DISTRICT COURT OF APPEAL
THIRD DISTRICT OF FLORIDA

CASE NO.: 3D23-1343, 3D23-1552
TRIAL COURT CASE NO.: 2020-020033-CA-01

Francoise Wynne,

Appellant,

vs.

Deborah Friedmann and SABBIA, LLC,

Appellees.

Answer Brief

FROM THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT,
IN AND FOR MIAMI-DADE COUNTY, FLORIDA

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STATEMENT OF THE CASE AND FACTS

A. Appellant is an educated and wealthy real estate magnate with significant experience in appraisals, purchase contracts, and due diligence.

Appellant is an educated and wealthy real estate magnate who lives in Key Biscayne and manages at least 18 real properties in Key Biscayne, Miami, and Washington D.C.[1] Appellant has her Bachelor's degree in international business, a graduate degree from American University,[2] and previously co-managed an international import and distribution company, where she was in charge of the distribution, accounting, and shipping.[3]

Appellant testified she is well-versed and thorough in due diligence, appraisals, comparables, and inspections prior to any large-ticket purchase.[4] Her personal due-diligence formula for potential return on investment is:

(i) Have the property inspected for state;
(ii) Find knowledgeable professionals;
(iii) Run comparables before purchase;
(iv) Additional advice from trusted friends on comparables;
(v) Find numbers on potential return on investment; and
(vi) Perform Appellant's personal formula, which accrues costs and potential income over a future period of time, divided by purchase price, for an expected percentage potential income.

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[1] R. 314 at Tr. 20, ln. 14–18.
[2] R. 333 at Tr. 96, ln. 3–23 and Tr. 94, ln. 17.
[3] R. 314 at Tr. 19, ln. 9–19.
[4] R. 335–36 (Tr. 102–108); 338 (Tr. 115); R. 342 (Tr. 131–32); R. 350 (Tr. 162); R. 365 (Tr. 225–29); Tr. 460.

R. 333–34 at Tr. 97, ln. 2–Tr. 98, ln. 3.

Appellant testified she knows to have property inspected by a professional before purchase, understands that if she buys without inspection as-is then she may later face some surprises, but has nevertheless knowingly bought big-ticket property without inspection. [5] Appellant testified she has good intuition for a fake deal and is extra careful of anyone representing a "great deal." [6]

B. Appellant is experienced and knowledgeable in purchasing jewelry, with a personal appreciation for luxury jewelry.

Appellant has a notable amount of experience in purchasing jewelry,[7] and testified that jewelry is a luxury item with appreciation qualities like art.[8] Appellant has purchased over 100 pieces of jewelry and lost/given away 80%

[5] R. 335 at Tr. 102, ln. 1–Tr. 103, ln. 1 ("Because if you do 'as is,' you run into huge surprises. So, yes, I normally do inspections.").
[6] R. 333 at Tr. 94, ln. 18–24.
[7] R. 322 at Tr. 52, ln. 1–25 ("as I buy them, I don't count . . . I could not give you a number . . . If I have maybe three hands full of jewelry . . . maybe a kilo, 300 pounds, 5 pounds of jewelry? I don't – I don't know").
[8] R. 332 at Tr. 90, ln. 22–Tr. 92, ln. 1. The Court should note that Appellant has lots of artwork but has never had any of her artwork appraised, and has never tried to sell or trade any of her artwork. *Id.*; R. 332 at Tr. 93, ln. 12–19 ([Q]: Have you ever tried to sell any artwork? [APPELLANT]: No, never. [Q]: Have you ever tried to [] trade any artwork? [APPELLANT]: No. [Q]: Have you had any of your artwork appraised at all? [APPELLANT]: No, never.").

of it.[9] Appellant previously purchased eight other rings, including rings with sapphires, diamonds, and pearls.[10]

Appellant testified she understood there a difference in price between different sized gemstones and different karat precious metals,[11] gemstone supply and demand economics,[12] and had **"*<u>always</u>* been told or heard" that heated stones are less valuable than non-heated stones**.[13] Appellant knowingly opts to not appraise jewelry, measure gemstones, or insure the rings she buys, even though she has a history of losing them and does take those steps when buying real estate.[14]

Importantly, Appellant does not buy jewelry as an investment or make jewelry purchases part of her investment portfolio:

> **[Q]: So is it fair to say that you do not buy jewelry as an investment?**
>
> **[BUYER]: Never. No.**

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[9] R. 321 at Tr. 46, ln. 3–6; *id*. at Tr. 52, ln. 1–25.
[10] R. 394 at Tr. 299, ln. 22–Tr. 300, ln. 7; Tr. 43, ln. 15–22; R. 322 at Tr. 52, ln. 3–4; Tr. 53, ln. 1–5; Tr. 61, ln. 11–18; Tr. 62, ln. 1–9.
[11] R. 327 at Tr. 73, ln. 1–Tr. 74, ln. 2.
[12] R. 328 at Tr. 76, ln. 15–21.
[13] R. 328 at Tr. 75, ln. 24–Tr. 76, ln. 7.
[14] R. 402 at Tr. 306, ln. 2–12; Tr. 307, ln. 1–Tr. 308, ln. 12 ("[Q]: And how did you lose the diamond ring? [BUYER]: It disappeared from my drawer. . . [Q]: Did you file any insurance claim for it or any other type of thing for it? [BUYER]: No. It wasn't insured. [Q]: What about the sapphire engagement ring, you said you lost that? [BUYER]: Yeah, but that was – yeah, I did. Nothing was insured. . . .").

[Q]: You don't consider any of your jewelry as part of your investment portfolio?

[BUYER]: No.

R. 339 at Tr. 120, ln. 1–9.

C. Appellant has been frequenting the Ritz-Carlton for at least 15 years, and confirms SABBIA and Debbie Friedmann always had an impeccable business reputation.

Since at least 2008 Appellant has been frequenting the Ritz-Carlton Key Biscayne and the SABBIA luxury retail jewelry store there.[15] Sometimes, *Appellant has stared into the windows of SABBIA at night, after closing, and admired the jewelry art pieces inside*.[16] Appellant has always thought well of SABBIA's owner Debbie Friedmann:

> [APPELLANT]: [N]ice lady – really sweet lady . . . yeah, **always had a nice impression about Debbie – sweet, yeah, very nice. And no reason not to.**
> . . .
> [Q]: So you had none of that sort of bad reputation or bad impression about SABBIA the store?
>
> [APPELLANT]]: No, no. Absolutely, none.

[15] R. 319 at Tr. 39, ln. 21–25.

[16] The Court should take notice that these are not the observations and words of a person making a cold, hard, and calculated business investment analysis on long-term growth and accrual of resale value. R. 320 at Tr. 42, ln. 22–Tr. 43, ln. 11.

R. 325–26 at Tr. 65, ln. 3–Tr. 66, ln. 19.[17]

D. In January 2020 Appellant bought a Sylva & Cie designer jewelry art piece at $90K below the manufacturer's retail price on the price tag, after two-months' due diligence and negotiation for a jewelry alteration and final cash sale with no returns.

In November 2019 Appellant began a two-months' due-diligence period for a one-of-a-kind custom Ceylon sapphire ring, with a 15-carat natural blue sapphire, 18k yellow gold setting, .99 carats in 78 individual round brilliant-cut diamonds, made by contemporary jewelry artist Sylva Yepermian of Sylva & Cie.[18]

The artist, designer, and manufacturer Sylva & Cie set the jewelry art piece's retail price at $350,700.00, independently beforehand, with no input or participation from SABBIA whatsoever.[19] At all times, the Sylva & Cie jewelry art piece bore a designer/manufacturer's **price tag** showing the manufacturer's retail price of $350,700.00, which Sylva & Cie had attached to the art piece before shipping it to SABBIA from Sylva's Los Angeles jewelry art studio. *Id*.

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[17] The Court should notice that this is not the description of a hard-pressing used car jockey or a snake oil salesman, and that no one has said anything negative about Debbie Friedmann in 15 years—Debbie Friedmann's reputation is impeccable and has been hard earned.
[18] R. 709 at Tr. 28; R. 747 at Tr. 66; R. 784 at Tr. 103.
[19] R. 776–79 at Tr. 95–98.

Appellant came into SABBIA at least four separate times to view and investigate Sylva & Cie's jewelry art piece, and Appellant then had repeated opportunities to further investigate the market, comparable pricing, the artworld's reception of contemporary designer Sylva Yepermian, and to view other jewelry art pieces from other designers and manufacturers.[20]

Appellant testified that she was a willing buyer who subjectively loved this particular piece of designer jewelry art, for the way that it struck her personally:

> [Q]: **What about this ring did you like?**
>
> **[APPELLANT]: Well, the beauty. Everything about it. I mean, it was – the centerpiece and looked absolutely stunning.** Debbie showed it to me. **The colors, the mounting, it was just a beautiful piece to see,** as she has many other pieces. **So it was just a striking piece** like many others.
> . . .
> [Q]: Was there something more striking about this Sylva ring than others to you?
>
> [APPELLANT]: I didn't even look at the others.

R. 389 at Tr. 294, ln. 5–20; R. 404 at Tr. 309, ln. 3–Tr. 310, ln. 2. She still finds it to be striking and beautiful today, with no loss. *Id*.

[20] R. 355 at Tr. 182, ln. 17; R. 450 at Tr. 355, ln. 18.

Appellant testified she was never buying the ring based on comparables or as a comparable investment, but was instead only admiring its beauty to her:

> [APPELLANT]: **I was not looking and comparing. <u>I wasn't comparing this ring with anything else</u>. I was just admiring the beauty of it. I wasn't comparing it**

R. 391 at Tr. 296, ln. 13–24. The gemstone was just as represented, a blue 15-carat Ceylon sapphire.[21]

Appellant cannot remember hardly a single detail about her due-diligence period, including when, why, or with whom she was at the Ritz-Carlton, nor what exactly SABBIA's owner Ms. Friedmann said about the ring.[22]

SABBIA's owner Ms. Friedmann testified she did not make the statements alleged in the Complaint and not in the characterization portrayed.[23] Ms. Friedmann testified that at most she stated that the ring is beautiful, one-of-a-kind, a 15-carat Ceylon sapphire, natural, royal blue, and

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[21] R. 404 at Tr. 309, ln. 3–Tr. 311, ln. 6; R. 406 at Tr. 311, ln. 23–Tr. 312, ln. 4 ("[Q]: Did you know that it was a 15-carat sapphire? [APPELLANT]: Yes. [Q]: Before you bought it? [APPELLANT]: Yes. That was always – that was told, I mean, from the beginning. Like, the size of it, she says it's 15 carats. Absolutely, yes, I did know it was 15 carats."); R. 406 at Tr. 311, ln. 19–22.

[22] R. 493 at Tr. 398, ln. 22–Tr. 400, ln. 14; R. 501 at Tr. 406, ln. 10–18; Tr. 407, ln. 5–13; R. 502 at Tr. 407, ln. 14–Tr. 408, ln. 13; R. 504 at Tr. 409, ln. 1–17.

[23] R. 763 at Tr. 82–85; R. 978 (SABBIA affidavit) at *1–9.

made by contemporary jewelry artist Sylva Yepermian. *Id*. The undisputed evidence showed that all of these statements are true.

