A I immediately clarified it.
> Q Okay.

> A And he said yes. So we had a clear meeting of the minds that my $100,000 deposit bought me three months of exclusivity, and if I didn't close within the three months and someone else bought it, I got my money back. I felt comfortable with that. That's why --
> Q By the way, you keep saying me, bought "me" exclusivity. Who was doing the buying?
> A Well, it was me or my company.

Day 6, Tr. at 125:11-18, 19-25. Putting aside the parties' dispute as to whether the deposit was refundable, Plaintiff Wagner's testimony admits that there was consideration for the agreement. In fact, consideration was present on the mere fact of the three months exclusivity, and it is immaterial, for purposes of establishing consideration, if there was any additional promise (*i.e.*, a refundable deposit). Thus, because Defendant Warren Mosler provided consideration to Plaintiff Wagner in exchange for the $100,000.00 in the form of three months of exclusivity, which Plaintiff Wagner testified constituted consideration for the agreement, the claim for unjust enrichment fails as a matter of law. *Am. Safety Ins. Serv., Inc. v. Griggs,* 959 So. 2d 322, 331–32 (Fla. 5th DCA 2007) ("When a defendant has given adequate consideration to someone for the benefit conferred, a claim of unjust enrichment fails"). Accordingly, a directed verdict against Plaintiff Wagner should be entered as to Count VI.

No Evidence Honored Exclusivity

III. DEFENDANT MACC IS ENTITLED TO A DIRECTED VERDICT ON PLAINTIFF SEI'S COUNT III BREACH OF CONTRACT CLAIM.

Anticipatory Breach

The three elements of a breach-of-contract action are: (1) a valid contract; (2) a material breach; and (3) damages. *Rauch, Weaver, Norfleet, Kurtz & Co. v. AJP Pine Island Warehouses, Inc.*, 313 So. 3d 625, 630 (Fla. 4th DCA 2021). "A valid contract, in turn, is generally composed of four basic elements: offer, acceptance, consideration, and sufficient specification of essential terms." *Jericho All-Weather Opportunity Fund, LP v. Pier Seventeen Marina & Yacht Club, LLC*, 207 So. 3d 938, 941 (Fla. 4th DCA 2016).

In Count III, Plaintiff SEI sues Defendant MACC and alleges that Defendant MACC breached a valid Distributorship Agreement by failing to manufacture and supply cars to Defendant SEI and by selling Defendant SEI's distributorship rights to a third party (RP High Performance). As set forth below, a directed verdict must be entered on this claim because Plaintiffs failed to provide evidence to establish that MACC was obligated to manufacture and supply cars, and also because the evidence establishes that SEI forfeited its distributorship rights.

A. DEFENDANT MACC WAS NOT OBLIGATED TO MANUFACTURE AND SUPPLY CARS UNTIL PLAINTIFF SEI PAID FOR THEM.

"The cardinal rule of contractual construction is that when the language of the contract is clear and unambiguous, the contract must be interpreted and enforced in accordance with its plain meaning." *Seawatch at Marathon Condo. Ass'n, Inc. v. Guarantee Co. of N. Am.*, 286 So. 3d 823, 827 (Fla. 3d DCA 2019) (quoting *Columbia Bank v. Columbia Developers*, LLC, 127 So. 3d 670, 673 (Fla. 1st DCA 2013) (citing *Ferreira v. Home Depot/Sedgwick CMS,* 12 So. 3d 866, 868 (Fla. 1st DCA 2009) ("Contracts are to be construed in accordance with the plain meaning of the words therein, and it is never the role of the trial court to rewrite a contract to make it more reasonable for one of the parties."))). "In construing a contract, the legal effect of its provisions should be determined from the words of the entire contract." *Florida Inv. Group 100, LLC v. Lafont,* 271 So. 3d 1, 4 (Fla. 4th DCA 2019) (quoting *Sugar Cane Growers Co-op. of Fla., Inc. v. Pinnock*, 735 So.2d 530, 535 (Fla. 4th DCA 1999)). "[T]he actual language used in the contract is the best evidence of the intent of the parties, and the plain meaning of that language controls." *Id.* (quoting *Summitbridge Credit Invs. III, LLC v. Carlyle Beach, LLC*, 218 So.3d 486, 488 (Fla. 4th DCA 2017) (citation and internal quotation mark omitted)). "[T]he court's task is to apply the parties' contract as written, not 'rewrite' it under the guise of judicial construction." *Id.* (quoting *City of Pompano Beach v. Beatty*, 222 So.3d 598, 600 (Fla. 4th DCA 2017)).

