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. ("SEI") a Florida corporation,

Plaintiffs,

vs.

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

Defendants.
_____/

OMNIBUS ORDER CONSIDERING PLAINTIFFS' POST-TRIAL MOTIONS (D.E. 834, 835; D.E. 838; and D.E. 837)

THIS CAUSE having come to be heard on September 14, 2023, on Plaintiffs' following post-trial motions:

I. **[D.E. 834][Duplicate entry at [D.E. 835] "PLAINTIFFS' MOTION:**

1. FOR NEW TRIAL AND/OR REHEARING AS TO COUNT 9 (DEFAMATION) WITH INCORPORATED REQUEST FOR ORDER TO SPECIFY GROUNDS;

2. FOR NEW TRIAL AND/OR REHEARING AS TO COUNT 3 (BREACH OF EXCLUSIVE DISTRIBUTORSHIPS IN CHINA AND THAILAND)

II. **[D.E. 838] PLAINTIFF'S MOTION TO HONOR INTENT OF THE JURY ON COUNT D AND STRIKE ERRANT AFFIRMATIVE DEFENSE IN PARAGRAPH 23(b); and**

III. **[D.E. 837] PLAINTIFFS' MOTION TO STRIKE CONTRACT-BASED PREEMEPTIVE BREACH AFFIRMATIVE DEFENSE FROM NO-CONTRACT COUNT E, UNJUST ENRICHMENT**

The Motions above at DE 834, 838, and 837 are collectively referred to herein as "**Plaintiffs' Motions**." This cause came before the Court at an "in person" hearing on September 14, 2023, upon the above-referenced three "**Plaintiffs' Motions**."

The Court, having reviewed Plaintiffs' Motions; having reviewed Defendants' responses to the Motions; having reviewed the record; having heard arguments of counsel; and being otherwise advised in the premises, it is hereupon **ORDERED AND ADJUDGED** as follows:

First, the Court considers:

I. [D.E. 834][Duplicate entry at [D.E. 835] "PLAINTIFFS' MOTION:

1. FOR NEW TRIAL AND/OR REHEARING AS TO COUNT 9 (DEFAMATION) WITH INCORPORATED REQUEST FOR ORDER TO SPECIFY GROUNDS;

2. FOR NEW TRIAL AND/OR REHEARING AS TO COUNT 3 (BREACH OF EXCLUSIVE DISTRIBUTROSHIPS IN CHINA AND THAILAND)

The Court has reviewed the motion [D.E. 834 and 835] ("**Plaintiffs' Motion for New Trial**"), Defendants' response to same [D.E. 849], and heard argument of counsel. The Court is aware of the Court's file and related documents therein (among other things, the Sixth Amended Complaint [attachment to D.E. 491]; Plaintiffs' Trial Exhibit 39 (The Final Days of Mosler article); Defendants' Motion for Directed Verdict [D.E. 822], Plaintiffs' written response to Defendants' Motion for Directed Verdict [D.E. 823], the Court's Order Denying Plaintiffs' Response to Defendants' Motion for Directed Verdict [D.E. 832], and the other exhibits which were provided to the Court in anticipation of the September 14, 2023 hearing. The Court deals with each of the requests for relief separately below. Based upon the above, the Court makes the following findings of fact and conclusions of law

As to: 1. PLAINTIFFS' MOTION FOR NEW TRIAL AND/OR REHEARING AS TO COUNT 9 (DEFAMATION) WITH INCORPORATED REQUEST FOR ORDER TO SPECIFY GROUNDS; IS <u>DENIED</u>

Plaintiffs' Motion for New Trial as to Count 9 concerns Plaintiff Wagner's defamation claim that Defendant Warren Mosler "published and/or caused to be published" certain words, that appear in Plaintiffs' Trial Exhibit 39, and which, read: "'He's 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' Trial Exhibit 39.

The Court previously reviewed the words Plaintiffs allege that Defendant Warren Mosler spoke, and reviewed Plaintiffs' Trial Exhibit 39, and granted Defendants' Motion for Directed Verdict against Plaintiff Wagner as to Count 9.

Plaintiffs' Motion for New Trial argues that the Court granted Defendants' Motion for Directed Verdict as to Count 9 "on the fly" and that the Court did not allow Plaintiffs time to research and file a written response to Defendants' Motion for Directed Verdict. The Court finds that Plaintiffs' argument has no basis in fact.

The docket reflects that, on May 24, 2023, Plaintiff filed a written response to Defendants' Motion for Directed Verdict as to Count 9 (and incorporated a motion for reconsideration) at D.E. 823. Thus, Plaintiffs' allegation that they were denied the opportunity to file a written response is frivolous. Further, with the benefit of Plaintiffs' written response, the Court "considered each and every paragraph" of Plaintiffs' written response and denied it pursuant to the Order that appears at D.E. 832. The Court explained the Court's ruling to Plaintiffs during trial, and the Court explained that the Court considered the elements of the claim and went through the analysis. Trial Tr. at 2211:17-2212:9. Accordingly, there is no basis to Plaintiffs' contention that the Court ruled "on the fly" or that Plaintiffs were deprived the time to research and file a written response.

The Court **DENIES** the Plaintiffs' Motion for New Trial as to Count 9, in the entirety, and further finds as follows:

Plaintiffs' arguments regarding summary judgment rulings in 2016 are not relevant. Plaintiffs already raised such arguments and Plaintiffs' counsel acknowledged such rulings were not relevant:

> MR. ZAPPOLO: This is a recycling of a summary judgment motion where Judge Hafele already looked at it and said this wasn't --
> THE COURT: We're beyond summary judgment.
> MR. ZAPPOLO: Right. I understand.

Trial Tr. 1907:4-8.

Plaintiffs further raised the predecessor Judge's rulings in Plaintiffs' written response (and incorporated a motion for reconsideration) to Defendants' Directed Verdict Motion as to Count 9 at D.E. 823 at 2. Thus, this Court already considered Plaintiffs' arguments and denied them by Order at D.E. 832.

The prior Judge's ruling, in 2016, at Docket Entry 183 is not relevant to Defendants' Motion for Directed Verdict or this Court's analysis of Plaintiffs' instant motion as to Count 9 for several other reasons.

First, none of the Court's rulings on summary judgment prevent the Court from ruling, in a contrary manner, on Defendants' Motion for Directed Verdict as to Count 9. Defendants moved for directed verdict at the close of Plaintiffs' case-in-chief, which is the first step of preserving the motion for appeal. *See Meruelo v. Mark Andrew of Palm Beaches, Ltd.*, 12 So. 3d 247, 251 (Fla. 4th DCA 2009). Therefore, the issue was properly before the Court.

Second, the *Skupin* case used by the Court for deciding Defendants' Motion for Directed Verdict was not decided at the time of the predecessor Court's ruling in 2016.

Third, the Court's ruling in 2016 concerned the Fourth Amended Complaint, and not the instant and operative Sixth Amended Complaint.

Fourth, the Court's prior ruling in 2016 did not decide as a matter of law that the words at issue in Count 9 are defamatory. Instead, the Court's ruling simply denied the particular argument on summary judgment.

Fifth, this Court has the inherent authority to reconsider its prior, non-final orders, and – to the extent there was any conflict with any prior orders – this Court was able to do so when Defendants' Motion for Directed Verdict properly came before the Court. *See also Silvestrone v. Edell,* 721 So.2d 1173, 1175 (Fla.1998) (citing *N. Shore Hosp., Inc. v. Barber,* 143 So.2d 849, 851 (Fla.1962) ("[I]t is well settled that a trial court has the inherent authority to control its own interlocutory orders prior to final judgment."). Furthermore, Plaintiffs omit that the prior judge presiding over this case doubted that there is any law to support the notion that Defendant Warren Mosler can even be sued for the other alleged defamatory statement at issue in this case that "the Twin Turbo conversion to the RaptorGTR Mosler MT900s will not pass emissions and is not certifiable for public sale." *See, e.g.,* 2020 Punitive Damages Hearing at 35:1-11. Whereas later, in 2023, Plaintiffs argued and this Court found that the same statement is capable of defamatory interpretation and allowed it to proceed to the jury. *See* Verdict Form D.E. 825 at Count F. Plaintiffs thus implicitly and explicitly recognize that this Court may alter any of its prior interlocutory orders.

Also, on November 21, 2022, Defendants moved for partial summary judgment at Docket Entry 717. Defendants filed that motion for partial summary judgment prior to Defendants' filing Defendants' Motion for Directed Verdict, and prior to the Court granting Defendants' Motion for Directed Verdict as to Count 9. Thereby Plaintiffs had the opportunity to research and file a written response to Defendants' Motion for Directed Verdict as to Count 9, and they did so at Docket Entry 823. The same is true of the summary judgment where Plaintiffs had the opportunity

to research and file a written response to Defendants' motion for partial summary judgment at Docket Entry 717. Thus, Plaintiffs' argument that they should have been allowed to file a written response like they did in response to Defendants' motion for partial summary judgment is frivolous.