There was no evidence of a hard sale, misrepresentations, or any sales statements that were unfair, deceptive, fraudulent, or unconscionable. After two-months' due diligence, Appellant independently made up her mind to buy. Appellant testified she knowingly forewent an appraisal.[24]

On January 29, 2020, Appellant came into SABBIA, pointed at the Sylva & Cie jewelry art piece, and said "That's my ring!"[25] The only person working was Maritza Minor, who confirmed she made no representations to Appellant.[26] Appellant demanded that Ms. Minor call SABBIA's owner, Debbie Friedmann, who was at home with her grandchildren—Appellant negotiated a $90K discount on the Sylva & Cie jewelry art piece in exchange for paying cash in a final sale, with immediate alteration of the art piece to accommodate Appellant's sizing.[27]

SABBIA's owner called the artist, designer, and manufacturer Sylva Yepermian for authorization to lower the manufacturer's price by $90K, given

[24] R. 338 at Tr. 115, ln. 2–4 ("[APPELLANT]: Should have done it before – should have done my investigation, my due diligence. I didn't.").
[25] Exhibit A at Tr. 358, ln. 3–6 (Appellant depo); Exhibit C at ¶ 34 (SABBIA affidavit).
[26] R. 752 at Tr. 71, ln. 1–8 (Debbie depo 2).
[27] R. 978 at ¶¶ 14–20 (SABBIA affidavit).

that the history of sale prices changes how much Sylva & Cie can charge for Sylva's jewelry artwork. *Id*. Sylva authorized the sale price in exchange for immediate cash payment in a final sale with no returns. *Id*. Based on the representations and negotiations of Appellant and Sylva & Cie, SABBIA's owner Debbie left her grandchildren with family and went to SABBIA to oversee the final cash sale. *Id*.

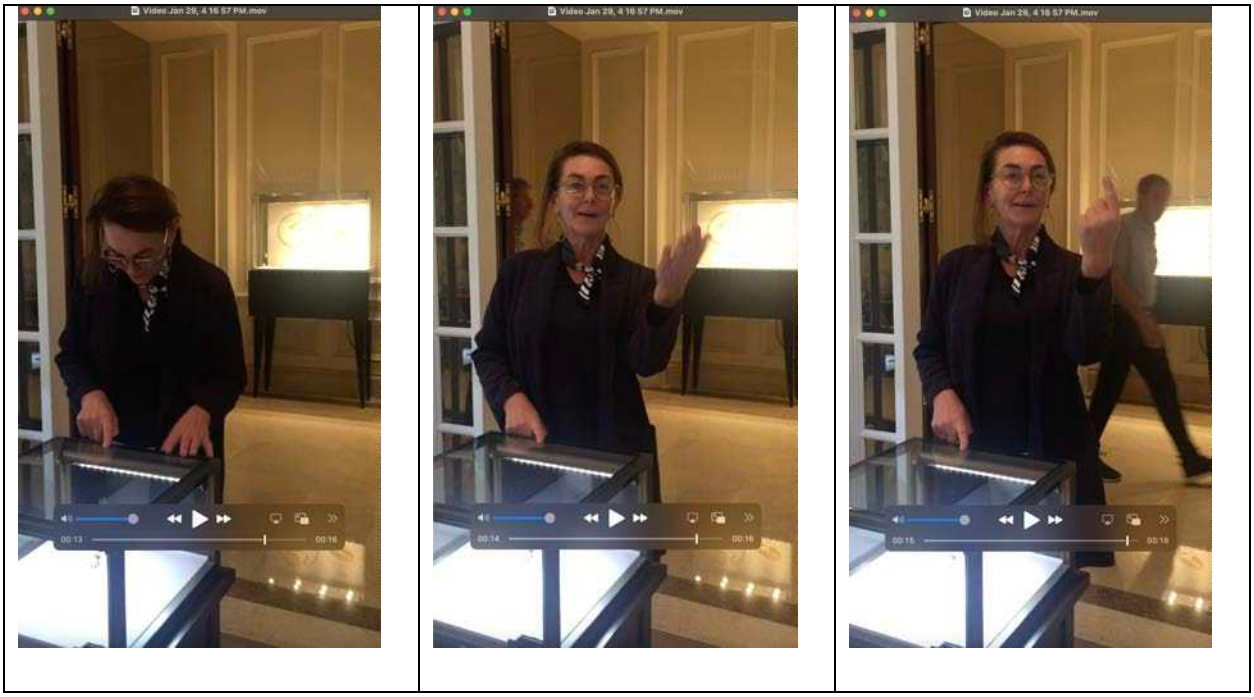
Appellant called her personal banker at First Horizon Bank and ordered he personally walk over to hand-deliver a $260,000.00 cashier's check.[28] He did. *Id*. Appellant ordered a round of cosmos to celebrate her purchase—including for her banker.[29]

Appellant had Ms. Friedmann write out a receipt showing the retail price of $350,700, the accommodation/alteration and discount to $260,000.00, in exchange for a cashier's check and a "FINAL SALE" with "No returns."[30] Appellant had Ms. Friedmann put the receipt with the jewelry to be shipped out for immediate alteration/accommodation to Appellant's size. *Id*.

Appellant had Ms. Friedmann and Ms. Minor take videos and photos of her wearing her new jewelry art piece. *Id*. Appellant had Ms. Friedmann

[28] R. 439 at Tr. 344–45 (Appellant depo); R. 1065 (actual cashier's check).
[29] R. 917 at Tr. 128 (Debbie depo 2).
[30] R. 978 at ¶¶ 33–37 (SABBIA affidavit).

video Appellant re-enacting her purchase for social media, walking up to the glass case, pointing at the ring, and saying “that’s my ring!” *Id*.



Id. SABBIA's owner had to return to her home to be with her grandchildren and left—Ms. Friedmann and Appellant left on happy and friendly terms, hugging. *Id*.

Appellant testified she does not specifically remember what Ms. Friedmann said about the Sylva & Cie ring—this specifically contradicts Appellant's allegations.[31] Appellant testified this was unquestionably payment in full for a final sale:

> **[Q]: Is that because you understood that you were actually purchasing the ring?**
>
> **[APPELLANT]: Yes. Yes.**

R. 340 at Tr. 124–127.

Appellant testified that the deal had to be cash, as it turned out SABBIA had to pay out the manufacturer at an agreed reduced price:

> **[Q]: --and it was down $90,000 from the asking price?**
>
> **[APPELLANT]: And probably was more than that, yes.**
>
> **[Q]: And you understood that for that deal, you had to pay in cash; is that correct?**
>
> **[APPELLANT]: Well, we mentioned it. Yeah, I don't think Debbie would have taken a credit card on that payment. So, yes, that was my understanding, absolutely.**

[31] R. 493 at Tr. 398, ln. 22–Tr. 400, ln. 14; R. 501 at Tr. 406, ln. 10–18; R. 502 at Tr. 407, ln. 5–13 and ln. 14–Tr. 408, ln. 13; R. 504 at Tr. 409, ln. 1–17 (Appellant depo).

R. 505 at Tr. 410, ln. 5–12. Appellant admitted in testimony that the reduction of the purchase to $260K down from the manufacturer's set retail price of $350K was a "good deal."[32]

E. SABBIA paid the agreed $153K to manufacturer Sylva, making a below-market 58% retail upcharge as revenue, sent the jewelry art piece for alteration, and Appellant confirmed she both was "super happy" and made SABBIA write "Final Sale – No Returns" on the receipt.

On the morning after Appellant's purchase, SABBIA paid the ring's manufacturer $153,280.00 on the agreed discounted retail sale price of $260K in reliance on a final sale, and SABBIA sent out the ring for alterations/accommodation ordered by the Buyer.[33] SABBIA therefore made a **58% retail upcharge** on the ring, well below the industry standard for luxury retail jewelry or art.[34] That's why the sale had to be final with no returns. *Id*.

After the purchase, on January 29th and January 30th, Appellant repeatedly thanked Ms. Friedmann and confirmed she loved the ring:

	[APPELLANT]:	[SABBIA'S DEBBIE]:
Wed, Jan 29, 5:53 PM	**Thank you** 🥰	pure pleasure 😘
	U r the best	

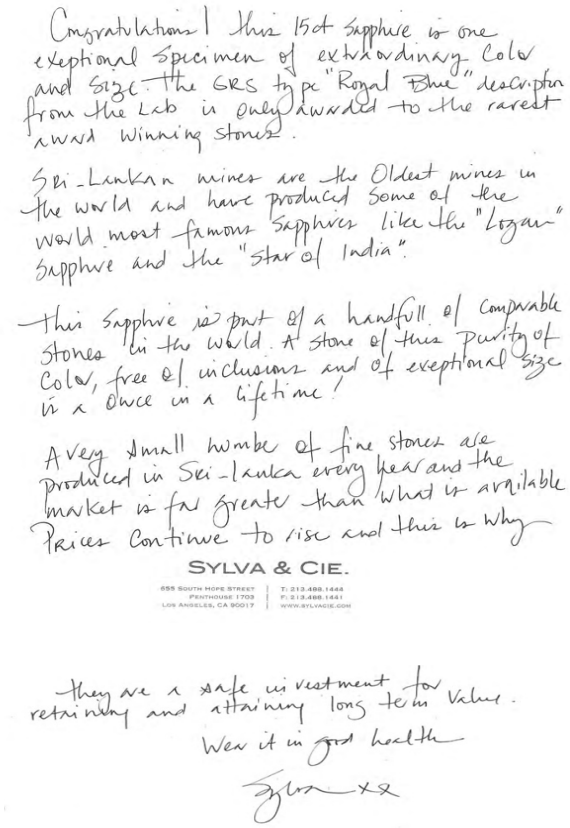
[32] R. 500 at Tr. 405, ln. 8–14.
[33] R. 861 at Tr. 72; R. 644 (Check to Sylva).
[34] R. 978 at ¶¶ 40, 41, 77 (SABBIA affidavit).

Thu, Jan 30, 1:52 PM **No worries. Super happy for the 💍.** Will pass on the beautiful 💎 loop earrings. Got to be reasonable. Thank you Debbie.

I understand! 😘

Id. at ¶ 42; R. 670–81 (actual text messages).

When manufacturer/designer Sylva & Cie altered and sent back Appellant's ring, the manufacturer Sylva wrote Buyer a letter providing representations as to the ring:



Congratulations! This 15ct sapphire is one exeptional specimen of extraordinary Color and Size. The GRS type "Royal Blue" description from the Lab is only awarded to the rarest award winning stones.

Sri-Lankan mines are the Oldest mines in the world and have produced some of the world most famous Sapphires like the "Logan" Sapphire and the "Star of India".

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Sri Lankan mines are the oldest mines in the world and have produced **some of the world's most famous sapphires** like the "Logan" sapphire and the "Star of India."

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A **very small number** of fine stones are produced in Sri Lanka every

year and **the market is far greater than what is available**. **Prices continue to rise and this is why they are a <u>safe investment</u> for retaining and attaining <u>long term value</u>**.

Wear it in good health
Sylva xx

R. 667 (actual letter); R. 978 at ¶ 43 (SABBIA affidavit).

These were not representations of SABBIA or Ms. Friedmann, but rather the manufacturer and designer Sylva & Cie, which have shown reasonable and true. [35] All evidence showed a good, fair, honest, and reasonable sale, at a good discount to the Appellant. *Id*.

F. <u>After the sale, Appellant had a sudden bout of buyer's remorse, out of thin air, which Appellant herself described as "purely insane</u>."

