UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
FORT LAUDERDALE DIVISION

CASE NO. 20-61375-CIV-CANNON/Hunt

MARINE DIESEL REPAIRS, LLC,

Plaintiff,

v.

M/Y DREAM ON, in rem,
and **ALLURE II**, **LLC**, in personam,

Defendants,
_____/

ALLURE II, **LLC**,

Counter-Claimant,

v.

MARINE DIESEL REPAIRS, **LLC**,

Counter-Defendant,
_____/

POST-TRIAL FINDINGS OF FACT AND CONCLUSIONS OF LAW

THIS CAUSE comes before the Court upon Plaintiff Marine Diesel Repairs, LLC's Verified Complaint, filed on July 8, 2020 [ECF No. 1] and Defendant Allure II, LLC's Counterclaims, filed on August 2, 2021 [ECF No. 51]. The Court has carefully considered the Complaint, the Counterclaims, MDR's Post-Trial Findings of Fact and Conclusions of Law [ECF No. 131], Defendant's Post-Trial Findings of Fact and Conclusions of Law [ECF No. 132], and the evidence presented over the course of the four-day bench trial [ECF Nos. 113–114, 117–118] and a subsequent hearing for closing arguments [ECF No. 137]. Upon review of the extensive record, the Court issues the following factual findings and legal conclusions, ultimately

determining that neither party has prevailed on any of the claims asserted.

INTRODUCTION

On July 8, 2020, Plaintiff Marine Diesel Repairs, LLC ("MDR") initiated this action by filing a three-count Complaint against Defendant Allure II, LLC ("Allure") and its vessel Defendant M/Y Dream On [ECF No. 1]. MDR's Complaint asserts the following claims: Count I – Claim for Foreclosure of Maritime Necessaries Lien Against M/Y Dream On [ECF No. 1 ¶¶ 28–30]; Count II – Breach of Contract Against Allure II, LLC [ECF No. 1 ¶¶ 31–34]; and Count III – Unjust Enrichment Against Allure II, LLC [ECF No. 1 ¶¶ 35–39]. Allure responded by filing four counterclaims against MDR, asserting the following: Count I – Fraud in the Inducement [ECF No. 51 pp. 12–14]; Count II – Deceptive and Unfair Trade Practices [ECF No. 51 pp. 14–16]; Count III – Breach of Contract [ECF No. 51 pp. 16–17]; and Count IV – Breach of Express Warranty [ECF No. 51 pp. 17–18].

FINDINGS OF FACTS

The Court heard testimony from the following witnesses during the four-day bench trial [ECF Nos. 113, 114, 117, 118]:

1. Toby E. Phillips Jr. – Expert Witness Retained by MDR
2. Charles Bailey – Marine Diesel Mechanic at Florida Detroit Diesel Allison
3. Allan English – Engine Technician at Florida Detriot Diesel Allison
4. Adolfo Scarano – Engine Technician at Scarano Marine
5. Alain Valdez – Parts Manager and Record Keeper at Discount Diesel Truck Parts
6. Olafun Skulason – Owner/Operator of Ship Side Service
7. Johan Nel – Owner of Johan Engineering
8. Lazaro Albuerne – Owner of Atlantic Turbos

9. Leo Du Plessis – Owner of Magna Marine

10. Michael Tibbetts – Former Captain of the Vessel

11. Diosdany Castillo – Mechanic at Marine Diesel Repairs

12. Dean Chris-Anderson – Former Service and Repairs Technician at Marine Diesel Repairs

13. Carlos Pastrana – Engine Technician at Marine Diesel Repairs

14. Reinaldo Gonzalez – Mechanic at Marine Diesel Repairs

15. Phil DeSocarraz – Former Engine Technician at Scarano Marine and Marine Diesel Repairs

16. Rolando Jorge – Engine Technician at Marine Diesel Repairs

17. Daniel Wahr-Evans – Shop Foreman and Engine Technician at Marine Diesel Repairs

18. Joandi Castellanos – Engine Technician at Marine Diesel Repairs

19. Rachel Staddon – Former Captain of the Vessel

20. Andrew Lynsky – Owner of Datum Rotating Machinery Services

21. Morne Devilliers – Former Engineer on the Vessel

22. Janus Sendowski – Owner of Allure II and Vessel

23. Leonardo Avila – Owner of Marine Diesel Repairs

24. Rolando Santos – Expert Witness Retained by Defendant

The Court also admitted into evidence over 250 combined exhibits [ECF Nos. 119–20, 123–25].

After considering the testimony and evidence from the parties, the Court finds the following facts.

Repairs Prior to MDR's Involvement

1. On July 21, 2017, Allure II, LLC ("Allure") purchased a 2007 105-foot Leopard motor

yacht named "Dream On" (the "Vessel") for approximately $1 million [ECF No. 131 p. 1; ECF No. 132 p. 1; ECF No. 120-6; ECF No. 129 p. 147:1–4].

2. The Vessel came equipped with three MTU M92 16V 2000 common diesel engines [ECF No. 131 p. 2; ECF No. 129 p. 230: 2–3].

3. When Allure purchased the Vessel, it intended to make improvements to the Vessel and eventually sell it for a profit [ECF No. 129 pp. 194:25, 195:1].

4. Allure employed a professional crew to maintain the vessel. The crew included Captain Michael Tibbetts, Captain Rachel Staddon, and Engineer Morne De Villiers. Captain Tibbetts worked on the Vessel from about July 8, 2019, to August 8, 2019. Captain Staddon joined the Vessel right before Captain Tibbetts left and remained as the captain until October 2020. De Villiers worked on the Vessel for about a year, beginning in July 2019 [ECF No. 132 p. 1; ECF No. 127 p. 261: 20–25; ECF No. 128 pp. 235: 8–12, 237:8–19; ECF No. 129 pp. 128:24–25, 130: 16–18, 153:18–21].

5. On January 16, 2018, Allure hired Scarano Marine to fix problems with the vessel and to test the Vessel's fuel injectors [ECF No. 131 p. 3; ECF No. 119-32; ECF No. 128 p. 122:16–22].

6. Philip Desocarraz, a former engine technician with Scarano Marine, worked on the Vessel in 2018 and testified that the Vessel was in poor shape due to "exhaust leaks from the risers . . . cooling leaks . . . oil leaks [and] fuel in the bilge" [ECF No. 131 p. 3; ECF No. 128 pp. 122:24–25, 123:1–2, 135:4–25, 136:1–10]. Scarano's billing records from that time reference various repairs, including one reference to repairing a leak on a seal [ECF No. 125-9; ECF No. 125-10; ECF No. 125-11].

7. Scarano took a fuel injector "bench test" of the sixteen starboard engine injectors on

January 15, 2018, and sent them to Everglades Diesel Injection Service Inc.; the test revealed that five of the injectors were faulty and in need of immediate replacement; no other engines were tested at that time [ECF No. 131 p. 4; ECF No. 120–15; ECF No. 128 pp. 122:20, 126:4–14].