Moreover, Plaintiffs argue, and the Court agrees, that (1) whether a statement is one of fact or opinion is a question of law for the Court to decide and (2) that the Court must consider the context of, and circumstances during which the statements sued upon where made. The Court has already done exactly what Plaintiffs argued for, and the Court found that the words at issue in Count 9 are not defamatory:

> THE COURT: I'm just reading it over and over again because I guess what has -- what's been bouncing around in my head, you know, is that I think this is a very personal issue. Sometimes people say you don't want to meet your heroes because they're only going to disappoint you.
>
> I can't imagine what it would be like to be Mr. Wagner. I think he really did look up to Mr. Mosler and so these statements probably really hurt his feelings significantly, significantly. But as I read the statements, they sound like opinion, rhetoric.
>
> You know, it doesn't take away from the fact that they're incredibly hurtful to him, but these statements on their face with the rest of this publication just sounds like, you know, an angry Mr. Mosler giving off some opinions. But as far as defamation --
>
> MR. ZAPPOLO: So, Your Honor, if you rule against me and I publish something to the Bar Journal next week that says you have serious mental problems that's okay?
>
> MR. WEBER: Well, it's different.
>
> THE COURT: I mean, you could do that. It's a different analysis. I'm a public official. You can say the most horrible things about me, it's okay, you know.
>
> But even if I were a private person, you know,

the way that these statements are worded, he's crazy, people say that people are crazy all the time. It's not necessarily defamatory.

MR. ZAPPOLO: Respectfully, Your Honor, people saying, oh, he's nuts, he's crazy, that's one thing. Saying he has serious mental problems, that's a very definite different thing.

THE COURT: I disagree.

MR. ZAPPOLO: And in this case, we have the definition of mental problems.

THE COURT: I disagree. I disagree. People say things like this all the time. It doesn't change the fact that it's hurtful. It doesn't change the fact that it's meanspirited. But is it defamatory, no. I think it is opinion and rhetoric.

All right. Your motion is granted.

Trial Tr. 1917:11-1919:5.

This Court's denial of Defendants' motion for partial summary judgment on January 20, 2023, approximately 4 months before trial, does not change the Court's decision in response to Defendants' Motion for Directed Verdict. On January 20, 2023, this Court held two hearings for this case. Defendants' motion for partial summary judgment was the second hearing that day, and the first was an evidentiary hearing. Defendants' motion for partial summary judgment was denied at D.E. 743, "for the reasons set forth in the transcript of proceedings." D.E. 743. The hearing transcript records the reasons, as follows:

THE COURT: I can't pretend I didn't just hear the testimony, and read some e-mails, that gave additional context, right.

And so, when I think about that particular statement, in the light most favorable to the non-moving party, and whether or not the finder of fact could return a verdict for them on that issue given that whole context, I think your case gets harder to argue on that issue regarding that being a hyperbole since, I believe, it was that e-mail -- or, you know, a handful of e-mails that's highlighted to

me, which is part of the record now, right, and so the Court can consider anything in the record.

MR. WEBER: Well, Your Honor, the question is, not whether Mosler made the statement to prove defamation, it's whether the statement is defamatory in and of itself.

So, let's just put aside whether he made the statement. You have to look at the statement in the context of the article, and decide whether that rises to the level of the high standard for defamation, which is, given the context, they tend to subject one to hatred, ridicule, contempt or disgrace, or tend to injure one in one's business or profession.

And even if Mr. Mosler said the statement, reading that statement in the context of the article, it is not defamatory. I mean, what does it even mean, Your Honor, he is nothing.

I mean, does someone really believe that he is nothing; he's got some serious mental problems. When you read this article, does it mean that he has actual psychological problems?

THE COURT: Okay. Well, I think for a motion for summary judgment, I have got to use the findings. I am not going to -- I'm not going to make the findings that he made that statement, I'm saying that in the light most favorable to the non-moving party, a jury could find that he made that statement.

It's going to be the Plaintiff's burden to establish that statement was made as part of his case. But as far as whether or not it's hyperbole, or opinion testimony given the content, and again, judicially noticing the hearing I just had, your motion for summary judgment on that statement is denied.

Let's move onto the next one.

January 20, 2023, Hearing on Defendants' Motion for Partial Summary Judgment, Tr. at 4:5-5:25.

Upon reviewing the transcript, the Court was being influenced by the evidentiary hearing that took place for the same case early that morning. Plaintiffs fail to identify the evidence from the hearing that influenced the Court in the same away as any specific evidence admitted at trial.

Moreover, this evidence cannot aid in the determination of whether the statement at issue is an opinion or a statement of fact because "[the Court] must construe the statement in its totality, examining not merely a particular phrase or sentence, but all the words used in the publication" – which is either the words allegedly said or the contents of Plaintiffs' Trial Exhibit 39. *Skupin v. Hemisphere Media Group, Inc.*, 314 So. 3d 353, 356 (Fla. 3d DCA 2020) (internal quotes omitted).

Additionally, Plaintiffs' response to Defendants' motion for partial summary judgment, at D.E. 721, does not change the Court's rulings on Defendants' Motion for Directed Verdict because the Court already considered those arguments in D.E. 721 in Plaintiffs' written response (and incorporated motion for reconsideration) to Defendants' Motion for Directed Verdict as to Count 9 at D.E. 823, which this Court rejected.

The Court notes that Plaintiffs make substantially similar arguments in D.E. 721 as Plaintiffs make in D.E. 823. The Court has already considered the words, Plaintiffs' Trial Exhibit 39, and the applicable law and elements and granted Defendants' Directed Verdict Motion as to Count 9.

None of the arguments made by Plaintiffs as to "facts adduced at trial" change the Court's decision. First, Plaintiffs fail to cite any portion of the record in support of their alleged "facts adduced at trial." Second, the same "facts adduced at trial" were substantially presented through Plaintiffs' response (and incorporated motion for reconsideration) to Defendants' Motion for Directed Verdict as to Count 9 at D.E. 823, which this Court already rejected. *See e.g.* D.E. 832 at ¶ 4.

The Court relied on the case in *Skupin* for the proposition that the Court, instead of the jury, can make the determination as to whether the words at issue in Count 9 are defamatory. The

Court, after reading the *Skupin* case, then concluded that the Court must read the words to determine if the words are defamatory as a matter of law, before going forward, and Plaintiffs' counsel agreed that the Court should examine the article:

THE COURT: So I think I can read these to determine whether or not as a matter of law they're defamatory. That Skupin case -- Dr. Skupin case looks like at the motion to dismiss stage, so very preliminary, he had enough alleged attached or that he could infer to where he could make a determination as a matter of law as to whether these statements were defamatory.

Here, we're well beyond all that. Everything that's going to be attached by the plaintiff is already there and everything that is going to be presented by the plaintiff has already been presented.

So I think I can read these to see if there is defamation as a matter of law. So I'm going to go ahead and read the article, and then when I'm done I guess I'll hear argument as to whether or not they are indeed defamatory.

MR. WEBER: Okay.

THE COURT: Okay. Let me hear your arguments.

MR. WEBER: Your Honor, reading this document as a whole, as Your Honor must do, it is not defamatory. There are --

THE COURT: Is it just this document or is it the entire case?

MR. WEBER: It's the statement in the totality, examining not merely a particular phrase, but all the words used in the publication. That's what the law says. That's what this Skupin case describes.

So you look at the publication and you must construe the statement in its totality looking at the publication as a whole.

THE COURT: Mr. Zappolo, I mean, it's just -- it's contained in two lines on page 3 of 9 of this document, right?

MR. ZAPPOLO: Right. So what's -- he's saying take it in context. When you look at that article, the vast majority of that article is about Mr. Mosler's political career. That's not giving the

4 basis for why he says –

Trial Tr. at 1909:14-1911:4 (emphasis added).

During the argument on Defendants' Directed Verdict Motion, the Court analyzed the article, and specifically asked Plaintiffs' counsel whether Plaintiff was suing based on the article or the words allegedly spoken by Defendant Mosler to the article's author, and Plaintiffs' counsel equivocated between suing on the words allegedly spoken or suing on the article, which was "prompted" by the words spoken:

> And just so that the Court is aware, one of the big issues is Your Honor said you need to consider "the statement," and you read the whole article. That's not the statement that was sued upon, Your Honor. In all the jumble and everything yesterday, it got lost in the translation here.
>
> I think at one point I did say -- I don't have the transcript, but at one point I did say that's not what we've sued upon. The statements that we've sued upon are Warren Mosler's statements to the journalists. To consider what others did with that or whatever when considering whether or not the statement itself is defamatory we assert is improper review of something that even Mr. Wagner -- excuse me, even Mr. Weber's case law does not suggest -- the case law that he presents is all stuff about media people and what the journalists actually said as being a defamatory statement. Here, we're not suing for what journalists said; we're suing for what Mr. Mosler said to the journalists.
>
> So even under their analysis, the only things that you should be considering is the statements that Mr. Mosler is quoted as having said to the journalists. And at this point, in a directed verdict motion, I think it is very important.
>
> And further, in this instance, remember we already had -- this is -- the timing of this is really weird and suspect, and I dealt with that because it doesn't consider --
>
> THE COURT: Hold on.
>
> MR. ZAPPOLO: -- their motion --

THE COURT: Let's say you do that. Let's say you argue to me right now -- let's say I entertain this for a second -- which I'm not sure I'm going to, but let's say I entertain this. And you're suing about statements that Mr. Mosler made to a journalist, not the statements that the journalist printed and published, correct?