Within hours of "super happy," Appellant suddenly had a bipolar flip:

	[APPELLANT]:	[SABBIA'S DEBBIE FRIEDMANN]:
Thu, Jan 30	**Debbie, I am freaking out about the ring.** I just can't to do. I am very sorry very sorry m. Been thinking about it all day I can't **I just can't spoil myself like that. When I think of friends in need I just feel like I will help them with a donation.**	

[35] R. 978 at ¶¶ 44–47 (SABBIA affidavit). The Court should take notice that Appellant's allegations mirror the letter sent by manufacturer Sylva & Cie.

Let's meet and discuss in a bit. **You made me write no returns yesterday!** You don't need an apartment.

I know Debbie I know.
I went to the extreme.

R. 978 at ¶ 48 (SABBIA affidavit); R. 670–81 (actual texts). Appellant thus confirmed in writing that she made "no returns" a material term of their agreement.

Appellant testified that her buyer's remorse came out of thin air; that ***it was all in her head***:

> [Q]: So I was just asking you, [Appellant], whether something external had happened, like a big inclusion appeared in the stone, somebody came and said your ring was trash, you fell down the stairs, something external that happened, or if these second thoughts were all just something that happened inside. Do you remember me asking that?
>
> **[APPELLANT]: Second thoughts happened inside, and I wanted to – I wanted to return it.**
>
> **[Q]: So nothing happened externally, no new event occurred?**
>
> **[APPELLANT]: No.**

R. 612 at Tr. 517, ln. 25–Tr. 518, ln. 11.

Even while inventing excuses for herself, Appellant admitted how improper ("*insane*") her own bipolar flip was:

	[APPELLANT]:	[SABBIA]:
Fri, Jan 31, 9:07 AM	Good morning Debbie; I opened the pouch where you place my <<beautiful black pearls! >> and there was a pair in it. I will return it this weekend. **Still debating about the ring.** Please allow me a little more time to be fully convinced about keeping it or not. I really appreciate it. This should have not been an impulsive decision. **I am fully aware of the behavior not being proper and apologize for it.** Have a great day.	
Mon, Feb 3, 7:26 AM	Good morning Debbie; Decision made. I am not getting the ring. **Purely insane. . . .** My weekend has been a challenged thinking of the ring; not easy and **upset by my behavior.**	

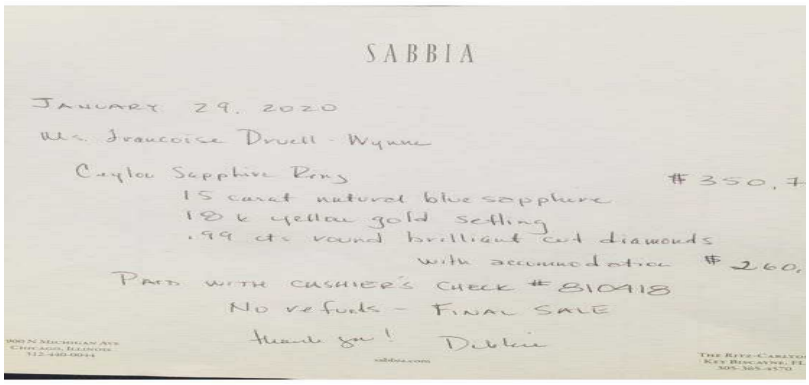
R. 978 at ¶ 50 (SABBIA affidavit); R. 670–81 (actual texts). Appellant sent all of these text messages after the "No returns – FINAL SALE."

G. Appellant then turned to panic and hired guns when SABBIA did not capitulate to Appellant's "purely insane" behavior.

After Appellant had her bipolar flip, SABBIA and Ms. Friedmann reiterated the plain terms of the agreement that SABBIA and Appellant made:

[APPELLANT] [SABBIA'S DEBBIE FRIEDMANN]:

Mon, Feb 3, 6:20 PM



SABBIA

JANUARY 29, 2020

Mrs. Francoise Druell - Wynne

Ceylon Sapphire Ring #350,7
15 carat natural blue sapphire
18 k yellow gold setting
.99 cts round brilliant cut diamonds
with accommodation #260,

PAID WITH CASHIER'S CHECK #810918
NO REFUNDS - FINAL SALE
thank you! Debbie

Francoise
I am sending you the receipt prepared on Wednesday . . . **In furtherance of that agreement** I sent your sapphire ring by courier on Thursday to be sized to your specification. **I also sent a check to the vendor for payment for the ring. Based upon our agreement, I had guaranteed payment for the reduced price. I relied on your statements and the written receipt that there were to be no returns and no refunds.** For that reason, I accepted the cashiers check hand delivered by Iberia Bank. I know you will enjoy this ring. **It is not a hasty purchase. You have seen and tried the ring 3 separate times over the last 6 weeks.** I would be happy to sit down and discuss the situation. I look forward to hearing your thoughts. With kind regards, Debbie

In total panic.

Tue, Feb 4, 1:58 PM

Francoise
Ring has arrived and is resized. Would you please come in and try it? Kind regards, Debbie

Wed, Feb 5, 1:42 PM	Debbie, . . . **I retained legal counsel**

R. 978 at ¶ 52 (SABBIA affidavit); R. 670–81 (actual texts). Appellant's bipolar buyer remorse then devolved into "total panic" and attack. *Id*.

Appellant never had the Sylve & Cie ring insured, which would require a legitimate appraisal and insurance valuation.[36] Appellant instead immediately hired a gang of lawyers to make up excuses, threaten SABBIA, and extort SABBIA to take back the ring at a loss or be sued. *Id*.

By February 4, 2020, Appellant's first law firm issued demand for a refund under threat of lawsuit, *claiming to be exercising SABBIA's online sales return policy*.[37] That was inapplicable, as *this was not an online sale* and Appellant made an in-person agreement for "No returns - FINAL SALE" in exchange for a $90K discount and alteration. *Id*.

By March 3, 2020, Appellant got a second law firm to threaten lawsuit, again on the inapplicable online sales return policy. *Id*. When that did not squeeze SABBIA into submission, after *eight months* Appellant got a third law firm to file this trumped-up FDUTPA lawsuit under entirely new theories of a fraudulent sale. *Id*.

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[36] R. 337 at Tr. 111, ln. 1–18 ("[Q]: did you ever get that insured? [APPELLANT]: No. . . . No, it is not – not, sir. It is not insured. It is not.").
[37] R. 978 at ¶¶ 55–59 (SABBIA affidavit).

Yet, none of the lawsuit Complaint's allegations were ever mentioned by Appellant or her numerous lawyers in the eight months between the January sale and the September complaint. *Id*.

H. Appellant sought out fake appraisals based on deceased estate auctions or nothing at all, rather than luxury retail sales of comparable jewelry artists and designers.

Rather than insuring the Sylva & Cie jewelry and obtaining a good faith appraisal of the retail replacement cost for that particular art piece, Appellant bought sham appraisals that could further her campaign to leverage SABBIA. Appellant did not seek any appraisal of comparable jewelry sales of (i) retail sales of new jewelry, (ii) designer art pieces, (iii) in Florida:

> [Q]: Did you talk to any appraisers – jewelry appraisers – in Florida?
>
> [APPELLANT]: No, I did not.
>
> [Q]: Did you talk to any jewelry appraisers outside of New York?
>
> [APPELLANT]: No, I did not.
>
> [Q]: Besides the particular jewelry appraiser that you did hire, did you talk to any others?
>
> [APPELLANT]: No, none. That's the only one. The only one. This first one I contacted and the first one I dealt with. The only one.
>
> [Q]: After you got the appraisal from your appraiser, did you ever talk to any other appraisers?
>
> [APPELLANT]: No, I did not.

[Q]: Did you ever obtain any other appraisals?

[APPELLANT]: No, I did not.

[Q]: Do you know – Okay. **So what made you decide that the appraiser that you chose was qualified?**

[APPELLANT]: I didn't know. You know, this whole situation because I mean – I really didn't think it was going to be a big deal for Debbie to take that ring back.

R. 337 at Tr. 112, ln. 11–Tr. 113, ln. 9.

Appellant bought a New York appraiser to price the ring out at a New York estate auction for distressed sales of used jewelry from deceased owners.[38] The evidence shows that appraiser ignored any and all retail sale comparables on earth, for Appellant to falsify a bargain-basement value for her lawsuit—Appellant later alleged her New York appraiser was mysteriously "unavailable" and could not be deposed. *Id*.

Appellant then bought a second bogus Palm Beach appraiser who has testified that she did not use any comparables at all, did not perform a proper appraisal, was generally rushed, and did not have reliable information.[39] The second appraiser has testified that her own appraisal had no comparables:

[38] R. 978 at ¶ 60–61 (SABBIA affidavit); R, 625 (Aretz appraisal). The Court should take notice that this type of appraisal is inapplicable and irrelevant to this retail sale of a new designer jewelry art piece between an alive, willing, and non-distressed buyer and a willing seller.
[39] R. 1058 at Tr. 108, ln. 20–Tr. 110, ln. 2 (Utley depo).

> [Q]: So is it fair to say that there are no actual comps in this page eleven [the appraisal comp list]? There is not sales for most of them. For two, they're not heated so those are not applicable. And for the only one left, it's 7.8 [carats], it's so undersized it is not comparable; is that fair to say?
>
> [UTLEY]: I think you could say that, yes, if you wish to. Uh-huh. Yeah.

R. 1058 at Tr. 108, ln. 20–Tr. 110, ln. 2 (Utley depo). That rushed second appraisal was a sham. *Id*.

I. Four independent and unpaid professionals testified that Appellant bought a rare luxury jewelry art piece at a fair retail price and fair market value.

To check Appellant's sham appraisals, SABBIA sought out review of the Sylva & Cie ring and sale with other well-known professionals in the luxury jewelry and art industry.[40]

Four professional, industry leaders in jewelry testified that the Sylva & Cie ring is exactly what SABBIA sold it as—a 15-carat Ceylon heated natural sapphire ring with 78 round cut brilliant diamonds on 18k gold, supported by an authoritative Gem Research Swisslab gemstone report, manufactured and designed by Los Angeles luxury jewelry designer Sylva Yepermian of Sylva & Cie, who set the manufacturer's retail price at $350,700. *Id*.

[40] R. 978 at ¶ 64 and R. 996, 1009, 1018, and 1021 (C(1)–(4) (Affidavits)).

These **four professionals provided solid retail comparables, sworn explanation of the jewelry retail market, and testimony that the manufacturer Sylva's retail price was a fair retail price** and that **Appellant bought the Sylva ring at fair market value**. *Id*.

As these four professionals testified, Appellant got this ring at a discounted rate below the retail mark-up regularly charged in the jewelry retail industry, both for common and luxury jewelry items (which ranges from 100% to 500% or more). *Id*.

Jerry Bern, a GIA Graduate Gemologist (G.G.), President of Marshall Piece & Company (a Chicago retailer of fine jewlry), and jeweler with 35 years in jewelry (and six generations and 120 years of family history) testified:

> All of the [comparable] rings have heat-treated Ceylon sapphires with carat between 13–16 carats. They have a suggested retail price between $270,000.00 to $310,000.00. This is the retail price for those rings. . . .
>
> **Comparing the Sylva & Cie 15-carat Ceylon sapphire ring to those being sold by Oscar Heyman, a suggested retail price of $350,000.00 is fair and reasonable for the Sylva & Cie ring. I would have no reason to doubt this to be a fair retail price for that ring. Thus, a final retail sale price of $260,000.00 for the Sylva & Cie 15-carat Ceylon Sapphire ring is more than a fair price and a fair market value.**
>
> This is a very good stone in a very fine piece of jewelry, for a very good and fair retail price.