8. Scarano did not replace the faulty starboard engine injectors [ECF No. 131 p. 4; ECF No. 119-32 p. 1 (invoice showing work done by Scarano)].

9. On January 22, 2018, Scarano was brought back to the Vessel to fix damaged turbocharger hoses on the starboard engines [ECF No. 131 p. 4; ECF No. 119-32 p. 2].

10. The Vessel passed a safety inspection by the Cook Islands Shipping Registry on August 18, 2018 [ECF No. 124-35].

11. More repairs were requested by the Vessel's captain, John Stable, on December 14, 2018, after the Vessel's generator experienced a delayed start up. Scarano discovered that the Vessel's Racor filters were empty and that the internal components were leaking; Scarano then rebuilt the Vessel's filters [ECF No. 131 p. 4; ECF No. 119-32 p. 3].

12. On January 10, 2019, Scarano came back to the Vessel to repair and reassemble malfunctioning MTU heat exchangers on the Vessel's engines [ECF No 131 p. 4; ECF No. 119-32 p. 4 (showing disassembly of units to address leaks)].

13. On April 26, 2019, Scarano was called back to the Vessel when the engines would not start and the Vessel's engineer, Morne De Villiers, discovered that there was a lot of air in the engines, which did not allow the high-pressure fuel pump to be primed with enough diesel fuel to start the engines [ECF No. 131 p. 4; ECF No. 119-32 p. 5; ECF No. 129 p. 141:1–5; ECF No. 119-32 p. 5 (noting engines would not start)].

14. Scarano removed the fuel filters and refilled them with clean diesel to allow the engines

to start [ECF No 131 p. 4; ECF No. 119-32 p. 5].

15. Multiple vendors performed work on the Vessel's engines throughout Allure's ownership of the Vessel [ECF No. 131 p. 5; ECF No. 119-32; ECF No. 120-11; ECF No. 120-12; ECF No. 120-13; ECF No. 120-14].

16. In July 2019, Allure received an offer from a prospective buyer who was interested in purchasing the Vessel. That buyer asked to conduct a sea trial prior to finalizing the purchase [ECF No. 132 p. 2; ECF No. 129 pp. 159:8–15, 182:12–14].

July 8, 2019 Sea Trial

17. Before conducting a sea trial with the potential buyer, on July 8, 2019, Captain Staddon, Captain Tibbetts, and Engineer Devilliers conducted a sea trial of the Vessel. During that sea trial, the Vessel reached a maximum speed of 35 knots; however, the port engine shut down and a high fuel temperature alarm sounded [ECF No. 131 p. 5; ECF No. 132 pp. 2–3; ECF No. 119-49; ECF No. 127 pp. 268:20–22, 269:3–6, 287:18; ECF No. 129 p. 84:7–10].

18. The July 8, 2019, sea trial was the first time the fuel temperature alarm sounded on any engines on the Vessel [ECF No. 132 p. 3; ECF No. 129 p. 132:21–23].

19. On July 11, 2019, Kelly Friedenberg of NavCorps was hired to visually inspect all three of the Vessel's engines to resolve the issues that occurred during the sea trial [ECF No. 131 p. 5; ECF No. 132 p. 3; ECF No. 127 pp. 270:1–7, 271:4–6].

20. Upon a visual inspection, Friedenberg found that the port high pressure pump had visual discoloration and indications that the paint had been burned off, a sign that the fuel had overheated in the port engine [ECF No. 131 p. 5; ECF No. 127 p. 271:10–12].

21. Friedenberg was unable to view the engine alarm history from the engine's computers

due to the computers being set to "Test Bench mode" [ECF No. 131 p. 6; ECF No. 127 p. 272:8–16].

22. Friedenberg recommended hiring a computer expert, Ray Hahn from MMI Electronics, to extract the alarm history from the computers [ECF No. 131 p. 6; ECF No 132 p. 3; ECF No. 123-26; ECF No. 127 p. 272:15–25].

MDR Is Hired to Conduct Repairs

23. After Friedenberg did not respond to requests to return to the Vessel to conduct repairs, Allure hired MDR on the recommendation of Allure's owner Janusz Sendowski [ECF No. 131 p. 6; ECF No. 132 p. 3; ECF No. 127 p. 274:3–13; ECF No. 129 p. 69:16–20].

24. During their initial meeting, Sendowski told MDR that Allure had a potential buyer for the Vessel and that he was anxious to repair the fuel temperature alarm so the Vessel would pass the pre-purchase inspection [ECF No. 132 p. 4; ECF No. 129 p. 159:8–15].

25. On July 19, 2019, Leo Avila of MDR conducted a visual inspection of the Vessel and took photos of various leaks on the Vessel's engines. The inspection was a "quick fly by" inspection; Avila was on the boat for around 30 minutes [ECF No. 131 p. 6; ECF No. 129 p. 233:13–23, 244:19–25, 248:9–10; ECF Nos. 119-22, 119-23, 119-27, 119-28].

26. Avila viewed the data from the local operating panel screens for each of the engines that displayed historical error codes; Avila took two pictures of the engine error codes on his phone [ECF No. 131 pp. 6–7; ECF No. 129 p. 240:3-25; ECF No. 119-22 p. 2; ECF No. 119-23 p. 10].

27. The error codes displayed the high temperature alarm on the port engine, the

communication faults on the button panel and local operating panel, sensor defects, a transmission oil pressure sensor defect, and a pan error code [ECF No. 131 p. 7; ECF No. 129 p. 240:18–25].

28. Avila recommended changing the fuel cooler as an initial troubleshooting step and told Sendowski this was the cheapest potential repair to eliminate the fuel temperature alarm [ECF No. 131 p. 7; ECF No. 129 p. 250:1–7].

29. Avila also ran all three engines and found that the center engine was accelerating and that the RPMs were automatically rising out of control; Avila then activated the emergency shut down to protect the Vessel [ECF No. 131 p. 7; ECF No. 129 p. 250:12–24].

30. This indicated a more serious problem, so Avila told Allure that he would need to diagnose it later as he did not have time that day [ECF No. 131 p. 7; ECF No. 129 p. 251:5–10].

31. MDR asked Allure for the Vessel's maintenance and engine logs but never received the logs and was told that the logs did not exist. Captain Staddon testified that no such logs were found on board the Vessel and that the only maintenance logs were from after her time on the Vessel began in July 2019 [ECF No. 131 p. 7; ECF No. 129 pp. 36:20–25, 37:2–16, 251:14-19; ECF No. 127 p. 276:18–25].

32. Avila and Sendowski agreed to have Carlos Mulet, an MDR engineer, conduct a sea trial on a date after the initial inspection [ECF No. 131 p. 7; ECF No. 129 p. 252:19–21].

33. On August 13, 2019, Mulet attempted to conduct a sea trial, but the sea trial was ultimately cancelled when Mulet heard a loud grinding noise coming from the port high pressure pump [ECF No. 131 p. 7; ECF No. 129 p. 253:2-8].

34. Mulet recommended that, for safety reasons, Allure not operate the Vessel due to its condition at that time [ECF No. 131 p. 7; ECF No. 129 p. 255:7–9].