MR. ZAPPOLO: Well, that's -- that's a differential thing. I'm suing about what Mr. -- and I want to clarify: I'm suing about what Mr. Mosler said to the journalist that then prompted the journalist to write that whole article.

THE COURT: Okay. Same analysis, we're good. I'm not going to change my mind.

MR. ZAPPOLO: All right. So --

MR. WEBER: Can we begin, Your Honor?

MR. ZAPPOLO: Thank you, Your Honor, for allowing me to make a record.

THE COURT: Because I thought you were talking about statements made to the journalist, in which case there would have been no damage, and then I probably would have granted all of them, you know.

MR. ZAPPOLO: No, because the journalist repeated, so that's the -- that's the gist of it, but what you -- the statement in the case law is what is actually said.

THE COURT: Okay. No, I follow. I understand.

MR. ZAPPOLO: Okay.

Trial Tr. at 1941:11-1943:22 (emphasis added).

Nonetheless, whether Plaintiffs are suing based on the article or the words allegedly spoken, the Court already considered Plaintiffs' argument that Plaintiff was suing upon the words allegedly spoken by Defendant Warren Mosler.

In Plaintiffs' written response to Defendants' Motion for Directed Verdict, Plaintiffs specifically stated that they were suing on the statements made and not the statements that the journalist subsequently republished. D.E. 823 at ¶¶ 2, 6. Thus, the Court already reviewed Plaintiffs' response and denied it. D.E. 832. Accordingly, there is no new argument set forth in

Plaintiffs' instant motion.

Furthermore, the Court specifically stated its analysis based on the words which were allegedly spoken and based on the context of the entirety of the article in which they appear:

> MR. ZAPPOLO: So, Your Honor, if you rule against me and I publish something to the Bar Journal next week that says you have serious mental problems that's okay?
> MR. WEBER: Well, it's different.
> THE COURT: I mean, you could do that. It's a different analysis. I'm a public official. You can say the most horrible things about me, it's okay, you know.
> But even if I were a private person, you know, the way that these statements are worded, he's crazy, people say that people are crazy all the time. It's not necessarily defamatory.
> MR. ZAPPOLO: Respectfully, Your Honor, people saying, oh, he's nuts, he's crazy, that's one thing. Saying he has serious mental problems, that's a very definite different thing.
> THE COURT: I disagree.
> MR. ZAPPOLO: And in this case, we have the definition of mental problems.
> THE COURT: I disagree. I disagree. People say things like this all the time. It doesn't change the fact that it's hurtful. It doesn't change the fact that it's meanspirited. But is it defamatory, no. I think it is opinion and rhetoric.
> All right. Your motion is granted.

Trial Tr. at 1918:4-1919:5. Plaintiffs' argument that the Court mistakenly analyzed the article instead of the words allegedly spoken is thus frivolous.

Defendant Warren Mosler's failure to recall any conversation with the author of Plaintiffs' Trial Exhibit 39 has no bearing on whether the words at issue are defamatory. As set forth above, the Court analyzed the words, and the article (Plaintiffs' Trial Exhibit 39) containing the words,

and under both scenarios the Court found that the words are not defamatory as a matter of law and explained the Court's reasoning. In doing so, the Court did not weigh the evidence of Defendant Warren Mosler's memory, and instead treated the statements as if they had been spoken as the Plaintiffs alleged.

Accordingly, this Court already found the words are not defamatory as a matter of law, a ruling this Court has already made twice (at trial and then again in response to Plaintiffs' motion for reconsideration and written response).

Plaintiffs also cite no authority for the proposition that the Court should consider only the quoted statements in the article and not the entire article. Nonetheless, in accordance with the law, the Court reviewed the entirety of the article as well as all the quoted portions of the article. As set forth above, the Court does not find the words allegedly spoken by Defendant Warren Mosler are defamatory under any scenario. Plaintiffs have made this argument before in Plaintiffs' written response to Defendants' Motion for Directed Verdict. D.E. 823 at ¶ 6. Thus, the Court has already considered and rejected this argument. It does so again here.

Plaintiffs repeatedly misquote the language of the statement at issue. Plaintiffs argue the words at issue as: "He has **severe** mental problems" but the words at issue actually appear in Plaintiffs' Trial Exhibit 39 as: "He's got some **serious** mental problems," Plaintiffs' Trial Exhibit 39. Nonetheless, Plaintiffs already argued the words to the Court, and the Court reiterates its ruling, regarding the words:

> THE COURT: I mean, you could do that. It's a different analysis. I'm a public official. You can say the most horrible things about me, it's okay, you know.
>
> But even if I were a private person, you know, the way that these statements are worded, he's

crazy, people say that people are crazy all the time. It's not necessarily defamatory.

MR. ZAPPOLO: Respectfully, Your Honor, people saying, oh, he's nuts, he's crazy, that's one thing. Saying he has serious mental problems, that's a very definite different thing.

THE COURT: I disagree.

MR. ZAPPOLO: And in this case, we have the definition of mental problems.

THE COURT: I disagree. I disagree. People say things like this all the time. It doesn't change the fact that it's hurtful. It doesn't change the fact that it's mean-spirited. But is it defamatory, no. I think it is opinion and rhetoric.

All right. Your motion is granted.

Trial Tr. at 1918:4-1919:5.

In granting Defendants' Directed Verdict Motion at trial and then denying Plaintiffs' written response and motion for reconsideration, this Court already found (twice) that the words at issue are not defamatory in the context allegedly stated or in Plaintiffs' Trial Exhibit 39. Plaintiffs already argued, in Plaintiffs' written response to Defendants' Motion for Directed Verdict, that the words include an assertion of facts. D.E. 823 at ¶ 7. The Court already considered and rejected this argument. It does so again here.

The Court does find and has found that the words at issue are not a statement of fact. After making this determination, the issue does not need to be tried by a jury because the Court has treated the evidence at trial as if it was true, and determined the Plaintiffs cannot succeed.

The Court already found (twice) that the words at issue "'He's out there billing himself as everything and he doesn't have anything" are not defamatory, even out of context. Plaintiffs' Trial Exhibit 39. Even if the Court could understand this statement as an expression of mixed fact and opinion about the Distributorship Agreement, and not literally what it is hyperbole, the

expression would consist of "[c]ommentary 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 [that] do not constitute libel," *Skupin*, 314 So. 3d at 356, because the article quoted Defendant Warren Mosler as having also allegedly said that the Distributorship Agreement was "'moot' from lack of production." Plaintiffs' Trial Exhibit 39

Plaintiffs argue that the only evidence of what was allegedly said by Defendant Warren Mosler to the author of Plaintiffs' Trial Exhibit 39 is set forth Plaintiffs' Trial Exhibit 39, and the Court already considered that language, and the entirety of Plaintiffs' Trial Exhibit 39, and denied Plaintiffs' arguments (twice). Therefore, Plaintiffs' Motion for New Trial raises no new arguments.

This Court already considered and rejected Plaintiffs' argument that *Skupin* was decided at the motion to dismiss stage, and therefore should not be considered. The Court specifically noted, when ruling on Defendants' Motion for Directed Verdict, that the *Skupin* case was decided at the motion to dismiss stage.

…That Skupin case -- Dr. Skupin case looks like at the motion to dismiss stage, so very preliminary, he had enough alleged attached or that he could infer to where he could make a determination as a matter of law as to whether these statements were defamatory.

Here, we're well beyond all that. Everything that's going to be attached by the plaintiff is already there and everything that is going to be presented by the plaintiff has already been presented.

So I think I can read these to see if there is defamation as a matter of law. So I'm going to go

ahead and read the article, and then when I'm done I guess I'll hear argument as to whether or not they are indeed defamatory.

Trial Tr. at 1909:16-1910:6 (emphasis added).

Furthermore, as the Court already noted, the standard on a motion to dismiss is not materially different than that argued for by Plaintiffs at the Directed Verdict Stage. The standard for a motion to dismiss for failure to state a cause of action is that "the court must accept the facts alleged therein as true and all inferences that reasonably can be drawn from those facts must be drawn in favor of the pleader." *Schneiderman v. Baer*, 334 So. 3d 326, 330 (Fla. 4th DCA 2022) (quotation omitted). Thus, under the motion to dismiss stage, a plaintiff would be given the benefit of the doubt as to the interpretation of the evidence, and Plaintiffs' argument that *Skupin* was decided at the motion to dismiss stage has no merit.