In this case, the Distributorship Agreement, which was entered into evidence as Plaintiffs' Exhibit 74, term A(6) provides that "Each vehicle must be paid for in full prior to export and delivery to SEI from MACC from the United States or any other location." Plaintiffs' Exhibit 74 at term (A)(6). Term B(1) states that "Beginning calendar year 2011 until the end of the Exclusive Distributorship Term, MACC agrees to supply SEI with a minimum of three (3) MACC vehicles in every calendar year." *Id.* The plain language of the entire Distributorship Agreement, which are clear and unambiguous, show that Defendant MACC was not required to supply any vehicles to Plaintiff SEI until Plaintiff SEI paid for them, and there is no term in the Distributorship Agreement stating that MACC must manufacture even one car if SEI does not pay for the vehicles in advance. *See* Plaintiffs' Exhibit 74 at term A(6), B(1). Furthermore, at trial, Plaintiff testified that SEI had in fact never purchased more than one vehicle, which it received. This testimony is consistent with the evidence that SEI only ever purchased one RaptorGTR, which was provided by Plaintiff MACC, pursuant to the Bill of Sale which is entered into evidence. Plaintiff SEI admits that they agreed to and signed the Bill of Sale. Day 8 Tr. at 194:6-7. The evidence, including testimony, establishes that the only vehicle that SEI ever ordered and paid for from MACC, the 2012 RaptorGTR, was in fact delivered to SEI. Day 6 Tr. At 22:3-18. There is no evidence that SEI paid for any cars that it did not receive. Therefore, SEI has failed to prove a "breach," and, as a matter of law, a directed verdict must be entered as to this claim.

B. A DIRECTED VERDICT IS FURTHER WARRANTED BECAUSE PLAINTIFF SEI FORFEITED ITS DISTRIBUTORSHIP RIGHTS.

It is established that RP High Performance purchased MACC in 2013. Day 5, Tr. 126:9-11. Plaintiff SEI alleges that Defendant MACC breached the Distributorship Agreement when it sold Plaintiff SEI's distributorship rights to RP High Performance. Compl. Count III. The evidence establishes otherwise.

Term C(1) of the Distributorship Agreement provides that "SEI will forfeit its Exclusive Distribution rights in China and Thailand immediately upon failure to perform any of Terms 2-6 in Paragraph A, provided that MACC has fulfilled its obligation to supply vehicles as described in Paragraph B". Plaintiffs' Exhibit 74 at term C(1). The evidence shows that, prior to 2013, Plaintiff SEI failed to perform terms A(3) and A(5). In particular, term A(3) required SEI to export C32 to Thailand or China 18 weeks after C32 had been completed. *Id.* at term A(3) ("C32 must be exported to Thailand or China within 18 weeks after C32 has been completed by MACC."). Because C32 was completed by August 25, 2011, the date of the bill of sale for the vehicle, term A(3) required SEI to import C32 to China or Thailand by December 29, 2011. However, as admitted by Plaintiff SEI, SEI never exported the car to Thailand or China, much less by the deadline of December 29, 2011. Accordingly, pursuant to term C(1), Plaintiff SEI forfeited its rights under the distribution right through its failure to export the car by December 29, 2011, which was prior to the sale of the distributorship rights to RP High Performance in 2013.

Furthermore, term A(5) states that "Beginning calendar year 2011, SEI must purchase at least three (3) MACC vehicles to be marketed (approximately 1 vehicle every 120 days) in the Thailand/China distribution territory in every calendar year of the Exclusive Distributorship term." Plaintiffs' Exhibit 74 at term A(5). Plaintiff SEI admitted it failed to perform term (A)(5) because, even though the Exclusive Distributorship Agreement is dated November 16, 2010, and was signed in November 2010, Plaintiff SEI never purchased any vehicle other than purchasing Chassis 32 in August 25, 2011. Accordingly, Plaintiffs' evidence at trial shows that Plaintiff SEI forfeited its rights under the distribution right prior to the sale to RP High Performance in 2013, and thus a directed verdict should be entered against Plaintiff SEI as to Count III.

IV. DEFENDANT WARREN MOSLER IS ENTITLED TO A DIRECTED VERDICT ON PLAINTIFF WAGNER'S COUNT VII FRAUDULENT INDUCEMENT CLAIM.

The elements of a claim for fraudulent inducement are: "'(1) a false statement of material fact; (2) the maker of the false statement knew or should have known of the falsity of the statement; (3) the maker intended that the false statement induce another's reliance; and (4) the other party justifiably relied on the false statement to its detriment.' *Prieto v. Smook, Inc.*, 97 So. 3d 916, 917 (Fla. 4th DCA 2012). Fraud-in-the-inducement claims will be barred if they are not independent of a contractual breach claim. *Island Travel & Tours, Ltd., Co. v. MYR Indep., Inc.*, 300 So. 3d 1236, 1240 (Fla. 3d DCA 2020) (finding as a matter of law that the fraud-in-the-inducement claims barred as a matter of law because was based on the same underlying conduct giving raise to the breach of contract claim). "[W]here the only alleged misrepresentation concerns the heart of the parties' agreement, simply applying the label of 'fraudulent inducement' to a cause of action will not suffice to subvert the sound policy rationales underlying the economic loss doctrine." *Hotels of Key Largo, Inc. v. RHI Hotels, Inc.*, 694 So. 2d 74, 77 (Fla. 3d DCA 1997). "[W]here the alleged fraudulent misrepresentations are inseparably embodied in the parties' subsequent agreement, the Economic Loss Rule will apply." *Bates v. Rosique*, 777 So. 2d 980, 982 (Fla. 3d DCA 2001).