35. On August 14, 2019, Avila met with Sendowski to discuss the findings and his recommendations after the visual inspection [ECF No. 132 p. 4; ECF No. 129 p. 175:8–16].

36. MDR recommended fixing the leaks, and Captain Tibbetts agreed that the port high pressure pump should be replaced due to its discoloration, loud grinding noises, and visible heat damage. Captain Tibbetts denied seeing any fuel, coolant, or oil leaks in the engine room [ECF No. 131 pp. 7–8; ECF No. 127 p. 298:2–4; ECF No. 129 p. 253:4-8].

37. MDR submitted two repair estimates to Allure for extensive work on all three engines and replacing cylinder heads, turbochargers, oil coolers, and fuel pumps; these estimates totaled $208,930.38 and contained a one-year warranty on all parts and labor [ECF No. 132 p. 5; ECF No. 123-4 (Estimate #1382); ECF No. 123-41 (Estimate #1378); ECF No. 123-22].

38. On August 15, 2019, MDR received approval from Allure on Estimate #1378 and began to work on the Vessel under Invoice #1629 [ECF No. 131 p. 8; ECF No. 119-9 (Estimate #1378); ECF No. 119-1 (Invoice #1629); ECF No. 129 p. 162:2–11].

39. On August 19, 2019, MDR disassembled the engines, removed them from the Vessel and transported them to the MDR facility in Hallandale Beach, Florida [ECF No. 132 p. 6; ECF No. 123-26].

40. Under Invoice #1629, MDR drained all of the engines of coolant, removed and replaced the port engine's high pressure fuel pump and freshwater pumps, and removed all three main engine air filters, housings hoses, and valve covers [ECF No. 131 p. 8; ECF No. 119-1 (Invoice #1629); ECF No. 119-24].

41. During the process of removing the port high pressure pump, which required disassembly

of most of the port engines, MDR found other problems with the engines, such as three leaking cylinder heads; intake valves that were leaking compression back into the engine; turbos leaking oil from the inlet side of the compressor; and damage to the turbocharger housing in the form of extensive pitting and distortions due to leaking oil, charge air coolers full of oil, and exhaust manifold [ECF No. 131 p. 8; ECF No. 129 pp. 257:17-21, 258:12–24; ECF No. 128 p. 136:3–10].

42. MDR subsequently received approval from Allure on Estimate #1382 and Invoice #1637 allowing them to conduct the work to address the problems discovered during the disassembly process [ECF No. 131 p. 8].

43. Under Invoice #1637, MDR replaced three cylinder heads on the port main engine; disassembled the three turbochargers and the carrier collector on the center engine; and replaced the oil cooler, turbocharger carrier base, and exhaust flappers [ECF No. 131 p. 8; ECF No. 119-2 (Invoice #1637); ECF No. 119-10 (Estimate #1382); ECF No. 128 p. 129:19–24].

44. In Estimate #1383, a third estimate, MDR recommended, under MTU guidance, that Allure replace the injectors on all three of the Vessel's engines that were manufactured in the "old style" with new and improved injectors. Allure did not approve the estimate because the Estimate categorized this as an "optional item[]" [ECF No. 131 p. 9; ECF No. 119-11 p. 9 (Estimate #1383); ECF No. 129 pp. 263:14–25, 130:1–11, 176:23]. The prior two estimates did not contain that optional language [ECF Nos. 119-9, 119-10].

45. In October 2019, MDR reinstalled the engines on the Vessel [ECF No. 132 p. 7; ECF No. 119-24].

October 15, 2019 Sea Trial

46. On October 15, 2019, after all of MDR's work was completed, Captain Staddon, Desocarraz, and Daniel Wahr-Evans of MDR conducted a sea trial; Datum Rotating Machinery Services LLC ("Datum"), a vibration specialist, was also onboard [ECF No. 131 p. 9; ECF No. 129 p. 92:2–8].

47. Datum's only purpose during the sea trial was to conduct vibration testing; Datum did not assess the individual components of the engine; the vibration testing was conducted at a low revolutions per minute (RPM) of 1090 [ECF No. 131 p. 10; ECF No. 119-20 p. 1; ECF No. 129 pp. 16:21–24, 27:8–17, 30:20–23].

48. The high fuel temperature alarm was again triggered towards the end of the sea trial when the engine was operating with very high RPMs [ECF No. 131 p. 9; ECF No. 129 pp. 44:18–19, 92:16–20].

49. Desocarraz testified that after the high temperature alarm sounded, the Vessel was surging on idle in the dock, which indicated that the injector was pushing compression back into the fuel system and that compression was raising the heat within the system [ECF No. 131 p. 9; ECF No. 128 p. 131:11–22].

50. The center engine also died during the sea trial [ECF No. 131 p. 9; ECF No. 128 p. 257:16–18].

Post-Sea Trial Activities

51. After the sea trial, MDR submitted final invoices to Allure totaling $67,753.95, which was $11,008.86 more than the original estimates. The invoices reflect that Allure paid MDR a total of $152,235.29 [ECF No. 132 p. 9; ECF No. 123-1; ECF No. 123-2].

52. On October 16, 2019, MDR told Allure's new captain Rachel Staddon, who joined the

Vessel around July 2019, that the port engine fuel injectors needed to be replaced to solve the high temperature alarm issues [ECF No. 131 p. 10; ECF No. 132 p. 9; ECF No. 130 p. 47:13–23; ECF No. 129 p. 94:16–18].

53. Captain Staddon requested the computer engine data from MDR on two separate occasions but was never provided it. On November 15, 2019, Avila responded to Captain Staddon's text message request to review the reports by stating that MDR would provide the reports "upon final payment of the open invoice that is due for the repairs performed," but noted that Captain Staddon could review the reports at MDR's shop prior to the payment being made [ECF No. 123-46 p. 4; ECF No. 129 pp. 89:3–23, 95:4–7].

54. MDR never downloaded engine computer data. The Court credits the testimony of both experts, who testified that downloading engine computer data is the standard in the industry for diagnosing engine issues and should have been performed here [ECF No. 127 p. 101:4–13; ECF No. 130 pp. 110:20–22, 130:20–25, 131:1–25].

55. Avila testified that he believed that the engine computer data had been downloaded during the October 2019 sea trial and that when this mistake was brought to his attention, MDR offered to provide an additional sea trial at no cost to Allure where the engine data could be downloaded. Captain Staddon confirmed that MDR offered an additional sea trial after the text message where Avila had previously offered to allow Captain Staddon to review the computer engine data at MDR's shop. MDR never performed the additional sea trial [ECF No. 130 pp. 107:5–19, 114:20–25, 115:1–12].

56. The Vessel's high fuel temperature alarm stopped going off after Florida Detroit Diesel Allison (FDDA) recommended the installation of fans in the engine room; the total cost for the fan and installation was $262.50 [ECF No. 125-42; ECF No. 127 p. 153:2–7;

ECF No. 129 p. 739:6–17].