There is no merit to Plaintiffs' argument that the Court did not interpret the statements allegedly sued upon in the light most favorable to Plaintiff. As set forth above, the Court considered both the words in quotations and the entirety of Plaintiffs' Trial Exhibit 39 and all possible contexts based on the evidence presented at trial in the light most favorable to Plaintiffs. Under all possible scenarios, the Court found that the words were not defamatory. Furthermore, the Court specifically noted that it was deciding Defendants' Motion for Directed Verdict based on the standard of light most favorable to Plaintiffs when the Court initially began considering Defendants' Motion for Directed Verdict:

THE COURT: But again, I think in the light most favorable -- even if I read it, you know, and let's say that I were to agree with you, wouldn't that still go to the jury? Because the jury could read it and come to a different conclusion. And so perhaps, you know, there's a rational jury out there that could rule for the nonmoving party?

Trial Tr. 1905:23-1906:4 (emphasis added).

Accordingly, the arguments set forth in Plaintiffs' Motion for New Trial as to Count 9 are DENIED.

As to: 2. FOR NEW TRIAL AND/OR REHEARING AS TO COUNT 3 (BREACH OF EXCLUSIVE DISTRIBUTROSHIPS IN CHINA AND THAILAND) IS DENIED

On Plaintiffs' Motion for New Trial as to Plaintiff SEI's Count 3, the Court granted Directed Verdict as to this Count. Directed Verdict was proper at the time this Court made its decision during trial, was proper in response to Plaintiffs' written response, and upon reconsideration, for a third time, the Court now affirms its decision and **DENIES** Plaintiff SEI a new trial as to Count 3 for the reasons specified below.

On May 25, 2023, Plaintiffs filed their written response to Defendants' Directed Verdict Motion (and incorporated motion for reconsideration) as to Count 3 (D.E. 826), which the Court already considered and denied (D.E. 831). There was no improper shifting of the burden of proof from Defendants to Plaintiffs as Plaintiffs themselves admitted Defendants' defense of prior breach.

This Court already considered and rejected Plaintiffs' arguments as to Count 3. The Court now does so for the third time.

Again, this Court finds that the evidence, viewed in the light most favorable to Plaintiff SEI (and with reasonable inferences in Plaintiff SEI's favor), that a jury could not reasonably differ as to the existence of a material fact in connection with Plaintiff SEI's Count 3, at least, because Plaintiffs established Defendant MACC's affirmative defense of prior breach and, as such, Defendant MACC was entitled to a directed verdict.

PLAINTIFFS PRIOR BREACH

Plaintiffs themselves undisputedly established Defendants' affirmative defense to the claim (Plaintiffs' prior breach of the contract) which further supports this Court's ruling in entering directed verdict in favor of Defendants as to Count 3.

The contract at issue in Plaintiff SEI's Count 3 is allegedly contained in Plaintiffs' Trial Exhibit 74. Trial Tr. at 923:18-924:6. No reasonable jury could have found for Plaintiff SEI because the Plaintiffs provided clear evidence of their prior breach of provision A(3) of the Distributorship Agreement by failing to export chassis 32 to Thailand or China 18 weeks after it had been completed:

You see in paragraph C, term 1, where it says "SEI will forfeit its exclusive distribution rights in China and Thailand immediately upon failure to perform any of terms 2 through 6 in paragraph A, provided that MACC has fulfilled its obligation to supply vehicles as described in paragraph B," correct?
A Yes.
Q Okay. So let's go back to paragraph A. Now paragraph A, term 2, refers to chassis 32. That's the RaptorGTR car at issue in this case, correct?
A Yes, it is.
Q Paragraph A-3 says that "C32 must be exported to Thailand or China within 18 weeks after C32 has been completed by MACC," correct?
A Yes, it says that.
Q The RaptorGTR was never exported to Thailand or China, correct?
A That is correct.

Trial Tr. at 1660:6-16.

It was based on Plaintiffs' undisputed testimony that Plaintiff SEI failed to comply with the Distributorship Agreement that the Court then granted directed verdict as to Count 3:

But what is really well written, I think, is paragraph A(3). It says chassis 32 must be exported to Thailand or China within 18 weeks after chassis 32 has been completed by MACC, period. There's an expected completion date, but that's a very simple, singular clause. This must happen within this time frame, and that did not happen.
All right. Your motion is granted as to Count III.

Trial Tr. at 1879:5-13.

The circumstances under which a defendant's affirmative defense may be proven during the plaintiff's case in chief is alluded to by *Custer Med. Ctr. V. United Auto. Ins. Co.*, 62 So. 3d 1086, 1097–98 (Fla. 2010). Where "the evidence as a whole with all reasonable deductions to be drawn therefrom points to only one possible conclusion, the trial judge is [] warranted in withdrawing the case from the jury and substituting her own evaluation of the weight of the evidence." *Id* at 1098.

Other appellate courts have also explicitly found that a plaintiff may prove a defendant's affirmative defense in its case in chief. For instance, in *Cooksey v. Wachovia Bank, N.A.*, 2006-UP-399, 2006 WL 7286908, at *2 (S.C. Ct. App. Dec. 7, 2006), the court stated that "a directed verdict may be granted based on an affirmative defense at the conclusion of the plaintiff's case without requiring the defendant to prove the defenses through its case-in-chief." *Id*. Thus, even if the Court's directed verdict was based solely on Plaintiffs' establishing MACC's prior breach affirmative defense during their case in chief, a directed verdict is proper where a plaintiff proves the merit of a defendant's affirmative defense during the plaintiff's case in chief. *See Metro. Dade Cnty. V. Lopez*, 889 So. 2d 146, 148 (Fla. 3d DCA 2004) ("Thus, as in *Meyers* and *Braude*, defendants were entitled to judgment at end of plaintiff's case, it having been pleaded affirmatively and proven that notice was not given.") (emphasis added). As such, this Court did not shift the burden of proof of disproving Defendants' affirmative defense to the Plaintiff SEI.

Plaintiffs established Defendants' affirmative defense to the claim in their case in chief, and due to the established prior breach, Plaintiff SEI also thereby forfeited its exclusive distribution rights:

> …the second page of the
> contract itself which says -- which deals with

forfeit and it says, forfeit of exclusive distribution rights. SEI will forfeit its exclusive distribution rights in China and Thailand immediately upon failure to perform any of terms 2 through 6 in Paragraph A, but then it says, provided that MACC has fulfilled its obligation to supply vehicles as described in Paragraph B.

Trial Tr. at 9:16-25.

PLAINTIFFS FUTILITY ARGUMENT

Plaintiff SEI states that it presented "ample evidence that any attempt to purchase vehicles was futile" yet Plaintiffs did not cite to any evidence from trial in support. The Court already considered Plaintiffs' futility argument in Plaintiffs' written response (D.E. 826 at 4-7) and, as before, Plaintiffs' argument fails.

Plaintiff SEI has failed to present any evidence that Defendant MACC was incapable of producing vehicles to meet its contractual requirement with Plaintiff SEI. What Plaintiff SEI really attempts to argue is that the Distributorship Agreement had a condition precedent that required Defendant MACC to have a car or cars available in inventory at MACC, and that MACC should have provided proof to Plaintiff SEI of the available inventory in order for Plaintiff SEI to purchase the vehicles that were required to be purchased under the agreement.

There is no such agreement nor any verbiage in the Distributorship Agreement, and the agreement is clear on its face, and contains no such terms that could be considered ambiguous in which the Court would have to interpret.

Not only does the agreement not provide Plaintiffs' assertion as a condition, and the terms of the agreement are unambiguous, but Plaintiff SEI through counsel stated during on September 14, 2023 that Defendant MACC in fact had an inventory of "finished vehicles" at the time in which Plaintiff Wagner was trying to purchase MACC:

considered at the time was the testimony of Mr. Wagner, which is unrefuted, again, that during the time period in question, Mr. Wagner was trying to purchase the company and the company itself had assets of finished vehicles. **He was trying to purchase the assets of the company including finished vehicles which would have satisfied the requirements of the contract.**

September 14, 2023 Hearing Tr. at 10:9-16 (emphasis added).

Therefore, if Plaintiff SEI wanted to purchase individual vehicles, such vehicles were available, but as set forth above, Plaintiff SEI never did because Plaintiff SEI received all the vehicles that Plaintiff SEI ordered. Thus, Plaintiff SEI fails to meet the elements of any possible anticipatory breach.

The Court also previously considered Plaintiffs' argument as to Plaintiffs' Trial Exhibit 23 in support of its newly alleged argument that Defendant MACC anticipatorily breached the exclusive Distributorship Agreement (*see* D.E. 826 at 2). The Court is aware of the necessary elements for an anticipatory breach of a contract.