Plaintiff Wagner's fraud in the inducement claim is that Defendant Warren Mosler misrepresented that the $100,000.00 was refundable. Sixth Amended Complaint at Count VII. Specifically, Plaintiffs allege that "WARREN MOSLER made a false statement regarding a material fact when he agreed that the deposit in the amount of $100,000 paid on behalf of Wagner via an intermediary/third party would be refundable should the sale of MACC to WAGNER not be finalized, and MOSLER sold MACC/MACC's assets to another." Sixth Amended Complaint at para 42. It is clear from the claim that the focus of the agreement between Plaintiff Wagner and

Defendant Mossler concerns the refundability of the $100,000.00, which is the same as the alleged misrepresentation at issue in the claim.

This is further evidenced by the testimony of Plaintiff Wagner, which was that his agreement with Defendant Mosler was that in return for the $100,000.00 deposit, he was to receive three months of exclusivity and the promise that the $100,000.00 would be returned if he did not close within three months and someone else bought MACC:

> A Yes. He made the offer.
> Q And that's in the documents, right?
> A Absolutely.
> Q And then later on up in the chain you did clarify what that meant, right?
> A I immediately clarified it.
> Q Okay.
> A And he said yes. So we had a clear meeting of the minds that my $100,000 deposit bought me three months of exclusivity, and if I didn't close within the three months and someone else bought it, I got my money back. I felt comfortable with that. That's why --
> Q By the way, you keep saying me, bought "me" exclusivity. Who was doing the buying?
> A Well, it was me or my company.

Day 6, Tr. at 125:11-18, 19-25.

The evidence therefore establishes that the refundability of the $100,000.00 concerns the heart of the agreement, and where, as here, "the only alleged misrepresentation concerns the heart of the parties' agreement, simply applying the label of 'fraudulent inducement' to a cause of action will not suffice to subvert the sound policy rationales underlying the economic loss doctrine." *Hotels of Key Largo, Inc. v. RHI Hotels, Inc.*, 694 So. 2d 74, 77 (Fla. 3d DCA 1997). Accordingly, a directed verdict is proper in favor of Defendant Warren Mosler as to Count VII.

V. THIS COURT SHOULD ENTER A DIRECTED VERDICT ON THE BREACH OF FEDERAL WARRANTY LAW.

In Count VIII, SEI purports to set forth a "Breach of Federal Warranty Claim" against MACC for "failure to honor federal warranty." Sixth Am. Compl. at 46-56. In this claim, SEI alleges that MACC provided SEI with a "warranty" as required by 42 U.S.C. 7541. SEI also alleges that there has been a breach of federal warranty because MACC failed notify SEI of recalls as required by the National Highway Traffic Safety Administration Act, 49 U.S.C. 30118 and 49 U.S.C. 30120. A directed verdict must be entered as to both of these claims because, as the evidence established, MACC sold the vehicle to SEI *without* a warranty, and none of the authority cited by SEI as support for its claim required MACC to issue a warranty or provides for a private right of action.

A. PLAINTIFF SEI'S WARRANTY CLAIMS FAIL BECAUSE THE VEHICLE WAS SOLD WIHTOUT A WARRANTY.

Claims related to breaches of express or implied warranties are governed by the Magnuson–Moss Warranty–Federal Trade Commission Improvement Act, § 101, 15 U.S.C.A. § 2301 ("MMWA"). The MMWA is designed principally to require certain disclosures with respect to written warranties to protect consumers from deceptive warranty practices arising out of state Uniform Commercial Code warranties. *Ocana v. Ford Motor Co.*, 992 So. 2d 319, 323 (Fla. 3rd DCA 2008). The MMWA does not require a manufacturer or seller to extend a written warranty with its product. *Id.* (citing 15 U.S.C. § 2302(b)(2)). The MMWA also "creates a federal private cause of action for consumers damaged by the failure of a warrantor to comply with any obligation under a written warranty. *Id.* (*citing* 15 U.S.C. § 2310(d)(1)). (2001).

A directed verdict is warranted as to Count VII because the evidence at trial unequivocally established that the vehicle was sold without a warranty. The bill of sale provides that:

> **PROVIDED, HOWEVER, that this Bill of Sale and Assignment is executed without recourse and without representations or warranties of Assignor whatsoever. Assignee further agrees to use vehicle to promote Mosler Automotive and its successors.**

Plaintiff SEI testified that it agreed to the bill of sale when it signed it (Day 8, Tr. 183:1-3), and further testified that it saw this language in the bill of sale when SEI signed it to purchase the car. Day 8, Tr. 183:15-21. Thus, it has been established that the warranty language within the bill of sale is plain and unambiguous and states that the vehicle was sold "without recourse and without representations or warranties .., whatsoever." *Id.* Accordingly, under the plain language of the bill of sale, the car was sold without warranty and directed verdict should be entered in favor of Defendant MACC on this count. *Ferreira v. Home Depot/Sedgwick CMS,* 12 So. 3d 866, 868 (Fla. 1st DCA 2009) ("Contracts are to be construed in accordance with the plain meaning of the words therein, and it is never the role of the trial court to rewrite a contract to make it more reasonable for one of the parties.").