57. The Vessel was eventually sold in September or October 2021 for close to $2 million [ECF No. 129 pp. 149:19–24, 150:1–10].

MDR Timekeeping and Billing Practices

58. The timekeeping practices of MDR were haphazard and resulted in disorganized and potentially inaccurate timesheets. MDR's employees did not submit their timesheets on a regular basis, and even when submitted, the timesheets were not always accurately inputted into the computer billing system [ECF No. 130 pp. 80:12–15, 82:9–12].

59. MDR charged the same rate for its labor hours regardless of the skill being performed or whether the technician had engine certifications [ECF No. 132 p. 15; ECF No. 130 p. 78:11–18].

60. MDR billed at least some time to Allure that was actually spent on side work not related to necessary repairs to the Vessel. Two technicians testified that they had to spend time during their workday doing side jobs such as sorting bolts and other parts into their proper bags after a mishap resulted in the parts being incorrectly labeled. Other technicians spent time searching for missing and/or mislabeled parts in a garage. This time was included on the technicians' timesheets for the Vessel and may have been included on the final invoices submitted to Allure [ECF No. 128 pp. 74, 11–22; 77:18–21, 154: 5-13, 159:14–16; *see, e.g.*, ECF No. 119-24 pp. 59, 63, 68–69, 82–83].

Procedural History

61. On May 27, 2020, Allure filed a lawsuit against MDR in Broward County, Florida [ECF No. 132 p. 16].

62. On July 8, 2020, MDR filed the instant lawsuit in federal court [ECF No. 132 p. 16;

ECF No. 1].

63. The parties agreed to dismiss the state lawsuit and proceed with consolidated claims and counterclaims in the federal lawsuit [ECF No. 132 p. 16].

CONCLUSIONS OF LAW

I. MDR Has Failed to Establish the Existence of an Enforceable Maritime Necessaries Lien (Count I of MDR's Complaint)

The Federal Maritime Liens Act grants a maritime lien to a party that provides "necessaries" to a vessel. *See* 46 U.S.C. § 31342. "Necessaries" includes "repairs, supplies, towage, and the use of a dry dock or marine railway." 46 U.S.C. § 31301(4). "A maritime lien is a 'special property right in a ship given to a creditor by law as security for a debt or claim subsisting from the moment the debt arises.'" *Dresdner Bank AG v. M/V Olympia Voyager*, 465 F.3d 1267 (11th Cir. 2006) (quoting *Galehead, Inc. V. M/V Anglia*, 183 F.3d 1242, 1247 (11th Cir. 1999)). "Maritime liens differ from other common law liens in that a maritime lien is 'not simply a security device to be foreclosed if the owner defaults;' rather, a maritime lien converts the vessel itself into the obligor and allows injured parties to proceed against it directly." *Crimson Yachts v. Betty Lyn II Motor Yacht*, 603 F.3d 864, 868 (11th Cir. 2010) (quoting *Amstar Corp. v. S/S ALEXANDROS T.*, 664 F.2d 904, 908–09 (4th Cir. 1981)). Such a lien is "stricti juris and cannot be extended by construction, analogy or inference." *Osaka Shosen Kaisha v. Pac. Exp. Lumber Co.*, 260 U.S. 490, 499 (1923).

For a party to establish a claim for a maritime lien in a vessel: (1) the good or service must qualify as a "necessary"; (2) the good or service must have been provided to the vessel; (3) on the order of the owner or agent; and (4) the necessaries must be supplied at a reasonable price. *See Barcliff, LLC v. M/V Deep Blue, IMO No. 9215359*, 876 F.3d 1063, 1068 & n.5 (11th Cir. 2017). On the first element, "courts have taken an increasingly broad view of 'necessaries,' to the point

where the term now includes almost any goods or services which are convenient or useful to the vessel." *Rybovich Boat Co., LLC v. M/Y BLUE STAR*, 546 F. Supp. 3d 1270, 1276 (S.D. Fla. 2021) (internal quotation marks and brackets omitted). Further, the Eleventh Circuit has explained that the statutory term "necessaries" is non-exhaustive and "has been liberally construed to include what is reasonably needed in the ship's business." *Bradford Marine, Inc. v. M/V Sea Falcon*, 64 F.3d 585, 589 (11th Cir. 1995) (internal quotation marks omitted). As to the fourth element, reasonableness as to the price of the necessaries, the Eleventh Circuit has explained that "reasonableness" of charges in the maritime context is measured by whether they are "customary" and "in accord with prevailing charges for the work done and the materials furnished." *Sweet Pea Marine, Ltd. v. APJ Marine, Inc.*, 411 F.3d 1242, 1249 (11th Cir. 2005) (internal citations omitted). "Accordingly, to satisfy the evidentiary burden on this element, a plaintiff must present some modicum of evidence which compares the charges claimed with what other competitors would have charged for similar work or materials." *Id.* "This burden may be satisfied by witness testimony that the charges were reasonably in accord with industry standards." *Id.* "The failure to present such evidence, however, dictates that a plaintiff cannot prevail on its maritime claims." *Id.*

While Allure has presented some evidence and argument that at least some of the repairs made by MDR may not have been entirely necessary in a strict sense at the time they were furnished, the Court determines that the testimony and evidence presented at trial sufficiently establishes that the repairs qualify as "necessaries" within the liberal meaning of that term as defined in the Federal Maritime Lien Act and as characterized by applicable caselaw. *See* 46 U.S.C. § 31301(4); *Rybovich Boat Co., LLC*, 546 F. Supp. 3d at 1276. Nevertheless, the Court cannot find that the remaining $67,753.95 worth of charges (over and above the $152,235.29

Allure already paid to MDR) were "reasonable" to require the Vessel to pay the remaining balance on Invoices #1629 and #1637 (the "Invoices").

As to the necessity of the repairs, Avila testified extensively at trial about the poor condition of the engines on the Vessel upon his first inspection [ECF No. 129 pp. 871:1–4, 246:1–8, 248:4–8, 250:16–24, 251:6–10, 253:4–8]. Specifically, Avila testified that he found various leaks and other issues on the engines—coolant leaking from the O-rings, corrosion on the charger cooler and turbo carrier base, and a fault in the center engine—which he subsequently identified to Captain Tibbetts and Sendowski [ECF No. 129 pp. 234:1–4, 246:1–8, 248:4–8; 250:16–24, 251:6–10]. He also testified that Mulet identified a noise emanating from the high-pressure fuel pump [ECF No. 129 p. 253:4–8]. Avila's description of the Vessel was bolstered by the testimony of Philip Desocarraz, who described the Vessel's leaks and other issues that were present in 2018 when he performed work on the Vessel for his former employer Scarano Marine [ECF No. 128 pp. 122:25, 123:1–2]. Desocarraz described the Vessel's engines as being in "poor condition" [ECF No. 128 p. 135:4]. MDR introduced photographs of the various leaks and corrosion that existed at the time of Avila's initial inspection [ECF Nos. 119-22, 119-23, 119-27, 119-28], and although there was some dispute as to when those photographs were taken, the Court ultimately credits the testimony of Avila on that subject and the substance of the photographs themselves is indicative of some leaking [ECF No. 129 p. 235:4–11]. Allure argues that MDR's description of the engine condition is inaccurate given Captain Staddon's testimony; however, while Captain Staddon testified that she had participated in flag state inspections on other vessels, she was not present for the flag state inspection on this Vessel and had not viewed the reports from any of the inspections [ECF No. 129 pp. 79:17–19, 81:24–25, 82:1]. In fact, the only evidence introduced by Allure about flag state inspections performed on the Vessel dates from August 18, 2018 [ECF No. 124-35]. Captain

Staddon also testified that when she became captain of the Vessel, there was no maintenance log on board detailing the Vessel's maintenance history, and it was up to her to start one [ECF No. 129 pp. 36:17–25, 37:1–16]. Given the evidence presented about the condition of the engines at trial, the Court finds that the repairs made to the Vessel by MDR are properly deemed "necessaries" within the broad meaning of that term.