The Court denies Plaintiffs leave to amend after trial and finds that any amendment would be futile because there was no anticipatory breach by Defendants. Plaintiffs' citation to Plaintiffs' Trial Exhibit 23 by simply citing to the portion of the email that states, " ...and be advised that MACC will not sell to you" must be taken in complete context.

Plaintiff SEI intentionally cites to only this portion of the email to make it seem as if Defendant MACC did not want to sell vehicles to Plaintiff SEI, and therefore that Defendant MACC breached the Distributorship Agreement. However, a review of the totality of the document, Exhibit 23, clearly shows, and no reasonable jury could find to the contrary, that Plaintiff Wagner was attempting to purchase a *custom piece of side-glass for a vehicle already sold to Plaintiff SEI*, not a vehicle. *See* Plaintiffs' Trial Exhibit 23.

Plaintiffs' assertion that a jury could infer that because Defendant Mosler could not sell the piece of custom side-glass, Defendants would refuse to sell an entire vehicle, does not establish their point and cannot defeat a motion for directed verdict. *Ryan v. Landsource Holdings Co., LLC*, 127 So.3d 764, 768.

Defendants clearly were not saying they refused to sell Plaintiffs any Mosler *vehicles*; instead, Defendant MACC was not able to sell a custom *part* to Plaintiffs for a vehicle Plaintiff SEI had already purchased. *See*, Plaintiffs' Trial Exhibit 23. Plaintiffs' argument thus require the court to draw an inference from the record that the court specifically does not find.

Furthermore, there are no facts in evidence showing that, had Plaintiffs attempted to purchase any Mosler vehicle, Defendants would have refused to sell. Plaintiffs' allegation that they were excused from purchasing cars under the Distributorship Agreement due to "futility" is without merit.

As to the requested amendment, Plaintiffs' request to amend their pleadings pursuant to Fla. R. Civ. P. 1.190, – three months after trial – on a case that was eleven years old – after six amendments to the complaint - to allege that any attempt to purchase vehicles was futile because there is no evidence that MACC anticipatorily repudiated the Distributorship Agreement. Florida's Rule of Civil Procedure 1.190 provides that:

> When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment, but failure so to amend shall not affect the result of the trial of these issues.
>
> Fla. R. Civ. P. 1.190(b).

But "'[a]n issue that has not been framed by the pleadings, noticed for hearing, or litigated by the parties' is not an appropriate matter for a trial court's determination." *Boca Golf View, Ltd. v. Hughes Hall, Inc.*, 843 So. 2d 992, 993 (Fla. 4th DCA 2003)(citing *Gordon v. Gordon*, 543 So.2d 428, 429 (Fla. 2d DCA 1989)). It is clear from this Court's review of the pleadings, and the record as evidenced by the operative *"sixth amended"* complaint (D.E. 491), the issues of anticipatory repudiation and futility were never framed by the pleadings, nor were they ever noticed for hearing.

Further, Plaintiffs fail to cite to any evidence that shows such issues were tried by consent. Plaintiffs rely on Plaintiffs' Trial Exhibit 23 as evidence that their newly manufactured claim of futility due to anticipatory repudiation was tried by consent. However, the trial record shows that Plaintiffs introduced Plaintiffs' Trial Exhibit 23 as evidence of whether the vehicle was sold with a warranty in furtherance of a separate breach of warranty claim (for which the Court also rendered a Directed Verdict in favor of Defendants).

Plaintiffs did not argue that they were intending to frame a cause for futility or anticipatory repudiation in the context of the Distributorship Agreement, which is the only contract at issue in Count 3. *See* Trial Tr. at 408:20-412:25.

Therefore, as Plaintiffs never moved to amend the pleadings to include the additional argument and, as the evidence supporting the additional argument was argued for another claim, Plaintiffs must be barred from arguing that the issue has been tried by consent.

Ultimately, the key test of determining "'whether an issue has been tried by implied consent is whether the party opposing introduction of the issue into the case would be unfairly prejudiced thereby.'" *Fed. Home Loan Mortg. Corp. v. Beekman*, 174 So. 3d 472, 475 (Fla. 4th DCA 2015). This case has already been tried by a jury and because these issues were never framed by the

pleadings, noticed for hearing, nor tried by consent, allowing Plaintiffs to amend at this juncture would be unduly prejudicial to Defendants. Among other things, Defendants would be prejudiced due to the lack of notice of any such claim.

Plaintiffs' argument of futility is also meritless because "[u]nder the doctrine of futility, a party may be excused from performing a condition precedent to enforcement of the contract, if performance of the condition would be futile." *Allegro at Boynton Beach, L.L.C. v. Pearson*, 287 So. 3d 592, 600 (Fla. 4th DCA 2019). There was no evidence at the trial in this case that would support any claim for futility or anticipatory repudiation. Plaintiffs' assertion that "any attempt to purchase vehicles was futile" is evidence itself that no such attempts were made. D.E. 834/835 at ¶ 23. Thus, there could have been no breach by Defendant MACC for refusing to sell when Plaintiffs never attempted to purchase.

The record is clear that every vehicle that Plaintiff ordered and paid for was in fact built and delivered to Plaintiff. Trial Tr. at 1629:16-25. Plaintiffs provided no evidence of any other actual attempt to purchase one of Defendant MACC's vehicles that was actually refused or otherwise unfulfilled.

Additionally, Plaintiffs Motion alleges that SEI attempted to purchase three vehicles in inventory as part of an alleged $1,000,000 purchase agreement to purchase *all* of MACC's assets, but that those three vehicles in inventory were then later sold off. This argument fails because Plaintiffs do not cite to any testimony or evidence that Plaintiff SEI sought to purchase three vehicles under the Distributorship Agreement, which is the only relevant agreement for the claim.

Considering that this Court is entertaining this same argument for the third time, Plaintiffs have had three (3) opportunities to present testimony and evidence to support their argument, yet they have failed to do so. Plaintiffs make a conclusory statement that "there was ample trial

testimony" that Plaintiffs sought to purchase 3 vehicles as part of the $1,000,000 purchase agreement, D.E. 834/835at ¶ 26, but do not cite to any of the alleged ample trial testimony. Nor do Plaintiffs cite to any testimony or evidence that Plaintiff SEI sought to purchase any such vehicles under the Distributorship Agreement that is the sole contract at issue in Count 3. As such this failure to cite to any testimony or evidence is fatal to their argument. This argument was also already heard and considered by this Court, D.E. 826 at 5-7., the Court affirms its prior decision and finds that Plaintiffs' argument is without merit. D.E. 831.

Furthermore, Defendant Warren Mosler's testimony at trial that he was unsure if he could build another *Photon* is completely irrelevant to Plaintiffs' argument. D.E. 834/835 at ¶ 33. This argument was already made in Plaintiffs' written response (D.E. 826 at 5), and considered by the Court, along with Plaintiffs' other arguments, and this argument also fails.

There is no evidence that Plaintiffs were seeking to purchase Photons from Defendant MACC, and Defendant Warren Mosler's testimony at trial does not show that had Plaintiffs ordered and paid for other vehicles that Defendant MACC would have been unable to supply them. In fact, as Plaintiffs admit, Defendant Warren Mosler testified that if a customer wanted a Photon, then Mosler "would have either talked him out of it or *figure out how to do that before the end of the year*," D.E. 834/835 at ¶ 33 (emphasis added), leaving open the possibility that such a vehicle could have been manufactured and sold to the customer. Such a statement does not support that MACC was incapable of building 3 cars per year, and cannot constitute an anticipatory repudiation or futility because any such statement is not "distinct, unequivocal, and absolute," as is required. *24 Hr Air Serv., Inc. v. Hosanna Cmty. Baptist Church, Inc.*, 322 So. 3d 709, 712 (Fla. 3d DCA 2021).

Moreover, none of Plaintiffs' other anticipatory repudiation arguments – which are also not alleged in any claim or defense – are supported by evidence at trial. The statement "We're not building a vehicle," in Plaintiffs' Trial Exhibit 75, does not in any way show a "distinct, unequivocal, and absolute" intent not to perform as Plaintiffs assert. The Court has already heard and considered this argument previously in Plaintiffs' written response (D.E. 826 at 3). Instead, it is a statement as to the current state of production, as it is undisputed that Plaintiffs had not paid any vehicles other than the one that Plaintiffs received.

Furthermore, the evidence at trial does not support Plaintiffs' newly manufactured argument about futility. Plaintiff Wagner in fact testified that when he read the articles, he believed that the authors were making it up and that he did not take them to be a distinct, unequivocal, and absolute intent not to perform:

> When all of this stuff was happening, I had no idea what was going on. I actually thought these journalists were making it up and I actually was, like, really angry with them. I was like "Gosh, what are you talking about? There's no way. There's no way." I mean, it just seems so improbable that the owner of the company finally had a product that could be profitable, like mega profitable and he just -- it just -- it was so far beyond the realm of possibility, I thought the journalists were making it up. That was my conclusion.