B. A DIRECTED VERDICT MUST BE ENTERED AS TO THE BREACH OF FEDERAL WARRANTY CLAIM AS IT RELATES TO 42 U.S.C. CHAPTER 85, SUBCHAPTER II, PART A BECAUSE THE ACT DOES NOT APPLY TO WARRANTIES FOR FAULTY FUEL LINES AND BECAUSE THE ACT DOES NOT CONFER A PRIVATE CAUSE OF ACTION.

As set forth directly above, Plaintiffs have admitted that the vehicle was sold without a warranty, and therefore this claim fails. SEI, however, appears to argue that a warranty was required, and therefore implied, despite the Bill of Sales clearly stating otherwise, by 42 U.S.C. 7541. This argument fails as a matter of law.

The statute that SEI relies on sets forth emission standards for vehicles. 42 USCA Ch. 85, Subch. II, Pt. A. Nothing in this statute requires that a warranty be issued as to the condition of the car. Rather, 42 U.S.C. 7541 states that a manufacturer of a motor vehicle or motor vehicle engine shall warrant that the vehicle or engine conforms to the emission standards set forth in section 7521. The defect that SEI alleges in the complaint, *i.e.*, "faulty fuel lines which resulted in vehicles catching fire and burning," Sixth Am. Compl. at 50, have nothing to do with the

vehicle's or engine's compliance with the required emission standards. Moreover, there is no right of private action as to this chapter of the statute. Instead, the statute clearly states that "Actions to restrain such violations shall be brought by and in the name of the United States." 42 U.S.C. 7553. Thus, to the extent that Count VIII seeks to impose civil liability for alleged faulty fuel lines pursuant to 42 USCA Ch. 85, Subch. II, Pt. A, a directed verdict is warranted as this section is wholly irrelevant to such claims and there is no private right of action.

C. A DIRECTED VERDICT MUST BE ENTERED AS TO THE BREACH OF FEDERAL WARRANTY CLAIM AS IT RELATES TO THE NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION ACT BECAUSE THE ACT DOES NOT CONFER A PRIVATE CAUSE OF ACTION.

SEI's further argument that there has been a breach of federal warranty because MACC failed notify SEI of recalls as required by the National Highway Traffic Safety Administration, 49 U.S.C. 30118 and 49 U.S.C. 30120, is also meritless as a matter of law. The National Highway Traffic Safety Administration Act does not confer an express private right of action. *Thorne v. Pep Boys Manny Moe & Jack Inc.,* 980 F.3d 879, 884 (3d Cir. 2020); *Ayres v. Gen. Motors Corp.*, 234 F.3d 514, 522–24 (11th Cir. 2000*); Mulholland v. Subaru of Am., Inc.*, 620 F. Supp. 2d 1261, 1265–66 (D. Colo. 2009). Instead, the Act makes those who violate it liable to the United States Government. *See id.* Thus, because a private party like SEI cannot bring a claim under the national Highway Traffic Safety Act, to the extent Count VIII claims a violation of the Act, it fails as a matter of law, and a directed verdict must be entered.

VI. DEFENDANT WARREN MOSLER IS ENTITLED TO A DIRECTED VERDICT ON THE DEFAMATION AND INJURIUS FALSEHOOD CLAIMS BECAUSE PLAINTIFFS FAILED TO PROVE THE ELEMENTS OF THE CLAIMS AT TRIAL.

A. APPLICABLE LAW.

The claim of defamation requires the plaintiff to prove: "(1) publication; (2) falsity; (3) actor must act ... negligently on a matter concerning a private person; (4) actual damages; and (5) statement must be defamatory." *Jews For Jesus, Inc. v. Rapp*, 997 So. 2d 1098, 1106 (Fla. 2008).

The elements of a claim for injurious falsehood are "(1) falsehoods about [a Plaintiff]'s business; (2) were published or communicated to third persons ...; (3) the defendants knew the falsehoods would likely influence prospective purchasers of [Plaintiffs]; and (4) the falsehoods played a material and substantial part in inducing others not to [deal with plaintiffs] "... [and (5) [s]pecial damages. *See Salit v. Ruden, McClosky, Smith, Schuster & Russell, P.A.*, 742 So. 2d 381, 388 (Fla. 4th DCA 1999).

B. THE STATEMENTS AT ISSUE.

The statements at issue in this case, and which are the subject of both Plaintiffs' defamation claim and injurious falsehood claim, are:

1) "'He is nothing. He's got some serious mental problems,' Mosler said. 'He's out there billing himself as everything and he doesn't have anything.'" Plaintiffs' Exhibit 44 in evidence. This will be referred to as Statement 1.
2) "I spoke with Warren Mosler today, who confirmed the Twin Turbo conversion to the 'Raptor GTR' Mosler MT900S will not pass emissions and is not certifiable for public sale." Plaintiffs' Exhibit 40 in evidence. This will be referred to as Statement 2
3) "Mosler says the Raptor GTR is not one of its products and refused to comment further;" Plaintiffs' Exhibit 41 in evidence. This will be referred to as Statement 3
4) "This is not from me. MOSLER is not involved in this. Warren Mosler" Plaintiffs' Exhibit 86 in evidence. This will be referred to as Statement 4.