There is also no meaningful dispute that the repairs were made to the Vessel at the direction of its owner, Sendowski. Sendowski testified that he personally authorized the work done to the Vessel by approving two estimates submitted to him by MDR [ECF No. 129 p. 161:11–14]. Notably, Sendowski declined to approve two additional estimates that were submitted to him recommending that Allure replace the Vessel's turbochargers and fuel injectors [ECF No. 129 pp. 176:21–23, 206:24–25, 207:1]. While Sendowski testified that he would not have authorized the initial estimates if he had known that MDR had not downloaded the computer data during the inspection [ECF No. 129 p. 211:22–24], the fact remains that he did authorize the work on the Vessel. That authorization is sufficient conclude that the repairs to the Vessel were made at the direction of its owner as required for a valid and enforceable maritime necessaries lien.

Although Plaintiff has satisfied the first three elements of its claim for a maritime necessaries lien as to the unpaid balance ($67,753.95), the trial evidence does not establish that those necessaries were supplied at a reasonable price. Much testimony was presented at trial regarding MDR's haphazard bookkeeping and billing processes. There were two main issues with MDR's bookkeeping processes that were highlighted at trial, both of which raise substantial questions about the reasonableness of MDR's charges for the repairs: (1) MDR failed to charge a different rate for the work provided depending on the skill of the worker performing the work on the vessel; and (2) MDR's bookkeeping processes reveal material doubts as to whether the time

charged to Allure was actually for work performed on the Vessel.

First, the Court heard testimony from owners of other similar marine diesel companies that the rates charged by their companies for the work they perform varies depending on whether the technician performing the work holds a certification. Specifically, Adolfo Scarano, owner of Scarano Marine, testified credibly that his company varies the rates they charge to customers depending on whether the work is performed by a technician who is certified on the engines being repaired [ECF No. 127 p. 186:18–20]. The Court also heard testimony from several of MDR's workers who performed work on the Vessel, some of whom held certifications from MTU in diesel engine repairs and others who did not [ECF No. 128 pp. 6:19–21, 47:7–9, 98:22–23, 109:13–15, 120:14–17, 190:18–23, 199:16–19, 221:14–17]. Avila testified that MDR has a practice of billing all of its technicians' labor at the rate of $118 per hour regardless of whether they are certified in MTU engine repairs [ECF No. 130 p. 78:11–18]. This one-size-fits-all billing practice is reflected in the Invoices depicting the rates charged by MDR for its work on the Vessel [ECF Nos. 119-1, 119-2]. The evidence presented at trial establishes that MDR's practice of charging a uniform amount for all work despite the technicians' certification status is not "reasonably in line with industry standards." *See Sweet Pea Marine, Ltd.*, 411 F.3d at 1249.

Second, MDR's billing practices suffer from another shortcoming that calls into question the reasonableness of the remaining charges assessed to Allure for the work on the Vessel. Because of the material evidence of disorganization in MDR's billing practices, MDR did not meet its burden to show that the remaining amount billed to Allure actually reflects work performed on the Vessel. The testimony at trial reveals that some of the time billed to Allure may have been for side work not related to necessary repairs to the Vessel. Specifically, at least two technicians testified that they had to spend time during their workday doing side jobs such as sorting bolts and

other parts into their proper bags after a mishap resulted in the parts being incorrectly labeled; the technicians also spent time searching for parts in a garage [ECF No. 128 pp. 154:5–13, 74:11–22]. This lost time was reflected on the technicians' timesheets for the Vessel; however, the technicians themselves could not verify whether it was actually a part of the time billed to Allure since the technicians were not responsible for creating the invoices [ECF No. 128 pp. 77:18–21, 159:14–16]. Various technicians also testified about their process for submitting timesheets for approval—they would do work on the Vessel but would not actually write the work down on their timesheet that day [ECF No. 128 pp. 10:4–7, 52:6–11, 101:18–22]. And Avila's testimony revealed that the technicians did not turn their timesheets in on a contemporaneous basis, but the submissions would "vary" by the workload, and MDR had no set period (i.e., daily or weekly) for the technicians to submit their timesheets [ECF No. 130 p. 80:12–15]. As a result, the timesheets were not always recorded into the computer through which billing occurred [ECF No. 130 p. 82:9–12]. Given these additional issues with the complete accuracy of MDR's timekeeping practices, the Court cannot conclude that the charges billed to Allure for MDR's work on the Vessel are reasonable as required for an enforceable maritime necessaries lien as alleged in Count I.

In sum, although the work performed on the Vessel qualifies as "necessary" under the broad applicable standard, MDR has not established that the remaining $67,753.95 assessed to Allure and sought in Count I are reasonable such that MDR is entitled to relief on Count I.

II. Neither Party Has Established a Material Breach of the Contract (Count II of MDR's Complaint and Count III of Allure's Counterclaims)

Under Florida law, "[t]o prevail in a breach of contract action, a plaintiff must prove: (1) a valid contract existed; (2) a material breach of the contract; and (3) damages." *Deauville Hotel Mgmt., LLC v. Ward*, 219 So. 3d 949, 953 (Fla. Dist. Ct. App. 2017). "[I]n order to maintain an action for breach of contract, a claimant must first establish performance on its part of the

contractual obligations imposed in the contract." *Marshall Const., Ltd. v. Coastal Sheet Metal & Roofing, Inc.*, 569 So. 2d 845, 848 (Fla. Dist. Ct. App. 1990). "Negotiations prior to or contemporaneous with the execution of a contract are admissible as an aid in contract construction, interpretation and determination of the meaning of the contract so long as that evidence does not vary or contradict the terms of the written contract." *MDS (Canada), Inc. v. Rad Source Techs., Inc.*, 822 F. Supp. 2d 1263, 1296 (S.D. Fla. 2011), a*ff'd in part, question certified*, 720 F.3d 833 (11th Cir. 2013), *certified question answered*, 143 So. 3d 881 (Fla. 2014), and *aff'd*, 579 F. App'x 700 (11th Cir. 2014). "To constitute a material breach, a party's 'nonperformance of a contract must be such as to go to the essence of the contract; it must be the type of breach that would discharge the injured party from further contractual duty on his part but a [party's] failure to perform some minor part of his contractual duty cannot be classified as a material or vital breach.'" *Id.* at 1298 (quoting *Atlanta Jet v. Liberty Aircraft Servs., LLC*, 866 So. 2d 148, 150 (Fla. Dist. Ct. App. 2004)).