Trial Tr. at 1154:3-12.

Thus, Plaintiffs' argument that the publishing of these articles caused him to believe the contract had been repudiated is refuted by Plaintiffs' own testimony and so must fail.

Finally, not only is the basis under which Plaintiffs request to amend their pleadings improper, but it is highly prejudicial because Defendants have been caught by surprise by such request to amend the pleadings and Defendants did not have the opportunity of cross-examination on this Exhibit on the issue of futility.

Even if Plaintiffs had moved to amend before the discharge of the jury, Plaintiffs' request to amend the pleadings to conform to the evidence would have been denied for all the reasons set forth above.

THE PLAIN TEXT OF THE DISTRIBUTORSHIP AGREEMENT

This Court already considered and rejected Plaintiffs' next argument regarding the plain text of the Distributorship Agreement (D.E. 826 at 1-2, 4; D.E. 831). Contrary to Plaintiffs' argument, the plain text of the Distributorship Agreement does not contain language that if Defendant MACC doesn't provide vehicles for SEI to purchase, then SEI cannot lose its exclusivity.

Moreover, there is no evidence that Defendant MACC ever failed to provide a vehicle. Plaintiff Wagner, owner of Plaintiff SEI, testified during trial that it received every car it paid for, and as such there is no evidence that Plaintiff SEI did not receive a vehicle that it paid for:

Q After SEI signed this document, the only car that SEI purchased from MACC was the RaptorGTR, right?
A That is correct. None else were available for purchase.
Q SEI only purchased that one vehicle, correct?
A Yes.
Q Let's go to paragraph A-6, which states "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," correct?
A Yes.
Q And again, the only vehicle that SEI paid for in full from MACC was the RaptorGTR, correct?
A Yes. The 2012 Mosler RaptorGTR.

Trial Tr, at 1662:8-21.

Plaintiffs quote paragraph C-1 of the Distributorship which 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' Trial Exhibit 74. Plaintiffs rely on this statement arguing that it was clear in the evidence at trial that Defendant MACC would not sell to Plaintiff SEI.

The Court already considered this argument as well (D.E. 826 at 2; D.E. 831), and there was no testimony or evidence presented at trial that Defendant MACC would not have sold vehicles to Plaintiff SEI, and the record does not show that Plaintiffs' filed a Reply to Defendants' Affirmative Defenses asserting any such claim or defense.

There is also no evidence in the record that shows that Plaintiffs sought to purchase just three (3) vehicles for $1,000,000.00 as they continue to repeatedly assert. As already considered and rejected by this Court (D.E 826 at 5-7; D.E. 831), the Court now affirms its ruling that the evidence and record are clear that the offer of $1,000,000.00 was for the purchase of the entirety of Defendant MACC and that the $100,000.00 purchase deposit was for the purchase of the business (Defendant MACC), not for the purchase of any vehicles from MACC under the Distributorship Agreement.

There is a difference between buying a business and its inventory and buying vehicles under the Distributorship Agreement. As such, this argument is also without merit and fails.

PLAINTIFFS ARGUMENT OF FORCED ANITICIPATORY BREACH

Plaintiffs allege that based on the Plaintiffs' case in chief, a reasonable jury could have found that Defendants Warren Mosler and Defendant MACC "attempted to force default and anticipatorily breached the agreement (and thereby made Plaintiff SEl's obligation to purchase – or even attempt to purchase cars – during the time period in question a futile gesture) by stripping MACC of assets and resources, instructing MACC employees to not build vehicles, and very clearly refusing to sell anything to MACC."

As noted above, this argument of Plaintiffs has already been heard by this Court and the Court affirms its ruling that it is baseless as there was no evidence presented by Plaintiffs of the stripping of any assets.

This argument was already addressed above, and Plaintiffs again attempt to allege that Defendant Warren Mosler could not build one vehicle for Olaffson, and therefore, could not build 3 for SEI. As noted above, and already having been considered by this Court previously, this argument is without merit.

First, this testimony is in connection with the building of a Photon, not a RaptorGTR; Second, Defendant Warren Mosler had a Photon available, but it was not available for sale to Mr. Olaffson; and finally Defendant Warren Mosler informed Mr. Olaffson that he could build him one. Trial Tr. at 757:22-759:6.

PLAINTIFFS RELIANCE ON INTERVIEW TO ESTABLISH FUTILITY

Another argument that has also already been heard and considered is Plaintiffs' attempt to rely on an interview by Jalopnik with Defendant Mosler (Plaintiffs' Trial Exhibit 75) which was published on November 21, 2011. See D.E. 826 at 3.

Plaintiffs specifically rely on Defendant Warren Mosler allegedly stating to the journalist, Matt Hardigree, "We're not building a vehicle," in support that this is another basis by which the jury could have concluded that MACC had anticipatorily breached and made any demand for cars futile. However, again, this argument was already address above. There was no vehicle that was paid for by Plaintiff SEI that was not provided and delivered by Defendant MACC to Plaintiff SEI because the agreement itself states that the vehicles had to be paid for *before* MACC provided them to the Plaintiff. Plainitffs' Trial Exhibit 74, Term 6 ¶A ("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 ARGUMENT THAT MOSLER DRAFTED THE AGREEMENT

Plaintiffs argue that the verbiage of the agreement should not be held against Plaintiff SEI since Plaintiff Wagner's testimony presented to the jury was allegedly that Defendant Warren Mosler was co-scrivener on the Distributorship Agreement. This argument was also already considered and rejected. D.E. 826 at 4; D.E. 831.

This Court did not construe the Distributorship Agreement's language against Plaintiff Wagner or Plaintiff SEI. A reading of the plain language, without reference to any rule of construction, showed that the Plaintiffs proved Defendants affirmative defense of prior breach. Trial Tr. at 1879:6-11 ("It says chassis 32 must be exported to Thailand or China within 18 weeks after chassis 32 has been completed by MACC, period. There's an expected completion date, but that's a very simple, singular clause. This must happen within this time frame, and that did not happen.")

As set forth above, the Distributorship Agreement required Plaintiff SEI to order and pay for a vehicle *first before* Defendant Mosler could provide a vehicle and deliver it (Plaintiffs' Trial Exhibit 74, Term 6 ¶ A), there is no evidence that Defendant MACC was required to hold vehicles in inventory until ordered for and paid by Plaintiff, and there is no evidence that Defendant MACC could not have produced a vehicle in response to Plaintiff SEI paying and ordering it. Therefore, Plaintiff SEI's argument that Defendant MACC had no cars available is baseless.

Plaintiffs argue that there was ample evidence that indicated prior breach by Defendant MACC and that Defendant Mosler attempted to force Plaintiff SEI's default. However, all

Plaintiffs' arguments are essentially a reframing of Plaintiffs' above anticipatory breach/repudiation and futility arguments, which the Court has already addressed above, nor did Plaintiffs ever file any Reply asserting a prior breach affirmative defense. By Plaintiffs' paragraph 14, Plaintiffs are again referring to the articles addressed above and to Plaintiffs' Trial Exhibit 23. The Court already addressed these arguments above and found that the evidence presented in Plaintiffs' case in chief established that directed verdict was proper.

This Court already considered the evidence viewed in the light most favorable to Plaintiffs during trial and in response to Plaintiffs' written response, and rejected Plaintiffs' arguments. The Court, viewing the evidence and arguments presented by Plaintiffs for a third time, denies Plaintiffs' motion and finds that the Court properly entered a directed verdict in favor of Defendant MACC as to Count 3.

Therefore, for all the foregoing reasons, and for the third time, the Court finds that directed verdict against Plaintiff SEI as to Count 3 was proper.

II. As to: [D.E. 838] PLAINTIFF'S MOTION TO HONOR INTENT OF THE JURY ON COUNT D AND STRIKE AFFIRMATIVE DEFENSE IN PARAGRAPH 23(B) IS DENIED

After the discharge of the jury, and after the Court granted Defendants' motion for judgment notwithstanding the verdict ("**JNOV**") as to Count D, Plaintiffs moved for an order striking the prior breach affirmative defense to Count D found at paragraph 23.b. of the Verdict Form: "James Todd Wagner sought return of the $100,000.00 before MACC assets were sold to another," and to "award the jury's award of $150,000.00." D.E. 825 ¶ 23(b)

THE VERDICT FORM

Plaintiffs' asserts a belief that the prior breach affirmative defense had been stricken, that Defendants' allegedly controlled the verdict form, that Defendants allegedly gave Plaintiffs the verdict form on Day 12 when the jury had already allegedly been waiting for one hour, and that Defendants allegedly gave the prior breach affirmative defense as scrivener to force Plaintiff Wagner to lose Count D.