R. 996. Jerry Bern received no compensation whatsoever for his testimony and opinion.[41]

Imre Petroczky, a Sirus Tanya representative who has owned three jewelry stores, represented at least eight prestigious jewelry companies, and has 40-years' experience in jewelry testified:

> In the jewelry market . . . Typically the retail markup is anywhere from +80% to +150% of the wholesale price, but can go up to +300% or +500% or more for rare luxury jewelry mark-up. Stones that are rare and desirable can be marked up more to whatever there is a market for, whatever the market will bear.
>
> **The retail price of $260,000.00 USD, charged by SABBIA and paid by [Buyer] for the 15-carat Ceylon Sapphire ring, is more than a fair price. [Buyer] got a very good stone for a very good and fair retail price.**

R. 1009. Imre Petroczky received no compensation for his testimony.[42]

Thomas Tashey, a GIA Graduate Gemologist (G.G.), Laboratory Director at Professional Gem Sciences Laboratory (a Chicago independent laboratory for the study and grading of diamonds and color gemstones), estimated that the insurance replacement cost excluding sales tax for Buyer's Sylva & Cie ring is $264,750.00, and reported:

> The ring is set with a large fine quality natural blue sapphire with excellent color, clarity, and cut. These 3 parameters are what sets the value of the center stone. It is mounted in a custom design ring from a famous designer – Sylva et Companie.

[41] R. 978 at ¶ 67.
[42] R. 978 at ¶ 69.

> Fine designer pieces are unique in the market place and do not fall under the standard retail mark-up. Unique jewelry can warrant 100 to 400% markup.

R. 1018. Mr. Tashey did not receive any compensation.[43]

Kevin Kasdin, a BU geologist/crystallographer, owner of Vollman and Rosenthal Bee (a New York wholesaler and manufacturer of fine jewelry), and jeweler with 45 years in jewelry testified:

> **The value of a colored stone is simply what a seller is willing to sell it for, and what the buyer is willing to pay for it. If these two factors come together, a sale is made. This and <u>ONLY this determines the value of a colored stone</u>**.

R. 1021 at ¶¶ 9–11. Kevin Kasdin received no compensation whatsoever for his testimony and opinion.[44]

Appellant testified she agreed with Mr. Kasdin as to this point:

> [Q]: And so he's saying that as with art like a painting, as with jewelry which is art made out of metal and gems, the value is what a buyer is willing to pay. Do you see that?
>
> [APPELLANT]: Yes.
>
> [Q]: Do you agree with that, disagree with that, something else?
>
> [APPELLANT]: I agree.

R. 590 at Tr. 495, ln. 6–20. Appellant also testified that she was just such a willing buyer who subjectively loved this particular piece of designer jewelry

[43] R. 978 at ¶ 72.
[44] R. 978 at ¶ 74.

art, for the way that it struck her personally. R. 389 at Tr. 294, ln. 5–20; R. 391 at Tr. 296, ln. 1–7;[45] *Id*. at Tr. 296, ln. 13–24;[46] and R. 404 at Tr. 309, ln. 3–Tr. 310, ln. 2.

Despite all this, Appellant maintained this FDUTPA lawsuit. SABBIA's Counterclaim sought damages for Appellant's breach of contract, as confirmed through her text messages and testimony, that caused her to lose the profit from the manufacturer's retail price in exchange for a final sale with no returns. The trial court entered two summary judgments dismissing Appellant's FDUTPA claim and awarding SABBIA her lost profit from Appellant's breach of contract, with extensive citations to the record evidence against Appellant and the case law supporting SABBIA and Ms. Friedmann. Appellant lacked the evidence to prove her case and defenses. This Court must affirm.

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[45] Appellant testified: "I was not looking and comparing. I wasn't comparing this ring with anything else. I was just admiring the beauty of it."

[46] Appellant testified: "[Q]: what about this ring, what feature of this ring struck you? [APPELLANT]: The size, the color, the shine to it from being in that magnificent case. . . . I was looking at just the whole thing. I was like, wow, this is magnificent. . . . It shows it. You can see, you clearly see, like I see it in the picture now. [Q]: So, to you, this ring, something about it taken as a whole is striking and beautiful to you; is that right? [APPELLANT]: Yes, that's correct. [Q]: Okay. Did that sense for you change in any way from the first time you saw it to the date that you bought it on January 29th? [APPELLANT]: No. I think still beautiful, still today. [Q]: So, as you sit here today, it still to you is the same degree of striking and beautiful as it was the first time you saw it? [APPELLANT]: Yes, sir."

SUMMARY OF ARGUMENTS

This case is about a "bipolar" buyer who described her own behavior here as "purely insane." This is not the first time the Appellant has sued somebody for her buyer's remorse, but it should be the last. Here, after two-months' due diligence, the Appellant bought a one-of-a-kind, sapphire and diamond, Sylva & Cie designer jewelry art piece—a ring—from the SABBIA luxury jewelry retailer at the Ritz-Carlton. Appellant also confirmed in writing that she made the sale "No Returns – FINAL SALE," in exchange for a $90K discount from Sylva & Cie's manufacturer suggested retail price.

Appellant entered the contract fully competent, educated, experienced, informed, and able. Appellant was well-versed in the process of due diligence, appraisals, and inspections prior to making any large-ticket purchase. The Sylva jewelry art was exactly as advertised: a luxury art piece from contemporary and popular designer Sylva Yepermian, with a 15-carat Ceylon sapphire of Royal Blue color, authenticated by its authoritative Gem Swisslab Report, and with 78 round-cut brilliant diamonds on gold, in a one-of-a-kind art piece design. All evidence showed a good and fair retail sale in the luxury jewelry art market to a competent and knowledgeable buyer.

Then, Appellant had an abrupt case of buyer's remorse. Without warning and without cause, she suddenly felt she couldn't "spoil" herself and

should instead give an apartment as a gift for a friend. Appellant testified that nothing external happened, there was nothing newly discovered or wrong with the ring, it was just all in her head. Appellant demanded SABBIA buy back the jewelry, without any justification and only on her whimsy, in plain breach of her contract.

As the trial court properly held, Appellant lacked admissible evidence to prove *actual* damages, as Appellant bought the Sylva jewelry art piece for her subjective admiration of its beauty, and multiple comparables and sworn professional testimony showed Appellant bought the ring at a fair retail price way below industry markup. *Angelo v. Parker*, 275 So. 3d 752, 756 (Fla. 1st DCA 2019); *Stuart Roofing, Inc. v. Thomas*, 372 So. 3d 298, 300 (Fla. 4th DCA 2023); *In re Crown Auto Dealerships, Inc.*, 187 B.R. 1009, 1019 (Bankr. M.D. Fla. 1995); *Ferreira v. Sterling Jewelers, Inc.*, 130 F. Supp. 3d 471, 480–82 (D. Mass. 2015).

Appellant lacked the evidence prove causation, as Appellant is a professional, educated, knowledgeable, and uniquely experienced person who evaluated the ring over a two-month due-diligence period, and bought the Sylva jewelry art piece for her subjective admiration of its beauty. *Hennegan Co. v. Arriola*, 855 F. Supp. 2d 1354, 1361 (S.D. Fla. 2012); *Chicken Unlimited, Inc. v. Bockover*, 374 So. 2d 96, 97 (Fla. 2d DCA 1979);

Virgilio v. Ryland Group, Inc., 680 F.3d 1329, 1336 (11th Cir. 2012) (holding FDUTPA defendant had no duty to disclose land was next to bombing range).[47]

Appellant lacked the evidence to prove a deceptive business practice, as the seller statements alleged were true, made in good faith dissemination of the manufacturer's representations, and are not actionable under Florida law. *Angelo* at 756; § 501.211(2), Fla. Stat. (2021).

Lastly, the undisputed summary judgment evidence showed that the parties had an enforceable contract in writing and conduct, Appellant breached without justification, and caused SABBIA losses. *Katz Deli of Aventura, Inc. v. Waterways Plaza, LLC*, 183 So. 3d 374, 382 (Fla. 3d DCA 2013); *W.W. Gay Mech. Cont., Inc. v. Wharfside Two, Ltd*., 545 So. 2d 1348, 1351 (Fla. 1989). Accordingly, this Court must affirm.

STANDARD OF REVIEW

[47] *See also Spradling v. Nat'l City Mortg*., 2009 WL 10713339, at *7 (M.D. Fla. May 4, 2009) (holding plaintiffs failed to allege an actionable nondisclosure where they could have learned the omitted information upon their own diligent inquiry); *S.K.Y. Mgmt. LLC v. Greenshoe, Ltd*., 2007 WL 9701121, at *4 (S.D. Fla. Mar. 11, 2007) (holding non-disclosure of material defects in vessel not actionable, as buyer had opportunity to conduct own investigation of the facts even though seller was in a position of superior knowledge).

A summary judgment movant can satisfy its burden in either of two ways: "If the nonmoving party must prove X to prevail at trial, the moving party at summary judgment can either produce evidence that X is not so or point out that the nonmoving party lacks the evidence to prove X." *In re: Amendments to Florida Rule of Civil Procedure 1.510*, 2021 Fla. C. O. 0024 (Fla. 2021). "[W]hen opposing parties tell two different stories, one of which is blatantly contradicted by the record, . . . a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment." *Id*.

Then the burden shifts to the nonmoving party to come forward with evidence demonstrating that a genuine dispute of material fact exists. *Id*.; *Romero v. Midland Funding, LLC*, 358 So. 3d 806, 808 (Fla. 3d DCA 2023). The nonmoving party must "go beyond pleadings and by her own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" *Id*.

However, it is well-established Florida law that the nonmoving party cannot contradict or repudiate her prior position or testimony (whether hers or of somebody else) simply to create a factual dispute against summary judgment. *Baker v. Airguide Mfg., LLC*, 151 So. 3d 38, 40 (Fla. 3d DCA 2014); *Ellison v. Goodman*, 395 So. 2d 1201, 1201–02 (Fla. 3d DCA 1981).

Further, "if the evidence presented by the nonmovant is merely colorable, or is not significantly probative, summary judgment may be granted." *Romero* at 809. In these circumstances, this Court must affirm. *Id*.

ARGUMENT WITH REGARD TO EACH ISSUE

I. Appellant lacked the admissible evidence to prove *actual* damages, as Appellant bought the Sylva jewelry art piece for her subjective admiration of its beauty, and multiple comparables and sworn professional testimony showed Appellant bought the ring at a fair retail price way below industry markup.

A. Appellant concedes she lacked the evidence to prove *actual* damages because she bought this jewelry art piece for its subjective beauty to her, her buyer's remorse was purely subjective opinion and speculation, and the condition of the jewelry art piece delivered was in the exact condition that she contracted.