Though there was an enforceable contract between the parties, neither party has provided evidence supporting a material breach of that contract. Neither party disputes that the Invoices established a valid contract between the parties [*See* ECF No. 131 p. 27; ECF No. 132 p. 38]. But the parties do disagree about the purpose of the contract. MDR argues that the purpose was to repair the various leaks and problems identified by Leonardo Avila during his July 2019 inspection [ECF No. 129 p. 251:22–24; ECF No. 131 p. 27]. During Carlos Mulet's inspection of the Vessel, he also identified a noise coming from the high-pressure fuel pump which Captain Tibbetts indicated he wanted repaired [ECF No. 129 p. 253:2–8]. Though Avila acknowledged that Sendowski brought the high fuel temperature alarm to his attention during the inspection, Avila denies ever making any particular guarantees to Allure that MDR would repair the high fuel

temperature alarm or that repairing the alarm was the discrete purpose of MDR's contract with Allure [ECF No. 129 p. 261:5–10]. In contrast, Allure argues that it entered into the contract with MDR in order to have the high fuel temperature alarm repaired [ECF No. 132 p. 27]. Sendowski testified that he informed Avila prior to signing the Invoices that he would not be able to sell the Vessel to his potential customer until the fuel temperature alarm was eliminated [ECF No. 129 p. 159:12–17]. Captain Tibbetts and Sendwoski testified that MDR was hired on the recommendation of Kelly Friedenberg, whom Allure brought on board to examine the Vessel after the high fuel temperature alarm sounded during the July 2019 sea trial [ECF No. 127 p. 274:3–13; ECF No. 129 p. 69:16–20].

After reviewing the conflicting evidence and testimony, the Court determines that the purpose of the contract between the parties was to prepare the Vessel for sale—a project whose impetus was the high fuel-temperature alarm that sounded during the July 2019 sea trial, but a process that broadened to include not only the issues surrounding the cause of the high fuel-temperature alarm but various additional repairs as reflected in the approved estimates and invoices. Sendowski testified that he told Avila at their first meeting that he had acquired the Vessel to sell it for a profit and that he was preparing to sell the boat, but that he first needed to ensure the Vessel was in proper shape before he showed it to a potential customer [ECF No. 129p. 158:8–17]. As established by the trial testimony, after Avila performed a cursory inspection of the Vessel and identified certain corrosion and leaks that Avila explained in detail to Captain Tibbetts and Sendowski, MDR provided Allure with Estimates #1378 and #1382 [ECF No. 129 pp. 247:5–9, 254:24–25, 255:1-2; ECF No. 123-4 (Estimate #1382); ECF No. 123-41 (Estimate #1378)]. During the initial inspection, Avila told Sendowski that the cheapest option for addressing the high fuel temperature alarm on the port engine was to replace

the fuel cooler [ECF No. 129 p. 250:1–7], which Sendowski authorized in Invoice #1637 [ECF No. 119-2 p. 4]. MDR then performed the authorized repairs in Invoices #1629 and #1637 [ECF No. 119-1 (Invoice #1629); ECF No. 119-2 (Invoice #1637)]. MDR provided Allure with two additional estimates—Estimates #1383 (to replace fuel injectors) [ECF No. 119-11] and #1388 (to replace turbochargers) [ECF No. 119-12]—which Allure declined to authorize [ECF No. 129 pp. 261:11–14, 266:1–4]. Sendowski testified that he declined to authorize those additional estimates because they were characterized by MDR as "optional" repairs [ECF No. 129 p. 206:5–8]. It is clear from the testimony of witnesses for both parties that MDR was hired by Allure to prepare the Vessel for sale, a process that included, but was not limited to, resolving the high-fuel temperature alarm.

What remains to be decided by the Court, therefore, is whether either party committed a material breach of the contract established by the Invoices. A review of the evidence establishes that neither party has produced evidence sufficient to establish a material breach of the contract. MDR argues that because it performed all of the work indicated in the Invoices, Allure was in breach of the contract for failing to pay the full amount due for the services rendered [ECF No. 131 pp. 27–28; ECF No. 1 ¶¶ 32–34]. In contrast, Allure argues that MDR breached the parties' contract by failing to repair the high fuel temperature alarm [ECF No. 132 pp. 38–39; ECF No. 51 ¶¶ 55–59]. There is no dispute among the parties that Allure paid $152,235.29 towards the services rendered by MDR [ECF Nos. 119-4, 119-5, 119-7]. It is also undisputed that the high fuel temperature alarm resurfaced during the October 2019 sea trial, which was conducted to test MDR's repairs to the Vessel [ECF No. 129 pp. 44:18–19, 92:16–20]. The high fuel temperature alarm ultimately stopped going off after Allure, with the assistance of a separate vendor (FDDA), installed a $262.50 fan in the engine room—but the repair process with MDR

caused a delay in Sendowski finding a buyer for the Vessel [ECF No. 125-42; ECF No. 129 p. 150:7–8].

From the testimony and evidence, the Court determines that neither party committed a material breach that would go to the "essence of the contract." *See MDS (Canada), Inc.*, 822 F. Supp. 2d at 1296. While MDR did not fulfill its entire obligation to prepare the Vessel for sale because its repairs did not resolve the high fuel temperature alarm, it did perform all repairs authorized by Allure under the Invoices. In return for those services rendered, MDR received a payment of $152,235.29. MDR argues that it remains entitled to $67,753.95 outstanding on the Invoices [ECF No. 131 pp. 27–28]. But given the failure of MDR to repair the high fuel temperature alarm, which caused a delay in the sale of the Vessel and slightly frustrated the purpose of the contract, the Court cannot find that Allure's failure to pay the remaining $67,753.95 constitutes a material breach of the parties' contracts.

The same is true of Allure's breach of contract claim; Allure has similarly failed to establish a material breach of the contract by MDR. Allure argues that MDR's failure to repair the high fuel temperature alarm entitles it to a return of the $152,235.29 paid to MDR as well as an award of the $262.50 it spent to hire FDDA to fix the high fuel temperature alarm issue [ECF No. 132 pp. 38–39]. However, as noted above, it is undisputed that MDR performed the repairs that were authorized by Allure in the Invoices. Allure's only objection is that MDR did not go far enough in its repairs to satisfy what it believed to be the sole purpose of the contract: to repair the high fuel temperature alarm. But Allure received the value of the repairs rendered to the Vessel in the form of a replacement of the fuel cooler, replacement of the high-pressure pump, and other general engine repairs. As such, MDR did not breach the parties' contract in a way that would entitle Allure to return of the amount paid under the Invoices. But at the same

time, MDR's work did not resolve the high fuel temperature alarm, thus causing a delay in the sale of the Vessel. Under these circumstances, combined with the material doubts about the accuracy of MDR's billing practices referenced above, MDR is not entitled to an award of damages for the remaining balance due under the Invoices ($67,753.95).