The Court finds that Plaintiffs' arguments are without merit. The trial transcript undisputedly shows that Plaintiffs agreed to inclusion of the prior breach affirmative defense in the jury instructions at trial, Trial Tr. at 2386:6-2387:9,

Plaintiffs' instant motion lack context because the motion omitted the portion of the trial transcript where Plaintiffs' counsel informed the Court that the parties agreed to include the prior breach defense. Trial Tr. at 2386:6-2387:10.

Also, Plaintiffs' motion asserts the Defendants had control of the verdict form, D.E. 838 at ¶ 2, but it is also important to remember Plaintiffs had the chance to show their disagreement both in red line, and orally: Trial Tr. at 2370:2-10, 2373:13-2437:19.

Also, the prior breach defense was read aloud by the Court prior to jury deliberations when the Court read the jury instructions: Trial Tr. 1474:21-2475:7.

Finally, Plaintiffs expressly consented to and requested that the Court not read the verdict form to the jury, and instead, Plaintiffs' counsel sought to read the verdict form to the jury during his closing – which verdict form included the prior breach defense. Trial Tr. at 2451:8-17.

If Plaintiffs believed that the affirmative defense had been stricken, it would not have made sense for Plaintiffs to approve the verdict form, yet Plaintiffs did approve the verdict form.

Plaintiffs admit that they did not object to the form of the verdict. Also, Plaintiffs knew about this affirmative defense for over three years, as again this case was filed eleven years prior; this affirmative defense is in Defendants Answer and Affirmative Defenses filed in 2020. D.E. 583. Thus, Plaintiffs had plenty of time to review this affirmative defense. To say there was a "rush" is without merit.

Furthermore, there are multiple issues with Plaintiffs assertion that "the 'affirmative Defense' is not an actual 'Affirmative Defense' at all." As set forth below, it cannot be reasonably disputed that prior breach is an affirmative defense. Plaintiffs have never objected to this affirmative defense, nor did Plaintiffs ever move to strike this affirmative defense, which they would have had to do within 20 days of the Answer being filed, making the deadline to strike the affirmative defense July 2nd of 2020. *See* Fla. R. Civ. P. 1.140(b). The time has passed for Plaintiffs to move to strike this affirmative defense. *Id*.

Furthermore, Plaintiffs cite no contradictory facts and give no support and no basis for their argument that prior breach is not an actual affirmative defense.

The Court DENIES Plaintiffs' motion.

Findings of Fact and Conclusions of Law

PLAITIFFS INCONSISTENT VERDICT ARGUMENT

Coba v. Tricam Industries, Inc., 164 So.3d 637 (Fla. 2015)

Plaintiffs' motion is untimely and seeks to strike an affirmative defense and seeks an untimely reconsideration of the jury's verdict because Plaintiffs never filed a motion to strike the affirmative defense and never objected to the verdict *before the discharge of the jury*. The Court rejects all the arguments set forth in Plaintiffs' motion and as set forth below, Plaintiffs waived any objections to the verdict by not objecting prior to the discharge of the jury.

Plaintiffs have now pivoted their arguments such that they now argue that the verdict as to count D was inconsistent and that *Defendants* waived any objection to it. This argument appears nowhere in the motion, but such an argument does not save Plaintiffs' motion. D.E. 838.

Coba v. Tricam Industries, Inc., 164 So.3d 637 (Fla. 2015) states that an "inconsistent verdict is defined as when two definite findings of fact material to the judgment are mutually exclusive." As set forth below, there is no inconsistent verdict and Defendants did not waive any arguments.

DEFENDANTS JNOV MOTION

Defendants have not argued that the verdict is inconsistent; following the verdict as to Count D, Defendants moved for JNOV, and the Court granted Defendants' JNOV motion because the jury found the existence of Defendants' affirmative defense.

There is no inconsistency in the jury's verdict because the jury erroneously assessed or indicated an award of damages based on a clerical error of continuing through the verdict form (contrary to the instructions on the jury form at D.E. 825: "If your answer to any of the above questions is "yes," then your verdict is for Warren Mosler on James Todd Wagner's breach of contract claim as to the $100,000 deposit. You should then proceed to question 26 and skip the

intervening questions") even after the jury found the existence of the prior breach affirmative defense, which this Court already found:

> THE COURT: So I don't see an inconsistency here. What I do see is, at the bottom of 23G, it says if you answer to any of the above -- if your answer to any of the above is "Yes," then your verdict -- hold on -- then your verdict is for Warren Mosler on James Todd Wagner's breach of contract claim as to the $100,000 deposit, and you should proceed to question 26. And what they did is they probably read that after, or they didn't read that carefully, but they should have proceeded to question 26.

Trial Tr. 2626:7-17.

Not only can the Court can correct verdicts where there are clerical errors in rendering the verdict, but here JNOV was appropriate given that the jury correctly found the existence of the prior breach affirmative defense. *Alvarez v. Rendon*, 953 So. 2d 702, 711 (Fla. 5th DCA 2007).

Here, after the verdict, Defendants moved for JNOV on several claims. Trial Tr. at 2618:12. Defendants motion as to Count D (Trial Tr. at 2626:20-21) and Count E (Trial Tt. at 2627:14) was granted.

There is no finding by the jury on the verdict form that is inconsistent with the jury's finding of the prior breach affirmative defense, and therefore Defendants are entitled to a judgment in their favor. Plaintiffs argue that, "pursuant to Coba," Defendants waived the right to argue against a monetary award at paragraph 25 of the verdict form. However, Plaintiffs' argument would apply only if the verdict is inconsistent, and Defendants are not arguing that the verdict is inconsistent, as noted above.

Based on the jury finding the existence of the prior breach affirmative defense, Defendant Warren Mosier was entitled to a judgment in his favor, which the Court already rendered in

response to Defendants' motion for JNOV. *See, e.g.,* Trial Tr. 2626:20-21.

For Plaintiff to prevail, it would require the Court to disregard the jury's findings of fact on the existence of the affirmative defense, which it does not. The Jury's verdict on the affirmative defense is clear.

Plaintiffs' argument that prior breach is not an affirmative defense is without merit. Prior breach is an affirmative defense. *See, e.g., Bradley v. Health Coal., Inc.*, 687 So. 2d 329, 333 (Fla. 3d DCA 1997); *Richland Towers, Inc. v. Denton*, 139 So. 3d 318, 321 (Fla. 2d DCA 2014).

Furthermore, the Court already decided at trial that the affirmative defense was the law of this case as instructed in accordance with the jury instructions. Trial Tr. at 2624:3-10.

Additionally, it cannot be disputed that the affirmative defense is supported because Plaintiff Wagner sought the return of the $100,000.00 deposit prior to the sale of Defendant MACC's assets to another in 2013, accordingly JNOV was appropriate. *See, e.g.,* Trial Tr. 238:21-239:1, 1614:1-1615:5, 1716:10-16, 2186:3-2189:21 2552:3-14; Defendants' Trial Exhibit 95, 96.

The verdict form represented the jury's findings of fact that the Plaintiff sought return of $100,000.00 before MACC assets were sold to another and thus Plaintiff breached the agreement first, and that view is supported by competent substantial evidence. Thus, as a matter of law, the Court properly granted Defendants' motion for JNOV as to Count D.

Therefore, for all the foregoing reasons, the Court **DENIES** Plaintiffs' motion.

III. [D.E. 837] PLAINTIFFS' MOTION TO STRIKE CONTRACT-BASED PREEMPTIVE BREACH AFFIRMATIVE DEFENSE FROM NO-CONTRACT COUNT E, UNJUST ENRICHMENT IS DENIED

As it relates to Plaintiff's claim unjust enrichment in Count E, which Plaintiff plead in the alternative to his claim for breach of contract in Count D, Plaintiffs' motion seeks an order striking the affirmative defense found at paragraph 29.b. of the Verdict Form: "James Todd Wagner sought return of the $100,000.00 before MACC assets were sold to another," to honor "the clear intent of the jury."

Plaintiffs filed this motion after the jury entered its verdict, after the discharge of the jury, and after the Court already granted JNOV as to this Count E (based on unjust enrichment) due to the existence of a contract.

Again, Plaintiffs' motion argued that the affirmative defense was only included on the verdict form due to an oversight and that any ambiguity as to the verdict form should be construed in favor of Plaintiffs because Plaintiffs allege that Defendants were the scrivener of the jury instructions and verdict form. The Court finds that Plaintiffs' argument is frivolous because it would only apply if there was an ambiguity in the verdict form or jury instructions and, in this case, there is no ambiguity in the verdict form or jury instructions.

Plaintiffs' argument is meritless because Plaintiffs and Defendants co-drafted the verdict form and jury instructions, and went through them with the Court. *See, e.g.,* Trial Tr. at 2208:10-2217:15, 2374:14-2439:20, 2447:15-2454:1. Therefore, Plaintiffs were scriveners themselves.