A FDUTPA plaintiff must prove *actual* damages, as "FDUTPA does not provide for recovery of nominal damages, speculative losses, or compensation for subjective feelings of disappointment." *Rollins, Inc. v. Butland*, 951 So. 2d 860, 873 (Fla. 2d DCA 2006); *Ahearn v. Mayo Clinic*, 180 So. 3d 165, 176 (Fla. 1st DCA 2015); *City First Mortg. Corp. v. Barton*, 988 So. 2d 82, 86 (Fla. 4th DCA 2008).[48]

[48] *See also Macias v. HSBC of Fla., Inc.*, 694 So. 2d 88, 90 (Fla. 3d DCA 1997) (speculative losses not recoverable); *In re Crown Auto Dealerships, Inc.*, 187 B.R. 1009, 1019 (Bankr. M.D. Fla. 1995) ("subjective feelings of disappointment are insufficient"); *Hennegan Co. v. Arriola*, 855 F. Supp. 2d 1354, 1361 (S.D. Fla. 2012); *Gibson v. Chase Home Fin., LLC*, 2011 WL

Florida law prohibits recovery of consequential damages in FDUTPA claims; i.e., for upcharges, overcharges, lost profits, the difference between purchase price and "market value," a diminution in value, or resale losses. *Angelo v. Parker*, 275 So. 3d 752, 756 (Fla. 1st DCA 2019) (citing *Lombardo v. Johnson & Johnson Consumer Cos., Inc*., 124 F. Supp. 3d 1283, 1289–90 (S.D. Fla. 2015) (deceptive pricing and overcharges are insufficient) and *Kia Motors Am. Corp. v. Butler*, 985 So. 2d 1133, 1140 (Fla. 3d DCA 2008) (no consequential damages, such as resale losses).[49]

As recently held: "the mere existence of an overcharge does not establish a violation of FDUTPA." *Angelo* at 756. Likewise, a FDUTPA plaintiff cannot establish actual damages through an inability to resell a product at a profitable price. *Hanson Hams, Inc. v. HBH Franchise Co., LLC*,

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6319401, at *6 (M.D. Fla. Dec. 16, 2011) (bank's deceptive letters were not shown to cause <u>*actual*</u> damages).

[49] *See also SMS Audio, LLC v. Belson*, 2017 WL 11631378, at *4 (S.D. Fla. Apr. 25, 2017) (diminution in value not recoverable); *Flexstake, Inc. v. DBI Servs., LLC*, 2018 WL 6270972, at *3 (S.D. Fla. Nov. 30, 2018) ("proof of actual damages is necessary to sustain a FDUTPA claim," which cannot include lost profit from a transaction); *Sub-Zero, Inc. v. Schuster*, 2018 WL 8369106, at *4 (S.D. Fla. Sept. 4, 2018) (lost profits are not actionable under FDUTPA); *BPI Sports, LLC v. Labdoor, Inc*., 2016 WL 739652, at *6 (S.D. Fla. Feb. 25, 2016) (holding FDUTPA claim failed where it was based on lost profit rather than actual damages); *Ounjian v. Globoforce, Inc*., 2022 SL 3223997, at *5 (N.D. Fla. July 18, 2022) (no FDUTPA consequential damages); *In re Crown Auto Dealerships, Inc.*, 187 B.R. 1009, 1019 (Bankr. M.D. Fla. 1995) (rejecting attempt to prove actual damages by expert witness regarding perceived diminished value of used car).

2004 WL 5470401, at *10 (S.D. Fla. Dec. 21, 2004) (no actual damages by inability to resell at a profitable amount). Lost profit is a consequential damage that is not recoverable or actionable under FDUTPA. *BPI Sports, LLC v. Labdoor, Inc.*, 2016 WL 739652, at *6 (S.D. Fla. Feb. 25, 2016).

Because there can be no FDUTPA recovery for upcharge, overcharge, lost profit, difference between purchase price and "market value," or resale losses, a plaintiff must prove that **there was an actual difference between the *condition* of the product as *contracted* and the *condition* of the product actually *delivered***. *Stuart Roofing, Inc. v. Thomas*, 372 So. 3d 298, 300 (Fla. 4th DCA 2023) (quoting *Rollins, Inc. v. Heller*, 454 So. 2d 580, 584 (Fla. 3d DCA 1984) and *Fort Lauderdale Lincoln Mercury, Inc. v. Corgnati*, 715 So. 2d 311, 314 (Fla. 4th DCA 1998) (car contracted without accident damage but delivered with significant accident damage)); *Rodriguez v. Recovery Perf. & Marine, LLC*, 38 So. 3d 178, 181 (Fla. 3d DCA 2010).[50]

[50] *See also Vintage Motors of Sarasota, Inc. v. MAC Enters. of N. Car., LLC*, 336 So. 3d 374, 378 (Fla. 2d DCA 2022) (must prove difference in condition of product contracted to delivered); *Baptist Hosp., Inc. v. Baker*, 84 So. 3d 1200, 1204 (Fla. 1st DCA 2012) (same); *Smith v. 2001 S. Dixie Hwy., Inc.*, 872 So. 2d 992, 994 (Fla. 4th DCA 2004) (same); *Coronacide, LLC v. Wellness Matrix Group, Inc.*, 2021 WL 4307488, at *9 (Sept. 22, 2021) (same); *Dorestin v. Hollywood Imports, Inc.*, 45 So. 3d 819, 825 (Fla. 4th DCA 2010) (no claim upon outside of contract).

Thus, A FDUTPA plaintiff cannot establish actual damages solely through an expert witness's perceived decrease in the value of a product sold, with no independent showing of harm or wear and tear to the product itself. *In re Crown Auto Dealerships, Inc.*, 187 B.R. 1009, 1019 (Bankr. M.D. Fla. 1995).

Additionally, an appellant waives and concedes any appellate argument by failing to specifically raise and brief it in the Initial Brief. *D.H. v. Adept Cmty., Servs., Inc.*, 271 So. 3d 870, 888 (Fla. 2018); *Polyglycoat Corp. v. Hirsch Distribs., Inc*., 442 So. 2d 958, 960 (Fla. 4th DCA 1983).

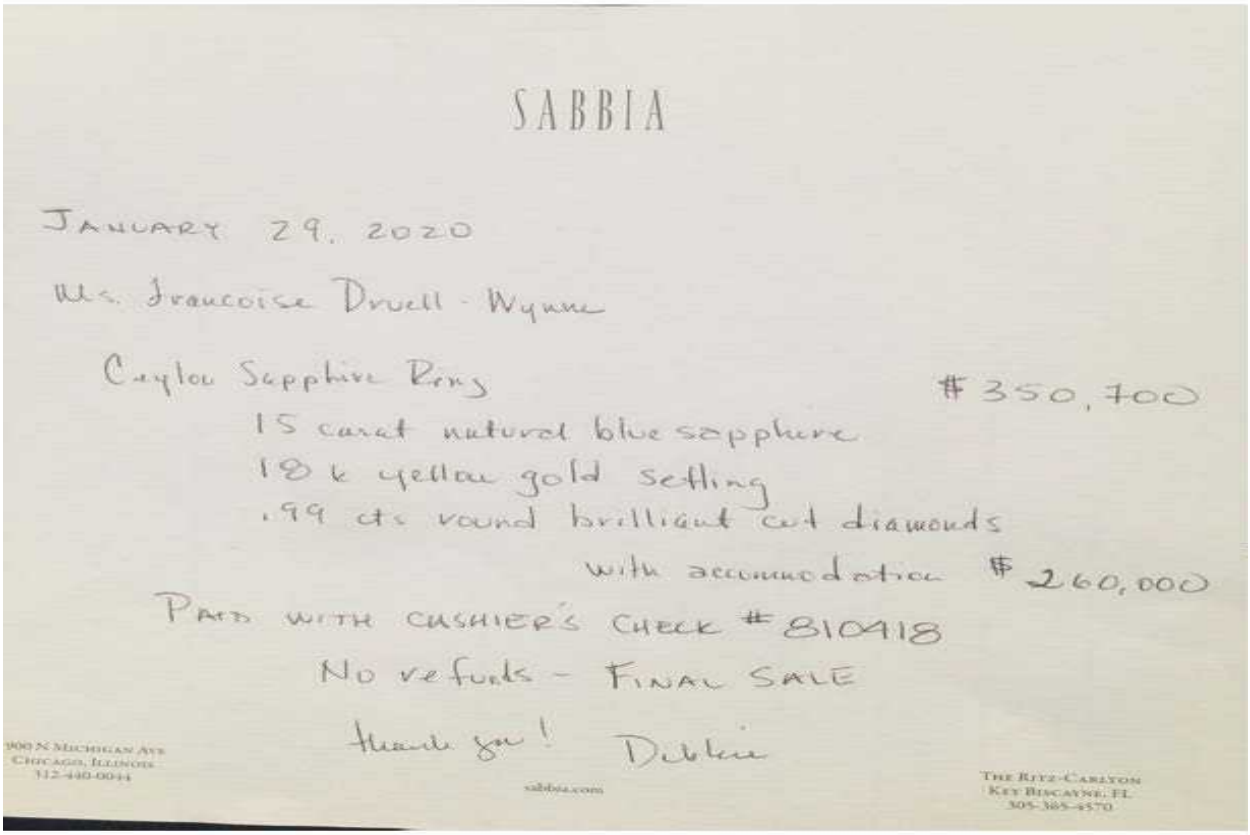
Here, it was undisputed below that SABBIA retail jewelry provided the jewelry art piece in the exact condition that Appellant contracted in every way—a 15-carat Ceylon natural sapphire ring, oval, royal blue, in 18k yellow gold setting, with .99cts in round brilliant cut diamonds.[51] Appellant testified that she changed her mind on the jewelry purely out of subjective and personal buyer's remorse, not actual damages, problems with the product, or nonconformity with the contract. *Id*. The trial court properly found and held as much in its summary judgment. R. 5194 (6/26/23 Judgment at *5–6). The

[51] R. 340–41 at Tr. 124–127; R. 505 at Tr. 410, ln. 5–12; R. 978 at ¶¶ 40, 41, 48, 52, and 77; R. 670–81 (actual texts); R. 861 at Tr. 72; R. 644 (Check to Sylva).

trial court's findings were supported by the record and case law. *Infra and supra*.

Appellant has not challenged this core holding and supporting findings from the trial court on actual damages, and has failed to cite any record evidence proving that the condition of the Sylva & Cie jewelry art piece delivered was not exactly the same as the condition actually contracted. Initial Br. *27–29, 47–55. Thus, Appellant waived this challenge and conceded the propriety of those rulings. *D.H.* at 889; *Polyglycoat* at 960. This alone requires affirmance.

Even if Appellant had not waived and conceded these grounds for affirmance—which Appellant has—the trial court's findings are accurate and undisputed in the record. The record evidence undisputedly showed Appellant and SABBIA had a written memorialization for their contract, which stated the exact condition of the Sylva & Cie jewelry art piece as contracted:



SABBIA

JANUARY 29, 2020

Ms. Francoise Druell - Wynne

Ceylon Sapphire Ring #350,700
15 carat natural blue sapphire
18 k yellow gold setting
.99 cts round brilliant cut diamonds
with accommodation #260,000

PAID WITH CASHIER'S CHECK #810418
NO REFUNDS - FINAL SALE

thank you! Debbie

900 N MICHIGAN AVE
CHICAGO, ILLINOIS
312-440-0044

sabbia.com

THE RITZ-CARLTON
KEY BISCAYNE, FL
305-365-4570

R. 978 at ¶ 52; R. 670–81.

Appellant thereafter repeatedly confirmed those were the contract terms in electronic correspondence sent by her.[52] Appellant corroborated the contract terms in testimony[53] and in conduct, having her banker deliver her

[52] R. 978 at ¶¶ 42, 48, 52; R. 670–81.