C. PLAINTIFFS FAILED TO PROVE THAT MOSLER PUBLISHED STMTS. 1-3.

With respect to the first element, "[p]ublication requires communication to one other than the person defamed." *Am. Ideal Mgmt., Inc. v. Dale Vill., Inc.*, 567 So. 2d 497, 498 (Fla. Dist. Ct. App. 1990).

With respect to statement 1, Plaintiff's presented evidence that Warren Defendant Mosler does not remember making Statement 1. At trial, Mr. Mosler said:

> Q Okay. So saying he's got serious mental problems --
> A Yeah.
> Q -- that was thought out by you, wasn't it?
> ...
> A Okay. Number one, I don't recall the conversation. I don't recall saying that. This is a statement that he attributed to me. He doesn't even remember me saying it. If you look at his testimony, he was asked if I said it, he said well, I attribute it to Mosler.

Day 5 Tr. 7:11-4, 18-23.

Plainiff's presented evidence that Clifford Atiyeh wrote the article, but he only agreed that the portion in quotation marks was "attributable to Mr. Mosler." Clifford Atiyeh Depo. 20:13-21:4.

With respect to Statement 2, Matt Farah did not write quotation marks around Statement 2. While claims to have spoken to Warren Mosler, he did so over the phone on a day and time that he did not remember and did not" recall some of the more specific details" when asked. Finally, in his deposition read at trial, Matt Farah gave a separate account of what Warren Mosler said.

A Allow me to clarify that because I realize

> that there are things I said in that comment that do not relate to my phone call with Mr. Mosler. So please let me clarify the statement that I made about that.
> When I spoke with Mr. Mosler, he said that Mr. Wagner did not work for him, was not representing the company, Mosler Automotive, and that the RaptorGTR was not his product.
> And I thought that was consistent with the fact that the RaptorGTR did not exist on Mosler's website or marketing, or any of that kind of stuff.

Day 6 Tr. at 57:20-58:5

With respect to Statement 3, Plaintiffs presented no evidence that Defendant Warren Mosler made the statement and instead stated that it was either Warren Mosler or someone else. The article containing Statement 3 does not say that Defendant Warren Mosler said Statement 3. The article says that "the RaptorGTR is not one of *its* products" (emphasis added) referring to MACC. MACC is not being sued for Statement 3. Neither live testimony nor deposition designations were presented to the jury from Benjamin Greene as to whether the words are true and accurate as written or whether they were actually spoken by Defendant Mosler. No testimony from anyone that knows who said this or heard what was said has been presented by the Plaintiff. The court should enter a directed verdict in favor of the Defendant Mosler as to Statement 3 for Defamation and Injurious falsehood because the article by itself is not sufficient evidence for the Plainiffs' claims because it does not state that Warren Mosler said these words, it only states that MACC said them.

D. PLAINTIFFS DID NOT PROVE THE STATEMENTS WERE FALSE.

To be actionable as defamation, a statement must be false and result in actual damages. See *Belmondo v. Amisial*, 337 So. 3d 856, 858, n. 2 (Fla. 3d DCA 2022). "According to the U.S. Supreme Court and Florida case law, falsity only exists if the publication is substantially and

materially false, not just if it is technically false." Smith v. Cuban Am. Nat. Found., 731 So.2d 702, 707 (Fla. 3d DCA 1999). That is because "Florida recognizes the substantial truth doctrine in defamation cases." Readon v. WPLG, LLC, 317 So. 3d 1229, 1234–35 (Fla. 3d DCA 2021). "A statement is substantially true if its substance or gist conveys essentially the same meaning that the truth would have conveyed[.]" Kieffer v. Atheists of Fla., Inc., 269 So. 3d 656, 661 (Fla. 2d DCA 2019). Under this doctrine, "a statement does not have to be perfectly accurate if the 'gist' or the 'sting' of the statement is true." *Readon*, 317 So.2d at 1234.

1. Plaintiffs Failed To Prove Statement 1 Is False.

With respect to Statement 1, "'He is nothing. He has serious mental problem,' Mosler said. 'He's out there billing himself as everything and he doesn't have anything.'"