Neither party has met its burden to prove a material breach of contract in the course of this contested commercial relationship. Count II of the Complaint fails, as does Count III of the Counterclaim.

III. MDR Cannot Prevail on its Unjust Enrichment Claim (Count III of Complaint)

A claim for unjust enrichment under Florida law consists of three elements: "(1) the plaintiff has conferred a benefit on the defendant; (2) the defendant voluntarily accepted and retained that benefit; and (3) the circumstances are such that it would be inequitable for the defendants to retain it without paying the value thereof." *Virgilio v. Ryland Grp., Inc.*, 680 F.3d 1329, 1337 (11th Cir. 2012). "[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. Dist. Ct. App. 2022) (quoting *Fulton v. Brancato*, 189 So. 3d 967, 969 (Fla. Dist. Ct. App. 2016)).

MDR cannot prevail on its unjust enrichment claim due to the existence of a valid contract between the parties for the same conduct MDR seeks to recover under its unjust enrichment claim. MDR argues that it conferred a benefit on Allure when it provided engine repair services to the Vessel and when Allure failed to remit payment for those services [ECF No. 1 ¶¶ 35–39]. As stated above, however, there is no dispute between the parties that the Invoices created a valid and enforceable contract for the repair of the Vessel [ECF No. 131 p. 27; ECF No. 132 p. 38]. The existence of this express contract for the repair of the Vessel precludes MDR from recovering

against Allure on an unjust enrichment theory for the very same conduct MDR alleges forms the basis for the express contract. *See Doral Collision Ctr., Inc.*, 341 So. 3d at 430. MDR's claim for unjust enrichment fails.

IV. Allure Has Not Proven Fraud in the Inducement by MDR (Count I of Counterclaim)

To establish fraud in the inducement under Florida law, a party must prove the following by clear and convincing evidence: "(1) [a] misrepresentation of a material fact; (2) [t]he representor of the misrepresentation, knew or should have known of the statement's falsity; (3) [i]ntent by the representor that the representation will induce another to rely and act on it; and (4) [r]esulting injury to the party acting in justifiable reliance on the representation." *Lou Bachrodt Chevrolet, Inc. v. Savage*, 570 So. 2d 306, 308 (Fla. Dist. Ct. App. 1990). This tort occurs "when the fraud occurs in the connection with misrepresentations, statements, or omissions which cause the complaining party to enter into a transaction." *Output, Inc. v. Danka Bus. Sys., Inc.*, 991 So. 2d 941, 944 (Fla. Dist. Ct. App. 2008) (quoting *D&M Jupiter, Inc. v. Friedopfer*, 853 So. 2d 485, 487–88 (Fla. Dist. Ct. App. 2003)). Fraud in the inducement "occurs when one party's ability to negotiate and make informed decisions as to the contract is undermined by the other party's pre-contractual fraudulent behavior." *GEICO Marine Ins. Co. v. Baron*, 426 F. Supp. 3d 1263, 1265 (M.D. Fla. 2019).

After a review of the testimony and evidence, the Court determines that Allure has not proven by clear and convincing evidence that MDR engaged in fraud in the inducement. Allure argues that MDR engaged in fraudulent behavior when it made false statements to Allure regarding the condition of the engines; Allure takes specific issue with statements made by Avila that MDR had downloaded the engine computer data in making its assessment of the engines' condition [ECF No. 132 p. 33]. Allure alleges that Avila knew of the falsehood of his statements

and made the statements with the intent that Allure would rely on the statements in deciding whether to authorize the repairs proposed [ECF No. 132 pp. 33–34]. Allure did in fact rely on these statements in authorizing the repairs, it alleges, and paid MDR $152,235.29 for what it characterizes as "unnecessary repairs" [ECF No. 132 p. 34].

The record evidence reflects that the engine computer data should have been downloaded in accordance with industry standards before MDR recommended and engaged in the extensive repairs to the Vessel [ECF No. 127 p. 101:4–13; ECF No. 130 pp. 110:20–22, 130:20–25, 131:1–25]. The evidence also establishes that Avila made some questionable statements to Allure about the existence of the computer engine data in November 2019, after the Invoices had been signed and the repairs completed [ECF No. 123-46 p. 4; ECF No. 129 pp. 89:3–23, 95:4–7; *see* ECF No. 129 p. 180:20–24]. That said, Allure has not met its burden to show, by clear and convincing evidence, that MDR knowingly made false statements of material fact at the time the Invoices were approved.

The testimony at trial did not reveal that Avila knowingly made any false statements of material fact to Allure prior to Allure's approval of the Invoices. It is undisputed that MDR never downloaded the engine computer data. Avila testified to such at trial [ECF No. 130 p. 110:20–22]. However, Sendowski, the owner of the Vessel and the person Avila interacted with during his inspection, did not testify that Avila specifically told him that MDR personnel had downloaded the computer engine data during the initial inspection. Sendowski testified that he was told that MDR would come back to the boat to analyze the issues, which Sendowski understood to mean that MDR would bring a computer to view the historical error codes [ECF No. 129 p. 203:6–9]. Though Sendowksi testified that he relied on the statements about the engine data in authorizing the repairs and that he would not have agreed to the repairs without

MDR downloading the engine data [ECF No. 129 pp. 204:18–20, 211:22–24], reliance is only one element of a claim for fraudulent inducement. The trial record does not contain evidence that MDR actually made false statements to Allure about the existence of the computer data prior to Allure's approval of the Invoices.

Allure's strongest evidence in support of the existence of a false statement is the combined testimony of Captain Staddon and supporting text messages about statements made by Avila in November 2019 related to the engine computer data records—text messages sent after the repairs by MDR were completed. On this point, Allure offered the testimony of Captain Staddon, who stated that, after the high fuel temperature went off again during the October 2019 sea trial, MDR offered to allow her to come and review the computer data at MDR's office [ECF No. 129 pp. 89:3–23, 115:1–2]. This offer is reflected in text messages sent by Avila to Captain Staddon in November 2019 [ECF No. 123-46 p. 4]. Even accepting that such statements constitute false statements of material fact, the testimony at trial did not establish that Avila knew the statements were false when made. Although debatable, the Court ultimately credits Avila's testimony that he mistakenly believed that Carlos Mulet, who was present for the October 2019 sea trial, had downloaded the engine data during that sea trial [ECF No. 130 p. 106:12–17]. Avila said that once he learned that this statement was false, he contacted Allure to apologize and offered to perform a second sea trial during which the engine data could be downloaded and provided to Allure on the spot [ECF No. 130 p. 107:12–19]. Captain Staddon confirmed that Avila made this offer [ECF No. 129 p. 115:8–9]. Thus, Avila's testimony reveals that, even if the Court considered his November 2019 statement that MDR had downloaded the computer data during the October 2019 sea trial to be a misrepresentation of a material fact, Allure has not proven by clear and convincing evidence that Avila knew the statement to be false. For this reason, the

Court declines to find liability on Allure's fraudulent inducement claim.