[53] R.340 at Tr. 124–127 ("**[Q]: you understood that you were actually purchasing the ring? [APPELLANT]: Yes. Yes.**"); R. 505 at Tr. 410, ln. 5–12 ("**[Q]: --and it was down $90,000 from the asking price? [APPELLANT]: And probably was more than that, yes. [Q]: And you understood that for that deal, you had to pay in cash; is that correct?**

$260K cashier's check, sizing the art piece, and amply discussing it thereafter without objection.[54]

After delivery, Appellant testified that there was nothing wrong with the jewelry art piece delivered and no difference from the piece contracted, that there were no external events, inclusions found in the gemstones, or other nonconformity of the product.[55] Appellant testified she changed her mind on the jewelry art piece purely out of subjective and personal buyer's remorse, not actual damages, problems with the product, or nonconformity with the contract. *Id*.

Because Florida law prohibits recovery of consequential damages in FDUTPA claims for upcharges, overcharges, lost profits, the difference between purchase price and "market value" alone, a diminution in value, inability to resell at a profitable price, or resale losses, nominal damages, speculative losses, or compensation for subjective feelings of disappointment, Florida law entirely barred Appellant's FDUTPA claim.[56]

[APPELLANT]:. . . . yes, that was my understanding, absolutely."); R. 500 at Tr. 405, ln. 8–14.

[54] R. 439 at Tr. 344–45; R. 978 at ¶¶ 33–37; R. 1065; R. 917 at Tr. 128.

[55] R. 612 at Tr. 517, ln. 25–Tr. 518, ln. 11.

[56] *Angelo* at 756; *Lombardo* at 1289–90; *Kia Motors* at 1140; *SMS* at *4; *Sub-Zero* at *4; *BPI* at *6; *In re Crown* at 1019; *Hanson Hams* at *10; *Stuart Roofing* at 300; *Rodriguez* at 181; *Vintage Motors* at 378; *Coronacide* at *9; *Rollins* at 873; *Macias* at 90; *Hennegan* at 1361; *Ahearn* at 176; *City First* at

B. Appellant's attempts to fabricate a basis for FDUTPA damages through inadmissible statements of purported experts violated Florida law, and those individuals testified that their own opinions were unreliable and incomplete.

Under Florida law, a trial court cannot consider inadmissible evidence in determining the disposition of a motion for summary judgment, including inadmissible reports from purported experts. *Rose v. ADT Sec. Servs., Inc*., 989 So. 2d 1244, 1249 (Fla. 1st DCA 2008) (affirming summary judgment dismissing plaintiff-buyer's fraud claim against seller, where buyer's proffered expert report was insufficient and inadmissible); *Dykes v. Quincy Tel. Co*., 539 So. 2d 503, 504 (Fla. 1st DCA 1989); §§ 90.402, 90.403, 90.603, 90.604, 90.702, 90.802, Fla. Stat. (2023) (relevance, exclusion on prejudice or confusion, testimony with lack of personal knowledge is inadmissible, disqualification of witnesses, testimony by purported experts, hearsay is inadmissible).[57]

86; *Gibson* at *6; *Baptist* at 1204; *Smith* at 994; *Dorestin* at 825; *Flexstake* at *3; *Ounjian* at *5.

[57] *See also Daubert v. Merrell Dow Pharmaceuticals, Inc*., 509 U.S. 579, 592–93 (1993); *Daubert v. Merrell Dow Pharm., Inc*., 43 F.3d 1311, 1318 (9th Cir. 1995); *Royal Caribbean Cruises, Ltd. v. Spearman*, 320 So. 3d 276, 290 (Fla. 3d DCA 2021); *Beckman v. State*, 230 So. 3d 77, 88–89 (Fla. 3d DCA 2017) (holding doctor testimony inadmissible as expert opinions would not have assisted jury); *Ramirez v. State*, 810 So. 2d 836, 842 (Fla. 2001) (proffered expert testimony inadmissible, as scientific reliability was not established, nor probative value weighed against prejudice or confusion of issues).

A FDUTPA plaintiff cannot establish actual damages solely through an purported expert's perceived decrease in the value of a product sold, with no independent showing of harm or wear and tear on the product. *In re Crown* at 1019. Further, under the Tipsy Coachman Doctrine, where a trial court reaches the correct result, the decision will be affirmed where the record reveals some other reason or basis to support it. *Rolling v. State*, 218 So. 3d 911, 912 (Fla. 3d DCA 2016); *Valdes v. Miami Herald Pub. Co*., 782 So. 2d 470, 471 (Fla. 3d DCA 2001).

Here, Appellant misleads this Court with the conclusory and unsupported argument that unspecified *admissible* evidence established the fair market value of the jewelry art piece was $45K.[58]

Nothing could be further from the truth.

Appellant relies entirely on the January 23, 2023 declaration of Robert Aretz to support her allegations (of potential lost profit).[59] Initial Br. at *50. (citing App. 789–811). Yet, as shown below Aretz's declaration was

[58] As a red herring that Appellant was only seeking non-actionable lost profit under FDUTPA, Appellant admits her damages claim is based on her supposed speculation that she could resell at a profit or break even (this purported non-actionable lost profit was the sole proffer of damages by Appellant). Initial Br. *48–50 ("that [Appellant] could sell it for that price if she wanted to").

[59] The Court should again note that lost profit and speculation are not actionable or recoverable under FDUTPA. *Supra*.

inadmissible in every way possible, and the trial court properly adhered to Florida law and its gate-keeper function by not admitting it for consideration in summary judgment or to a jury. *See* R. 5190 at *1–7 (6/26/23 Judgment); *Rose* at 1249; *Dykes* at 504; §§ 90.402, 90.403, 90.604, 90.603, 90.702, 90.802, Fla. Stat. (2023); *Beckman* at 88–89; *Ramirez* at 842. The trial court reached the correct result, as confirmed in the record. *Rolling* at 912; *Valdes* at 471 (Tipsy Coachman).

1. Appellant concedes the summary judgment evidence of four experts testifying that the jewelry art piece sold as contracted, at its fair market value and fair retail price, and SABBIA could have charged much more.

First, Appellant concedes[60] here that four professional, industry leaders in jewelry testified that the Sylva & Cie ring was exactly what SABBIA sold it as—a 15-carat Ceylon natural sapphire ring with 78 round cut brilliant diamonds on 18k gold, supported by an authoritative Gem Research Swisslab gemstone report, manufactured and designed by Los Angeles luxury jewelry designer Sylva Yepermian of Sylva & Cie, who set the manufacturer's retail price at $350,700 and independently put a price tag for that amount on the jewelry art piece. R. 996–1030.

[60] *D.H.*, 271 So. 3d at 888; *Polyglycoat*, 442 So. 2d at 960.

These multiple professional analyses and reliable comparables showed Appellant bought a valuable luxury jewelry art piece at a fair retail price.[61] **The Appellant testified that she specifically agreed with expert Mr. Kasdin that the fair market value is whatever a willing buyer and a willing seller agree upon—just as occurred in Appellant's own sale**.[62] Appellant testified that she was just such a willing buyer who subjectively loved this particular piece of designer jewelry art, for the way that it struck her personally.[63] This all showed that there were no actual damages. The trial court correctly found as much,[64] and this Court must affirm.[65]

2. Appellant's sham appraisals were inadmissible in every way, and the trial court thus properly did not admit them for summary judgment or jury confusion.

Because Appellant had no actual damages, she attempted to create a cause of action in bad faith through *inadmissible* sham appraisals, but her

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[61] Appellant got this jewelry art piece at a discounted rate below the retail mark-up regularly charged in the jewelry retail industry, both for common and luxury jewelry items (which ranges from 100% to 500% or more). *Id*. This is the opposite of actual damages; Appellant got a better sale price than the industry standard markup.

[62] R. 590 at Tr. 495, ln. 6–20.

[63] R. 389 at Tr. 294, ln. 5–20; R. 391 at Tr. 296, ln. 1–7; R. 404 at Tr. 309, ln. 3–Tr. 310, ln. 2.

[64] R. 5195 (6/26/23 judgment at *5).

[65] *Rose* at 1249; *Dykes* at 504; §§ 90.402, 90.403, 90.604, 90.603, 90.702, 90.802, Fla. Stat. (2023); *Beckman* at 88–89; *Ramirez* at 842; *Daubert*, 509 U.S. at 592–93; *Daubert*, 43 F.3d at 1318; *Royal Caribbean* at 290; *In re Crown* at 1019; *Rolling* at 912; *Valdes* at 471.

appraisers plainly did not analyze comparable jewelry sales of (i) retail sales of new jewelry, (ii) designer art pieces, (iii) in Florida.[66] Appellant bought a New York appraiser to price the ring out at a New York estate auction for distressed sales of used jewelry from deceased owners.[67] The appraiser ignored any and all retail sale comparables for Appellant to falsify a bargain-basement value for her lawsuit, and later was mysteriously "unavailable" and could not be deposed.[68] Appellant testified she would never make this type of a purchase in an auction; this was simply irrelevant.[69]

When her first sham appraisal proved inadmissible, Appellant bought a second bogus appraiser mid-litigation; yet this appraiser testified that she did not use any comparables at all, did not perform a proper appraisal, was generally rushed, and did not have reliable information.[70] The second appraiser testified that her own appraisal was not reliable. *Id*.

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[66] R. 337 at Tr. 112, ln. 11–Tr. 113, ln. 9.
[67] R. 625.
[68] R. 625 (Aretz); R. 634 (Graff comparables); R. 635 (Sylva appraisal); R. 978 (SABBIA affidavit); R. 996–1030 (four professional reports with comparables); R. 1066–90 (comparables).
[69] R. 334 at Tr. 98, ln. 9–Tr. 99, ln. 25.
[70] R. 1058 at Tr. 108, ln. 20–Tr. 110, ln. 2 (Utley depo); R. 1055 at Tr. 95, ln. 15–Tr. 96, ln. 4 ("[Q]: do you think it's possible that it would also skew your analysis if you don't have access to all the private sales that are probably going on up and down South Florida . . . ? [UTLEY]: Yes. **Yes, all of those things might change my value analysis if I had more information. . . I have no idea what percentage of them are out there, what percentage of them are currently being marketed, or what percentages of the them**

Together, Appellant's appraisers gave shocking testimony revealing the total lack of information, method, genuineness, and reliability of their speculative opinions, confirming Appellant's only proffer on unrecoverable damages was inadmissible:

1. Admitted missing information skewed their analysis and limited the valuation.[71]
2. No actual comparables used.[72]
3. No idea which retailers have 15-20 carat Ceylon sapphires, how rare they are, or for how much they sold.[73]

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are owned outright and being worn and – I just don't, I don't have that analysis.").

[71] R. 1055 at Tr. 95, ln. 15–Tr. 96, ln. 4.

[72] R. 1057 at Tr. 105, ln. 18–Tr. 106, ln. 3; R. 1058 at Tr. 106, ln. 21 – Tr. 109, ln. 2 (**[Q]: So is it fair to say that there are no actual comps in this page eleven? . . . is that fair to say? [UTLEY]: I think you could say that, yes, if you wish to. Uh-huh. Yeah."**); *see also* R. 1055 at Tr. 97, ln. 20–24; R. 1057 at Tr. 104, ln. 4–7 ("I don't have the actual price.").