Expert testimony is a necessity for establishing the existence, or lack thereof, of a mental health condition. *See e.g., Curtis v. Reinhardt o/b/o R.B.C.,* 243 So. 3d 451, 452 (Fla. 5th DCA 2018); *Gordon v. Davis*, 267 So. 2d 874, 876 (Fla. 3d DCA 1972); *Smart v. Bock*, 220 So. 3d 1196, 1198 (Fla. 4th DCA2017); *Maddox v. Bullard*, 141 So. 3d 1264, 1266 (Fla. 5th DCA 2014); see also Finley v. Kelly, 384 F. Supp. 3d 898, 914–15 (M.D. Tenn. 2019); *Rogers v. Louisville Land Co.*, 367 S.W.3d 196, 207 (Tenn. 2012); Jones v. State, 998 So. 2d 573, 583 (Fla. 2008), as revised on denial of reh'g (Dec. 23, 2008);

In this case, Plaintiff Wagner failed to present any expert testimony as to whether he actually has a serious mental problem. Without such expert testimony, Plaintiff Wagner failed to prove the statement that he has serious mental problems is false. Accordingly, Plaintiff Wagner's claim for defamation fails as to this statement.

2. Plaintiffs Failed To Prove Statement 2 Is False

With respect to Statement 2, there was no evidence presented that the statement is false, and indeed Plaintiffs admitted that Plaintiffs do not know whether the vehicle will pass EPA confirmatory testing.

3. Plaintiffs Failed To Prove Statement 4 Is False

With respect to Statement 4, the statement is a comment "This is not from me. MOSLER is not involved in this. Warren Mosler" Plaintiff's 86 in evidence. Defendant MACC and Defendant Warren Mosler did not directly request this video to be produced, did not provide any financing the video, did not have any personnel present at the filiming of the video, and did not have anyone involved in the editing or production of the video.

E. PLAINTIFF FAILED TO PROVE ACTUAL DAMAGES.

In order to recover for defamation, a plaintiff must show that the damages were proximately caused by the defamatory statements. *Cape Publ'ns. v. Reakes*, 840 So. 2d 277, 281 (Fla. 5th DCA 2003).

In this case, Plaintiff Wagner testified that statements other than statements made by Defendant Mosler caused him and Plaintiff SEI damages.

F. NONE OF THE STATEMENTS ARE DEFAMATORY.

"[A] defamatory statement is one that tends to harm the reputation of another by lowering him or her in the estimation of the community or, more broadly stated, one that exposes a plaintiff to hatred, ridicule, or contempt or injures his business or reputation or occupation." *Jews For Jesus, Inc. v. Rapp*, 997 So. 2d 1098, 1108–09 (Fla. 2008).

To be actionable, a defamatory publication "must convey to a reasonable reader the impression that . . . it describes actual facts about the plaintiff or activities which she participated." Ford v. Rowland, 562 So.2d 731, 735 (Fla. 5th DCA 1990).

Under Florida law, "[s]tatements of pure opinion are not actionable under the First Amendment." *LRX, Inc. v. Horizon Assocs. Joint Venture ex rel. Horizon-ANF, Inc.*, 842 So.2d 881, 885 (Fla. 4th DCA 2003). "[A] statement is pure opinion, as a matter of law, when it is based on facts which are otherwise known or available to the reader or listener." *Fid. Warranty Servs., Inc.*, 74 So.3d at 515. "Commentary or opinion based on facts that are set forth in the subject publication or which are otherwise known or available to the reader or listener" are not defamatory. *Skupin v. Hemisphere Media Grp., Inc.*, 314 So. 3d 353, 356 (Fla. 3d DCA 2020). "The law draws a distinction, however, between pure expressions of opinion, which are constitutionally protected, and mixed expressions of opinion, which are not. Mixed opinion is based upon facts regarding a person or his conduct that are neither stated in the publication nor assumed to exist by a party exposed to the communication. Rather, the communicator implies that a concealed or undisclosed set of defamatory facts would confirm his opinion." *LRX, Inc*, 842 So.2d at 886. "Where the speaker or writer presents the facts [that his opinions are based on] at the same time he or she offers independent commentary, a finding of pure opinion will usually result." *Zambrano v. Devanesan*, 484 So.2d 603, 606 (Fla. 4th DCA 1986).

1. Statement 1 Is Rhetorical Hyperbole And Opinion.

The law provides "protection of statements that cannot 'reasonably [be] interpreted as stating actual facts' about an individual. This provides assurance that public debate will not suffer for lack of 'imaginative expression' or the 'rhetorical hyperbole' which has traditionally added much to the discourse of our Nation." *Fla. Med. Ctr., Inc. v. New York Post Co.*, 568 So.2d 454, 458 (Fla. 4th DCA 1990) (citations omitted). Florida Law thus "recognizes a difference between statements presented as fact and statements presented as an opinion or rhetorical hyperbole." *Readon*, 317 So. 3d at 1235. "The key distinction is whether the incorrectly reported material

would have had a different effect on the mind of the viewer by affecting the gist of the story." *Id.* (internal quotations omitted).

Statement 1 is "'He is nothing. He's got some serious mental problems,' Mosler said. 'He's out there billing himself as everything and he doesn't have anything.'"