V. Allure Cannot Establish Deceptive and Unfair Trade Practices by MDR (Count II of Counterclaim)

Allure brings a claim of deceptive and unfair trade practices against MDR under the Florida Deceptive and Unfair Trade Practices Act (FDUPTA). Fla. Stat. §§ 501.201–.23. FDUPTA is designed to protect consumers from those 'who engage in unfair methods of competition, or unconscionable, deceptive, or unfair acts or practices in the conduct of any trade or commerce.'" *Schauer v. Gen. Motors Acceptance Corp.*, 819 So. 2d 809, 812 (Fla. Dist. Ct. App. 2002), *reh'g denied*, *clarification granted* (June 26, 2002) (quoting Fla. Stat. § 501.202)). There are three basic elements to a FDUPTA claim: (1) a deceptive act or unfair practice; (2) causation; and (3) actual damages. *KC Leisure, Inc. v. Haber*, 972 So. 2d 1069, 1073 (Fla. Dist. Ct. App. 2008). "'[D]eception occurs if there is a representation, omission, or practice that is likely to mislead the consumer acting reasonably in the circumstances, to the consumer's detriment.'" *Zlotnick v. Premier Sales Group, Inc.*, 480 F.3d 1281, 1284 (11th Cir. 2007) (quoting *PNR, Inc. v. Beacon Prop. Mgmt., Inc.*, 842 So. 2d 773. 777 (Fla. 2003)). "This standard requires a showing of 'probable, not possible, deception' that is 'likely to cause injury to a reasonable relying consumer.'" *Zlotnick*, 480 F.3d at 1284 (quoting *Millennium Comc'ns Fulfillment, Inc. v. Office of the Att'y Gen.*, 761 So. 2d 1256, 1263 (Fla. Dist. Ct. App. 2000)). This is an objective standard, not a subjective one. *Davis v. Powertel, Inc.*, 776 So. 2d 971, 974 (Fla. Dist. Ct. App. 2000) ("[T]he question is not whether the plaintiff actually relied on the alleged deceptive trade practice, but whether the practice was likely to deceive a consumer acting reasonably in the same circumstances.")

Although the trial evidence leaves some doubts about MDR's practices as a whole, Allure did not establish with the requisite level of proof that MDR engaged in deceptive conduct

sufficient to give rise to a valid FDUPTA claim.[1] Allure's FDUPTA claim stems from the same conduct Allure complains of in its fraudulent inducement claim; specifically, that MDR induced Allure into spending hundreds of thousands of dollars on unnecessary repairs based on Avila's false statements about the condition of the engines and the existence of downloaded diagnostic data [ECF No. 132 pp. 35–36]. As discussed in more detail above, however, although MDR should have been more thorough in its diagnosis and investigation in accordance with industry standards, the Court is not persuaded, as an objective matter, that MDR actually made false statements about whether it had downloaded the computer data prior to submitting its estimates to Allure for approval. *See* Part IV *supra*; *Davis*, 776 So. 2d at 974 (stating that the standard is an objective, not subjective one). Put another way, the testimony at trial did not show that MDR's behavior relating to its downloading of the computer data was "likely to mislead a consumer acting reasonably in the circumstances." *See Zlotnick*, 480 F.3d at 1284. And although it is true that Allure, through Sendowski, relied on Sendowski's understanding of the representations made by Avila about the computer data, this reliance is not sufficient to find liability under FDUPTA absent a finding of actual deception or unfairness, which the record does not support sufficiently. Allure has not prevailed on its FDUPTA counterclaim.

VI. Allure Has Not Established that MDR Breached an Express Warranty

To state a cause of action under Florida law for breach of an express warranty, a party must allege: "(1) the sale of goods; (2) the express warranty; (3) breach of the warranty; (4) notice to seller of the breach; and (5) the injuries sustained by the buyer as a result of the breach of the express warranty." *Jovine v. Abbott Lab'ys, Inc.*, 795 F. Supp. 2d 1331, 1339–40 (S.D. Fla.

[1] The standard of proof to sustain a claim under FDUPTA claim—as between preponderance of the evidence or clear-and-convincing evidence—is not clear under the relevant caselaw. The Court therefore assumes the lower standard and applies that herein.

2011). This begins with the party "first identify[ing] the express warranty that [was] allegedly breached." *Toca v. Tutco, LLC*, 430 F. Supp. 3d 1313, 1324 (S.D. Fla. 2020). "[A]n express warranty is generally considered to arise only where the seller asserts a fact of which the buyer is ignorant prior to the beginning of the transaction and on which the buyer justifiably relies as part of the basis of the bargain." *Thursby v. Reynolds Metals Co.*, 466 So. 2d 245, 250 (Fla. Dist. Ct. App. 1984) (internal citations omitted).

Here, Allure argues that MDR is liable for breach of an express warranty because the Invoices contained a one-year express warranty on any repairs made, but MDR failed to return to resolve the fuel temperature alarm that occurred during the October 2019 sea trial [ECF No. 132 pp. 40–41]. MDR says that it cannot be held liable for breaching any express warranty because it did not expressly warrant that the purpose of its repairs was to solve the high fuel temperature alarm [ECF No. 131 pp. 32–33]. The evidence at trial does not support a finding of liability on Allure's counterclaim for breach of express warranty. The Invoices and Estimates submitted to Allure by MDR contain an express warranty on the repairs, parts, and labor for one year from the date of the Invoice [*See* ECF No. 123-2 ("Warranty for repairs is for a duration of 1 year unlimited hours on parts and labor from date of inv.")]. However, none of the Invoices or Estimates expressly references the high fuel temperature alarm. Further, while Sendowski testified that he told Avila about the high fuel temperature alarm during the first inspection [ECF No. 129 p. 159:8–15]—and while getting to the bottom of the alarm was part of the overall purpose of initiating the work with MDR to get the Vessel ready for sale—there was no testimony that Avila made any oral express guarantees to Sendowski or to any other member of the Allure team that MDR would definitively repair the high fuel temperature alarm [ECF No. 129 p. 261:5–10]. Allure makes no argument, nor can it, that the parts used by MDR in replacing the

Vessel were inadequate. Its only gripe is with MDR's inability to repair the high fuel temperature alarm, which is not a basis, on the evidence presented at trial, to find that MDR is in breach of an express warranty. The Court declines to find liability on Allure's breach of express warranty counterclaim.

CONCLUSION

Accordingly, it is **ORDERED AND ADJUDGED** that final judgment consistent with this Order will be entered separately pursuant to Rule 58 of the Federal Rules of Civil Procedure. *See* Fed. R. Civ. P. 58.

DONE AND ORDERED in Chambers at Fort Pierce, Florida this 13th day of October 2023.

AILEEN M. CANNON
UNITED STATES DISTRICT JUDGE

cc: counsel of record