[73] R. 1052 at Tr. 82, ln. 2–Tr. 83, ln. 19 ("I did not contact any of the places that I just mentioned. . . . Most of the jewelry stores, if I called them up, would not give me that information. That's proprietary information. They would not share with me unless they had the permission of the client to do so. . . . **No, they won't tell you who buys what and what they sold it for.** . . . **They still wouldn't tell me unless I was a qualified buyer** . . . **they would not share that** . . . **I don't know. I don't have access to that information."**); R. 1052 at Tr. 84, ln. 13–16 ("[UTLEY]: **Do you find the larger stones frequently? No.**"); R. 1052 atTr. 85, ln. 22–Tr. 86, ln. 14 ("[Q]: Well, what percentage of sapphires that are out there for sale do you believe are 15 carats or bigger? [UTLEY]: I have no clue. [Q]: Do you think it's more than five percent? [UTLEY]: I just don't know. I'm sorry. I just don't have that kind of statistical data available. [Q]: Do you think it's more than 20 percent?

4. No idea where 15-carat Ceylon sapphire jewelry is most commonly sold.[74]

5. No testable method to determine where this Sylva & Cie jewelry art piece was most commonly sold, as required.[75]

6. No analysis of brand, artist, or designer, though required. [76]

7. No appraisal on retail replacement value, the actual market.[77]

8. Admitted auction replacement valuation done was not proper for the new designer Sylva & Cie jewelry art piece here.[78]

9. Checked only one resource—auction sales—which was not the market.[79]

[UTLEY]: I have no idea. Really, I truly don't. **[Q]: So you have no idea what percentage of sapphires are over 15 carats? [UTLEY]: No, no."**).

[74] R. 1053 at Tr. 89, ln. 1–23 ("I don't know that. [Q]: But you didn't check and even if you did, you don't think they would tell you? [UTLEY]: No. . . . [Q]: Does the fact that an appraiser cannot find out this information, right, because you said if you call them, they won't tell you, does that modify this analysis of where these produces are most commonly sold? [UTLEY]: Yes. . . . [Q]: And that ultimately, as an appraiser, you're limited to information that you personally can access? [UTLEY]: Yes."); R. 1054 at Tr. 90, ln. 10–20 ("[Q]: you were not able to garner comparable information for 15-plus-carat Ceylon sapphire rings; is that accurate? [UTLEY]: Yes.").

[75] R. 1037 at Tr. 22, ln. 18–25; *see also* Utley Tr. 23, ln. 17–Tr. 24, ln. 24.

[76] R. 1036 at Tr. 21, ln. 7–23.

[77] R. 1035 at Tr. 17, ln. 5–10 ("[UTLEY]: most of the time they want to be sure that they are completely covered, and so they would prefer that everything probably be written to a retail replacement value."); *see also* R. 1035 at Tr. 17, ln. 21–Tr. 18, ln. 2.

[78] R. 1036 at Tr. 18, ln. 24–Tr. 19, ln. 3 and Tr. 20, ln. 9–13; R. 1035 at Tr. 16, ln. 14–23.

[79] R. 1054 at Tr. 90, ln. 21–Tr. 91, ln. 5; R. 1035 at Tr. 15, ln. 2–4 ("it does affect valuation because the auction market and possibly the retail market could be two different marketplaces. So maybe the piece would sell in one market for one price and one market for another price.").

10. Zero (0) actual sales by dealers compared.[80]

11. Zero (0) retail jewelry store sales compared.[81]

12. Zero (0) pricing guides used, as 15-carat Ceylon sapphires are so large and rare that there are no pricing guides.[82]

13. Zero (0) invoices compared.[83]

14. Zero (0) specialists who deal in kind to give a comparable.[84]

15. Zero (0) advertisements of sales to compare.[85]

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[80] Utley Tr. 91, ln. 6–12.

[81] *Id*.; *see also* R. 1034 at Tr. 13, ln. 4–16 and Tr. 14, ln. 4–7; R. 1049 at Tr. 71, ln. 11–Tr. 72, ln. 7.

[82] R. 1054 at Tr. 91, ln. 13–25 ("[Q]: your testimony is that there is not a good recognized pricing guide for a 15-plus-carat Ceylon sapphire. [UTLEY]: Right.").

[83] R. 1054 at Tr. 92, ln. 13–18 ("[Q]: How many invoices did you see and analyze for this particular appraisal? [UTLEY]: I did not."); R. 1038 at Tr. 26, ln. 21–Tr. 27, ln. 3; R. 1054 at Tr. 92, ln. 19–Tr. 93, ln. 2 ("[Q]: Did you use the invoice from the actual sale of this particular ring? . . . [UTLEY]: No. [Q]: And you did not have any other invoices? [UTLEY]: No.").

[84] R. 1054 at Tr. 93, ln. 3–Tr. 94, ln. 6 ("[Q]: Any other specialist that you were able to speak with who deals in like kind for this particular appraisal? [UTLEY]: No.").

[85] R. 1055 at Tr. 94, ln. 7–14 ("[Q]: So you don't use asking prices in your analysis? [UTLEY]: No."). Utley just ignored asking prices that were in line with the actual sale between SABBIA and Appellant, and only used bargain basement asking prices that were in line with the demands of Appellant's assignment—this clear evidence of bias and falsification alone showed grounds to strike the appraisal, exclude Utley as a witness, and ultimately sanction and grieve Utley for misrepresentation of appraisal. The reputation of SABBIA and Ms. Friedmann are being tarnished by this fraud; SABBIA and Ms. Friedmann deserve to have their names cleared.

16. Zero (0) other sources of "internet information."[86]

17. Zero (0) comparable auction sales.[87]

18. Tampering by Appellant by ordering review of the auction market rather than the retail market.[88]

19. Admitted that reports improperly failed to annotate true lack of comparables.[89]

20. Arbitrary and abject refusal to use comparables of significantly higher value, even when confronted with multiples of them in deposition.[90]

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[86] R. 1055 at Tr. 96, ln. 19–Tr. 97, ln. 1.

[87] *Infra*; R. 1055 at Tr. 97, ln. 20–Tr. 98, ln. 3 ("[UTLEY]: She would not say. That was proprietary information of the auction house."); R. 1056 at Tr. 98, ln. 24–Tr. 99, ln. 6.

[88] R. 1035 at Tr. 15, ln. 2–10 ("[UTLEY]: it does affect valuation because the auction market and possibly the retail market could be two different marketplaces. . . . I would write for the client that hires me is an appraisal that they're in agreement reflects how they would replace the item."); *see also* R. 1035 at Tr. 15, ln. 21–Tr. 16, ln. 2 ("[UTLEY]: I would ask for guidance from the insurance company and the client.").

[89] R. 1060 at Tr. 114, ln. 11–Tr. 115, ln. 13 ("[Q]: You didn't make any notation in your analysis? . . . [UTLEY]: No.").

[90] R. 1059 at Tr. 111, ln. 14–20; R. 1059 at Tr. 111, ln. 23–Tr. 112, ln. 3; R. 1059 at Tr. 112, ln. 16–Tr. 113, ln. 6 and R. 1066 (Exhibit 24) ("[Q]: here I've got this loose stone sapphire, natural blue, 15.67 carats, oval shaped from Ceylon, heat treated. Does that seem like a comparable stone to the one from the Sylva ring? [UTLEY]: Yes. It's a little more round, I think hers is a little more oval, but the size and the color and the heat treatment do match. [Q]: This one [] is being asked for $113,608. Does that seem like a fair asking price to you? [UTLEY]: I guess it's fair if that's what they're asking."); R. 1059 at Tr. 113, ln. 16–22 and Exhibit 25 ("[Q]: Does this seem, although one and a half carats less, somewhat comparable? [UTLEY]: Somewhat comparable, yes. Uh huh.").

21. Admitted did not have sufficient time to collect sufficient data and perform a proper analysis—yet, recklessly submitted reports anyway to the prejudice of SABBIA and Ms. Friedmann.[91]

Appellant's appraisals did not actually use any specific scientific theory to make their determinations, much less one that: (1) can be or has been tested; (2) has been subjected to peer review and publication; (3) has any known or potential rate of error of a particular scientific technique; (4) has any standards controlling the technique's operation; or (5) can show any general acceptance in the scientific community. *Kemp v. State*, 280 So. 3d 81, 89 (Fla. 4th DCA 2019).

Appellant's appraisals were not supported by the requisite testing, peer review, known or potential for rate of error, or similar indicia of reliability—it was inadmissible "pure opinion." *Royal Caribbean* at 290; *Kemp* at 89; *May v. State*, 326 So. 3d 188, 193 (Fla. 1st DCA 2021);" *Cristin* at 955. Appellant's sham appraisals were inapplicable, unreliable, irrelevant, and inadmissible.[92]

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[91] R. 1058 at Tr. 109, ln. 12–Tr. 110, ln. 4 ("[Q]" Did you not have a reasonable period of time to do your analysis? [UTLEY]: I had a small window, I would say . . . There may be more information out there now that I could use as a comparable . . . if I had maybe given myself more time and not completed it for maybe two or three months and allowed for more sales in the marketplace for comparables, that I might have had different comps and value conclusions, you know, or values.").

[92] *Rose* at 1249; *Dykes* at 504; §§ 90.402, 90.403, 90.604, 90.603, 90.702, 90.802, Fla. Stat. (2023); *Beckman* at 88–89; *Ramirez* at 842; *Daubert*, 509

Id.; *In re Crown* at 1019; § 90.702, Fla. Stat. (2022); *Daubert* at 592–93.[93] The trial court properly entered judgment, given Appellant lacked evidence to prove actual damages, and this Court must affirm now.

3. Appellant's own case law holds against Appellant's speculative and untenable argument for consequential damages, which are not recoverable under FDUTPA.

On appeal, Appellant mistakenly relies on *HRCC v. Hard Rock* and *Presidio v. Warner Bros.*, as those courts ruled against Appellant's specific arguments, requiring this Court to affirm. *HRCC* at 1323–24, 1333–34; *Presidio* at 682–83. Appellant cited several old cases with stale law which are all distinguishable because they all involved products whose physical condition on delivery was plainly different than as specifically contracted, which we do not have here. Initial Br. at *48–55 (citing *Ft. Lauderdale Lincoln*; *Besett*; *D.D.D. Corp.*; *Rollins*).

U.S. at 592–93; *Daubert*, 43 F.3d at 1318; *Royal Caribbean* at 290; *In re Crown* at 1019; *Rolling* at 912; *Valdes* at 471. Under the new summary judgment rule, even "if the evidence presented by the nonmovant is merely colorable, or is not significantly probative, summary judgment may be granted." *Romero* at 808–09. In these circumstances, this Court must affirm. *Id*.

[93] *See also Royal* 290; *Cristin v. Everglades Correctional Institution*, 310 So. 3d 951, 955 (Fla. 1st DCA 2020); *Vitiello v. State*, 281 So. 3d 554, 560 (Fla. 5th DCA 2019); *Chavez v. State*, 12 So. 3d 199, 205 (Fla. 2009) (citing *Glendening v. State*, 536 So. 2d 212, 220 (Fla. 1988)); *Sidran v. E.E. Dupont De Nemours & Co., Inc*., 925 So. 2d 1040, 1043 (Fla. 3d DA 2003) (excluding expert opinion that had some probative value that was substantially outweighed by the potential of misleading the jury).