The first sentence of Statement 1 is "rhetorical hyperbole." No juror could "reasonably [be] interpreted as stating actual facts." *Fla. Med. Ctr., Inc.*,568 So.2d at 458. Plaintiff Wagner testified in the courtroom and is human being. He is not either the vacuum of space nor anything else that would be consider not a thing and he does not know what it means. This statement may be derogatory, but it is not a statement of fact and is not based on facts about Plaintiff Wagner. This sentence allegedly from Defendant Mosler expresses must be a "statement[] presented as an opinion or rhetorical hyperbole." *Readon*, 317 So. 3d at 1235. As such, the Court should enter a directed verdict on the defamation claim against Defendants as to the first sentence of Statement 1.

The middle sentence in Statement 1 is "rhetorical hyperbole." No juror could "reasonably [be] interpreted as stating actual facts." *Fla. Med. Ctr., Inc.*,568 So.2d at 458. However, no juror could believe that he was stating facts about Wagner's mental health. Defendant Mosler is not a medical professional and neither is Defendant Wagner. Plaintiff Wagner has similarly used the word "insane" for himself casually.

> Q Okay. We'll get there. I want you to look at this line right here. And you said, "And you know I'm already insane for working for nothing for the last eight months."
> Q When you said "I'm already insane," did you mean legally insane or just casually insane?
> A You know the answer to this. I do not mean legally insane. I was just saying I've been going all in on this. And I was, I was all in. My mind, body, soul, every dollar I had was in on this.

Q So just casually insane you were, right?
A I was speaking off-the-cuff.

Day 8 Tr. 109:12-23.

In context, this part of Statement 1 may be derogatory, but it is not a statement of fact and is based on the behavior described farther up in the same article. The sentence before Statement 1 is "When a potentional deal went south, Mosler blamed Wagner for ruining it when he allegedly demanded Mosler pay him $100,000 'in return for agreeing not to sue the new owner.' Mosler refused." Statement 1 as a whole is a response to Plainiffs Wagner's position, that Defendant Mosler alleged said based on that dispute. Plaintiffs have presented no evidence that Defendant Mosler based this statement on anything other than what is presented in the article, or using in anyway other than "casual" rhetorical hyperbole or pure opinion. As such, the Court should enter a directed verdict on the defamation claim against Defendants as to the middle sentence in Statement 1.

The final sentence of Statement 1 is an opinion based on facts readily available in the article. Defendant Mosler is alleged to have said that Plainiff Wagner was "claiming to be the official distributor despite their agreement being 'moot' from lack of production." Defendant Mosler true belief that the agreement was "moot" is the very fact that supports the sentence "'He's out there billing himself as everything and he doesn't have anything.'" Because Defendant Mosler "present[ed] the facts [that his opinions are based on] at the same time he [offerd] independent commentary, a finding of pure opinion [would] usually result." *Zambrano v. Devanesan*, 484 So.2d 603, 606 (Fla. 4th DCA 1986). Here it should result, because the Plaintiffs' have not presented an alternative meaning for this phrase. As such, the Court should enter a directed verdict on the defamation claim against Defendants as to the final sentence of Statement 1.

2. Plaintiffs have provided evidence of a statement (Statement 2) that is an opinion.

The Statement referred to as Statement 2 is "I spoke with Warren Mosler today, who confirmed the Twin Turbo conversion to the 'Raptor GTR' Mosler MT900S will not pass emissions and is not certifiable for public sale." Plaintiff's 40 in evidence.

Both parts of this statement are nothing but opinions because "it is based on facts which are otherwise known or available to the reader or listener." *Fid. Warranty Servs., Inc.*, 74 So.3d at 515. Notably, both of the portions in Statement 2 are "confirm[ing]" a piece of information shared in the comments that surround Matt Farah Comment. The Plaintiffs have not presented any evidence that Warren Mosler had knowledge outside these comments when he shared these opinions.

The first portion of Statement 2 is that the RaptorGTR "will not pass emissions." The Plaintiffs have not presented any evidence that Defendant Mosler knew anything more about this statement than what is in the article's comments. This statement is in the future tense, and is about a car that Defendant Mosler sold to Plainiff SEI in August of 2011. Plainiff's 36 in evidence. Other commenters said that it would not pass emissions, including the prior comment on directly above Statement 2. The comment says

> "Matt do not let him fool you, his "turbo" Moslers have not once passed emssions. He is such a good engineer, he thought installing catalytic converter in the up-pipe, pre-turbo would keep them clean enough to pass emissions..."

Plainiffs' 40 in evidence at page 10.

The Plainiffs have not presented evidence that Warren Mosler was using anything but this information and other information presented in the article to come to this conclusion.

The same is true for the next portion of statement 2, which states that the RaptorGTR is not certifiable for public sale. The Plainiffs did not present evidence that Defendant Mosler based this opinion on anything not presented in the article's comments. Again, Matt Frah does not purport that Defendant Mosler made these statement in a vacuum. Instead, Farah refers to facts in the article:

> A Allow me to clarify that because I realize
> that there are things I said in that comment that do not
> relate to my phone call with Mr. Mosler. So please let
> me clarify the statement that I made about that.
> When I spoke with Mr. Mosler, he said that
> Mr. Wagner did not work for him, was not representing
> the company, Mosler Automotive, and that the RaptorGTR
> was not his product.
> And I thought that was consistent with the
> fact that the RaptorGTR did not exist on Mosler's
> website or marketing, or any of that kind of stuff.