Finally, the Court explicitly confirmed, aloud in court, the affirmative defenses that would be included in response to Count E, including the subject of the 29(b) affirmative defense, and Plaintiffs had no objection to it:

> Warren Mosler denies James Todd Wagner's claim and Warren Mosler asserts defenses in response. Warren Mosler asserts that the $100,000 was a

20 nonrefundable deposit, **that Wagner sought the**
21 return -- sought return of the $100,000 before
22 MACC's assets were sold to another, that there was.

Trial Tr. at 2467:17-22.

The bold language above matches what is in the verdict form, which matches the 29(b) Defense, and what the jury found that Plaintiffs are now complaining about for Count E: "James Todd Wagner sought return of the $100,000.00 before MACC's assets were sold to another". Plaintiffs did not object to the jury instructions, or the verdict form. Again, to the contrary, Plaintiff actively participated in drafting.

Finally, Plaintiffs expressly consented to and requested that the Court not read the verdict form to the jury, and instead, Plaintiffs' counsel sought to read the verdict form to them during his closing – which verdict form included the 29(b) Defense. Trial Tr. at 2451:8-17. Accordingly, all Plaintiffs' arguments are meritless because the defense was approved by Plaintiffs and is the law of the case.

However, Plaintiffs' attempt to strike the jury's finding of an affirmative defense in Count E is truly entirely frivolous because the Court found that JNOV was proper on the entirety of Count E, not based on the affirmative defense, but given that the jury found the existence of a contract in Plaintiff Wagner's breach of contract claim (Count D), which is based on the same subject matter as Count E and plead in the alternative to Count E. D.E. 825 ¶ 18; s*ee Fulton v. Brancato*, 189 So. 3d 967, 969 (Fla. 4th DCA 2016) ("A plaintiff cannot pursue an equitable theory, such as unjust enrichment or quantum meruit, to prove entitlement to relief if an express contract exists."); *Abdullatif Jameel Hosp. v. Integrity Life Scis., LLC*, 2016 WL9526457, 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."); *see also Doral Collision Ctr., Inc. v. Daimler Tr.*, 341 So. 3d 424, 430 (Fla. 3rd DCA 2022).

Following the jury's discharge, Plaintiffs' counsel admitted that JNOV was appropriate because the Court granted JNOV as to Count E based on the Court's similar rulings with respect to Counts B and C. First, Plaintiffs' counsel admitted that Count B (SEI's claim for quantum meruit against MACC) cannot exist if the jury found that a contract existed in Count C. Trial Tr. 2620:18-19. Then, with respect to Count E (which is the subject of Plaintiffs' instant motion), Plaintiffs' counsel admitted that the Court should grant JNOV as to Count E given the jury's finding of a contract in Count D and to remain consistent with the Court's prior ruling and the law with respect to Counts B and C. Trial Tr. 2626:23-2627:14. Plaintiff Wagner's claim for unjust enrichment in Count E cannot exist because Count E is equitable claim plead in the alternative to the breach of contract claim in Count D and the jury found the existence of a contract in Count D.

As the Court noted during trial, to prevail on the claim for unjust enrichment in Count E, Wagner must have proven, among other things, that "there was no contract with Wagner to purchase MACC." Trial Tr. at 2467:22-23; *Agritrade, LP v. Quercia*, 253 So.3d 28, 35 (Fla.3d DCA 2017)("The court held that the trial court, following the jury verdict, should have granted the defendant and her agency's motions for a judgment notwithstanding the verdict ("JNOV") to relieve the defendant and her agency from damages as a result of the unjust enrichment claim "once the jury determined a finite amount of damages attributable for the buyers' agency's breach of contract").

Finally, Plaintiffs are judicially estopped from opposing the verdict in Defendants' favor on Count E given the jury's finding of a contract in Count D. In response to Defendants' Directed Verdict Motion, Plaintiffs previously argued that the entry of any verdict with respect to Counts D and E must wait until the jury renders verdicts, that Plaintiffs are entitled to a judgment on only

one of the things, and that Plaintiffs cannot get a double recovery on their legal and equitable claims:

> MR. ZAPPOLO: I don't want to interrupt your train of thought, Your Honor, but the case law is -- there's a lot of case law on this. I do this all the time. It's pled in the alternative. The jury renders their verdict and then you are only able to collect -- you only get a judgment on one of the things.

Trial Tr. 1862:19:25.

The doctrine of judicial estoppel is an equitable doctrine that is used to prevent litigants from taking totally inconsistent positions in separate or the same legal proceeding. *Ripple v. CBS Corporation*, 337 So.3d 45, 58 (Fla. 4th DCA 2022). Plaintiffs cannot now take an inconsistent position and oppose the JNOV with respect to Count E while also seeking a judgment for Count D, which was plead in the alternative.

The Court denies Plaintiffs' motion.

Findings of Fact and Conclusions of Law

Analysis of Coba v. Tricam Industries, Inc., 164 So.3d 637 (Fla. 2015)

The Court's analysis with respect to this claim is virtually identical to Plaintiffs' motion with respect to Count D above, except that, additionally, Plaintiffs' claim for unjust enrichment in Count E is barred as a matter of law due to the existence of a contract in Count D and Plaintiffs are judicially estopped from arguing otherwise. D.E. 825 at ¶ 18.

Plaintiffs' motion untimely seeks to strike Defendants' affirmative defense and seeks reconsideration of an inconsistent verdict, even though Plaintiffs never objected to the verdict *before the discharge of the jury* and the Court did not render a JNOV based on that affirmative defense.

As set forth above, in addition to the Court's granting JNOV as to Count E (rendering Plaintiffs' entire motion moot), Defendants are not arguing that the verdict is inconsistent. In addition to the affirmative defense' existence (which does not make the verdict inconsistent for the same reasons set forth in Count D above), Count E was properly dismissed pursuant to the Court's JNOV due to the existence of a contract and Plaintiffs are judicially estopped from arguing otherwise.

Shortly after the verdict, Defendants moved for a JNOV on several claims. Trial Tr. 2618:12-13. Defendants' motion for a JNOV as to Count D (Trial Tr. 2626:20-21) and Count E (Trial Tr. 2627:14) was granted.

The jury's finding of the affirmative defense in Count E does not make the verdict inconsistent, and nonetheless, Defendants are entitled to a judgment in their favor by a JNOV because a contract existed and Plaintiffs are judicially estopped from arguing otherwise. *See Alvarez v. Rendon*, 953 So. 2d 702, 712 (Fla. 5th DCA 2007).

Plaintiffs argue that, "pursuant to Coba," Defendants waived the right to argue against a monetary award at paragraph 31 of the verdict form. However, Defendants have no reason to raise such an argument, because Defendants do not argue that the verdict is inconsistent, as noted above there is no basis for Plaintiffs' argument that prior breach is not an affirmative defense. Prior breach is an affirmative defense. *See Bradley v. Health Coal., Inc.*, 687 So. 2d 329, 333 (Fla. 3d DCA 1997); *Richland Towers, Inc. v. Denton*, 139 So. 3d 318, 321 (Fla. 2d DCA 2014).

Also, as noted above, Plaintiffs cite no contradictory facts and give no support and no basis for their argument that the jury wrongly decided Count D or E or that the prior breach affirmative defense has no factual support.

As with the Count D, Plaintiff has previously made a different argument not that the verdict was inconsistent, but that the true intention of the jury was to award damages. D.E. 837 at ¶3. Plaintiffs' argument was waived because Plaintiffs argue that the intent of the jury requires not the correction of a clerical error, but instead for the Court to disregard the jury's findings of fact: the existence of Plaintiff Wagner's prior breach.

The verdict form represented the jury's agreement with Defendants in that Plaintiff Wagner sought return of the $100,000.00 before MACC assets were sold to another. Thus, as a matter of law, the verdict grants Defendants' affirmative defense as to Count D and Count E, which precludes an *award* of damages and Plaintiffs are judicially estopped from arguing otherwise.

The totality of the jury's findings do not contradict the jury's agreement with Defendants' affirmative defense. "An affirmative defense is a defense which admits the cause of action, but avoids liability, in whole or in part, by alleging an excuse, justification, or other matter negating or limiting liability." *State Farm Mut. Auto. Ins. Co. v. Curran*, 135 So. 3d 1071, 1079 (Fla. 2014) (internal quotations omitted). Even though the jury agreed with the cause of action, it also agreed with Defendants' affirmative defense that Wagner sought return of the $100,000.00 before MACC assets were sold to another, which means that Defendants are not liable, especially as to Count E because a claim for unjust enrichment cannot exist because the jury found that a contract exists.

Therefore, for all the foregoing reasons, the Court denies Plaintiffs' motion.

DONE and ORDERED at West Palm Beach, Palm Beach County, Florida

502012CA023358XXXXMB 05/06/2024
Luis Delgado
Circuit Judge