Day 6 Tr. at 57:20-58:5

As seen above, the Plaintiffs did not present any evidence that Statement 2 is Matt Farah inferences based entirely factually information about whether Plaintiffs were employed by Defendant MACC or whether the Raptor GTR was owned by MACC. Even if Warren Mosler said exactly what is in the comment, it would be a response and confirming opinion based on the facts in the article's comments. The Plaintiffs did not provide an alternative meaning to this interpretation Statement 2, and the plain meaning, that Defendant Mosler was issuing an opinion that affirmed the facts in the article, must control. Because of this, Statement 2 is "pure opinion... not actionable under the First Amendment." *LRX, Inc.*, 842 So.2d at 885

G. A DIRECTED VERDICT IS PROPER BECAUSE THE SAME STATEMENTS THAT FORM THE TRADE LIBEL CLAIM FORM THE CLAIM FOR DEFAMATION.

"In Florida, a single publication gives rise to a single cause of action." *Callaway Land & Cattle Co., Inc. v. Banyon Lakes C. Corp.*, 831 So. 2d 204, 208 (Fla. 4th DCA 2002). "The various injuries resulting from it are merely items of damage arising from the same wrong." *Id.* "The rule is designed to prevent plaintiffs from circumventing a valid defense to defamation by recasting essentially the same facts into several causes of action all meant to compensate for the same harm." *Id.* (quoting *Messenger v. Gruner + Jahr USA Publ'g*, 994 F. Supp. 525, 531 (S.D.N.Y. 1988), vacated on other grounds by, 208 F.3d 122 (2d Cir. 2000)).

"Florida's single publication/single action rule precludes the recasting of defamation claims as additional, distinct causes of action in tort if all of the claims arise from same defamatory publication." *Int'l Sec. Mgmt. Grp., Inc. v. Rolland*, 271 So. 3d 33, 48 (Fla. 3d DCA 2018), *reh'g denied* (Feb. 28, 2019).

In other words, "[w]hen claims are based on analogous underlying facts and the causes of action are intended to compensate for the same alleged harm, a plaintiff may not proceed on multiple counts for what is essentially the same defamatory publication or event." *Kinsman v. Winston*, No. 615CV696ORL22GJK, 2015 WL 12839267, at *5 (M.D. Fla. Sept. 15, 2015).

At trial, Plaintiff SEI's presented the same evidence for both Plaintiff SEI's defamation claims and its injurious falsehood claim, which showed that each statement and seeking the same alleged damages as SEI's Defamation Claim. Thus, SEI has improperly recast its defamation claim as its Injurious Falsehood Claim. Because all three of the comment presented by the evidence were only published as most once, SEI's Injurious Falsehood Claim cannot be maintained because it violates the "single publication/single action rule," and thus, cannot proceed as a matter of law. *Callaway*, 831 So. 2d at 208 (preventing multiple actions arising from the same publication). As such, there is no evidence to support the additional claim for damages in SEI's Injurious Falsehood

Claim because the additional claim violates the "single publication/single action rule." Defendant Mosler is entitled to a directed verdict for the claim of injurious falsehood. *See Nat'l Car Rental*, 423 So. 2d at 917.

H. PLAINTIFFS DID NOT PROVIDE EVIDENCE OF STATEMENTS PLAYED A MATERIAL AND SUBSTANTIAL PART IN INDUCING OTHERS NOT TO DEAL WITH PLAINTIFF SEI.

Plaintiff SEI did not provide evidence that showed that the statements 1, 2, 3, and 4 "played a material and substantial part" in people not dealing with it. *Salit*, 742 So. 2d at 388. Hassan Abboud stated he "I didn't see anything that prevented me from doing business with him" in 2012 in response to the Clifford Atiyeh article. Day 3 Tr. at 124:18-20. Statement 1-3 were published in 2011. Abby Cubey cited "bad press" and articles that called "James Wagner's car" a fake as reasons why she did not invest in Mosler, but did not say this had an impact with her dealing with SEI and she could not identify the articles or statements with any specificity.

Accordingly, for all the reasons set forth above, a directed verdict must be entered in favor of Defendants and against Plaintiffs as to Plaintiffs' claims as set forth above.

WHEREFORE, Defendants ask this Court to render an order (1) entering a directed verdict in favor of Defendants and against Plaintiffs as to all Plaintiffs' claims as set forth in this motion and (2) such other and further relief as the Court deems just and proper.

Dated: May 23, 2023

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished via the Florida E-Filing Portal to ***Scott W. Zappolo, Esquire,*** ZAPPOLO LAW, P.A., 7108 Fairway Drive, Suite 322, Palm Beach Gardens, FL 33418, scott@zappololaw.com; colleen@zapplololaw.com; filings@zappololaw.com), *Attorney for Plaintiffs*, on this 23rd day of May, 2023.

By: s/Steven D. Weber
Steven D. Weber