Appellant improperly relies on the unreported, non-binding, 30-year-old case from Texas, *Sadovsky v. Hassler*, 105 F.3d 654 (5th Cir. Dec. 16, 1996). *Sadovsky* is legally inapplicable and factually distinguishable in nearly every way that matters:

(i) **The Texas standard of review was dispositively different from Florida review here, which that court repeatedly leaned upon**.[94] Here instead, the Court affirms if Appellant lacked the record admissible evidence or Appellant's evidence was "merely colorable, or is not significantly probative." *Romero*, 358 So. 3d at 808–09.

(ii) **The 45-year-old old Texas law was dispositively different from Florida law here**, with a different measure of damages ("the 'out of pocket' and 'benefit of the bargain' measure[s];" "a laundry list violation" and "convey[s] definite implications" violation that does not exist or apply in Florida (and may not exist now in Texas). *Sadovsky* at *5–6, 10. In Florida, none of these are actionable.[95]

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[94] *Sadovsky* at *2, 6–7, 10.

[95] *Angelo* at 756; *Lombardo* at 1289–90; *Kia* at 1140; *SMS* at *4; *Sub-Zero* at *4; *BPI* at *6; *In re Crown* at 1019; *Hanson Hams* at *10; *Stuart Roofing* at 300; *Rodriguez* at 181; *Vintage Motors* at 378; *Coronacide* at *9; *Rollins* at 873; *Macias* at 90; *Hennegan* at 1361; *Ahearn* at 176; *City First* at 86; *Gibson* at *6; *Baptist* at 1204; *Smith* at 994; *Dorestin* at 825; *Flexstake* at *3; *Ounjian* at *5; *MDVIP, Inc. v. Beber*, 222 So. 3d 555, 561 (Fla. 4th DCA 2017); *Addison v. Carballosa*, 48 So. 3d 951, 955 (Fla. 3d DCA 2010); *Wasser v. Sasoni*, 652 So. 2d 411, 412 (Fla. 3d DCA 1995); *Warren Technology, Inc.*

(iii) **The Texas seller made dispositively different statements than SABBIA here, and the Texas gemstone was delivered in a significantly different condition than contracted, unlike here**. The Texas seller misrepresented a gemstone's condition/quality as "perfect," when it was "highly included," of "medium" quality, with "an uneven cut, a defect that was partially hidden from view by the way the stone was set;" and testified he knew it was defective but intentionally concealed that. *Sadovsky*, 105 F.3d at *5–7, 9. Here, we have no such parallel affirmative fraudulent misrepresentations. *Supra*.

It is misleading to invite this Court to erroneously apply this wrong measure of damages from an old, unreported, non-controlling, and inapplicable Texas case.

Lastly, this Court must ignore Appellant's loose references and mischaracterizations of FTC regulations that are non-binding and do not expressly require specific affirmative disclosures, including of permanent heat treatment or other such treatments to any gemstone prior to retail sale of any and all jewelry in the U.S.—that mischaracterization of the FTC

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v. UL LLC, 962 F.3d 1324, 1328–29 (11th Cir. 2020); *Dolphin LLC v. WCI Communities, Inc.*, 715 F.3d 1243, 1250 (11th Cir. 2013); *see also Sadovsky* at *8 (citing *Autohaus, Inc. v. Aguilar*, 794 S.W.2d 459, 463 (Tex. Ct. App. 1990) for non-actioable puffery).

regulations is "vastly misleading" as heat treatment increases a particular gem's value. *Ferreira v. Sterling Jewelers, Inc*., 130 F. Supp. 3d 471, 480–82 (D. Mass. 2015). Accordingly, the Court must affirm.

II. The evidence showed that Appellant cannot prove causation, as Appellant is a professional, educated, knowledgeable, and uniquely experienced person who evaluated the ring over a two-month due-diligence period, and bought the Sylva jewelry art piece for her subjective admiration of its beauty.

Under Florida law, a plaintiff cannot maintain a FDUTPA action where she cannot prove causation; i.e., not only that a defendant engaged in unfair or deceptive trade practices but also that those practices directly caused injury to the plaintiff-buyer. *Hennegan Co. v. Arriola*, 855 F. Supp. 2d 1354, 1361 (S.D. Fla. 2012) (FDUPTA "causation must be direct, rather than remote or speculative."); *Chicken Unlimited, Inc. v. Bockover*, 374 So. 2d 96, 97 (Fla. 2d DCA 1979) ("this [FDUTPA] statute makes it clear that a plaintiff seeking damages must show not only that a defendant engaged in unfair or deceptive trade practices but also that those practices caused injury to the plaintiff.").

Under this causation element, even if a FDUTPA defendant's "statements were indisputably misleading, if not false," a plaintiff cannot prove FDUTPA causation if the evidence shows the plaintiff also "knew of the

possible falsity of those statements [] which she later claimed were misrepresentations." *Bockover* at 97.

Further, in the absence of a fiduciary relationship, mere nondisclosure of material facts in an arm's length transaction is not actionable, unless some artifice or trick has been employed to prevent a buyer from making further inquiry. *See Virgilio v. Ryland Group, Inc*., 680 F.3d 1329, 1336 (11th Cir. 2012) (holding FDUTPA defendant had no duty to disclose land was next to bombing range).[96]

SABBIA and Ms. Friedmann cited this exact case law on causation in their motion for summary judgment, failed to address this, instead focusing on fraud reliance, and thus conceded it. Further, Appellant lacked the evidence to prove causation, as held:

> Exhibit A at Tr. 115, ln. 2 – 4 ([Appellant's depo]. There is no evidence that [Appellant] was denied any request whatsoever by SABBIA or Ms. Friedmann, or that any question went unanswered. These facts go against the occurrence of anything deceptive or unfair in this retail sale.

[96] *See also Spradling v. Nat'l City Mortg*., 2009 WL 10713339, at *7 (M.D. Fla. May 4, 2009) (holding plaintiffs failed to allege an actionable nondisclosure where they could have learned the omitted information upon their own diligent inquiry); *S.K.Y. Mgmt. LLC v. Greenshoe, Ltd*., 2007 WL 9701121, at *4 (S.D. Fla. Mar. 11, 2007) (holding non-disclosure of material defects in vessel not actionable, as buyer had opportunity to conduct own investigation of the facts even though seller was in a position of superior knowledge).

R. 5194 (6/26/13 Judgment at *4–5). Appellant failed to address these causation findings and case law, and thus waived appellate challenge to them. *D.H.* at 888; *Polyglycoat* at 960; *Hennegan* at 1361; *Bockover* at 97.

Because Appellant "knew of the possible falsity of those statements [] which she later claimed were misrepresentations," she cannot provide FDUTPA causation even if those "statements were indisputably misleading, if not false." *Bockover* at 97. This Court must affirm on this record, as the trial court reached the correct result. *Rolling*, 218 So. 3d at 912; *Valdes*, 782 So. 2d at 471. The overwhelming record evidence supported the trial court's ruling.[97]

Appellant mistakenly relies on *State v. Wyndham*, in which the court affirmed dismissal of a FDUTPA defendant in a hotel's application of secret surcharges after guests entered contracts for room rates, because there was insufficient evidence that the defendant directly caused the secret surcharge losses. 869 So. 2d 592, 599. This Court must do the same here. Appellant otherwise improperly relies on three non-controlling class action cases that

[97] R. 335 at Tr. 102–108, 115, 131–32, 162, 225–29, 460 (Appellant depo discussing these topics in detail); R. 332–33 at Tr. 94–95; R. 332–33 at Tr. 94, 96; R. 333–34 at Tr. 97–98; R. 334 at Tr. 98–99; R. 333 at Tr. 95; R. 335 at Tr. 102–03; R. 342 at Tr. 133.

did not analyze FDUTPA causation and are inapplicable here. *Carriuolo*, 823 F.3d 977; *Waste Pro*, 282 So. 3d 911; and *Turner*, 885 So. 2d 1004.

Further, the *Ferreira* court specifically ruled against Appellant's misquotation and non-contextual citation of the FTC guidelines as "vastly misleading" and inaccurate. *Ferreira*, 130 F. Supp. 3d at 480–82. The Court must affirm.

III. The evidence showed Appellant could not prove a deceptive business practice, as the seller statements alleged were true, made in good faith dissemination of the manufacturer's representations, and are not actionable under Florida law.

A. Appellant lacked the evidence to prove a FDUTPA deceptive or unfair business practice, as was plain in the record and properly found by the trial court.

Florida law requires a FDUTPA plaintiff to prove the defendant committed deceptive practices, by conducting business in a way "likely to mislead consumers acting reasonably in the circumstances, to the consumers' detriment." *Angelo v. Parker*, 275 So. 3d 752, 755 (Fla. 1st DCA 2019) (citing *Kia*, 985 So. 2d at 1140 (Fla. 3d DCA 2008)). A plaintiff must prove that a reasonably objective person in the same circumstances would have been deceived. *Id*.[98]

[98] *See also Zlotnick v. Premier Sales Group, Inc*., 480 F.3d 1281, 1284–87 (11th Cir. 2007) (holding no FDUTPA deceptive act where vendor cancelled

Florida law requires a plaintiff to prove the defendant committed unfair practices by conducting business that causes substantial injury to a consumer which the consumer could not have reasonably avoided. *Id*. A plaintiff must prove that a reasonably objective person in the same circumstances could not have reasonably avoided the actual damages. *Id*.

Florida law prohibits a buyer from suing a seller for representing that a contract price is a great deal or a great value—these negotiations, "puffing," or statements of opinion are not actionable under Florida law. *MDVIP, Inc. v. Beber*, 222 So. 3d 555, 561 (Fla. 4th DCA 2017) ("exceptional" product not actionable); *Addison v. Carballosa*, 48 So. 3d 951, 955 (Fla. 3d DCA 2010) (easily discoverable with ordinary diligence not actionable); *Wasser v. Sasoni*, 652 So. 2d 411, 412 (Fla. 3d DCA 1995) ("building very good" and "excellent deal" non-actionable opinions).

Over and over again, Florida courts have held that these statements about the pricing and market value of a product as "exceptional," a "great deal," a "minimum rate," and so on, are not actionable. *Id*.; *Warren Technology, Inc. v. UL LLC*, 962 F.3d 1324, 1328–29 (11th Cir. 2020); *Dolphin LLC v. WCI Communities, Inc.*, 715 F.3d 1243, 1250 (11th Cir. 2013).

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sale reservation agreement at one price and then offered to sell to same buyer at higher price).

Likewise, "the mere existence of an overcharge does not establish a violation of FDUTPA." *Angelo* at 756; *see also HRCC, Ltd. v. Hard Rock Café Int'l (USA), Inc.*, 302 F. Supp. 3d at 1323. The existence of a difference between the price paid for a product by the retailer, and the price then charged to the retail buyer for that product (i.e. the mark-up), is not actionable. *Id*. Instead, a plaintiff must prove an overcharging retailer acted in a way that was unscrupulous, oppressive, unethical, or immoral. *Id*. There must be some defect in the product or some failure to deliver the product in the condition that it was contractually promised, not simply a buyer's failure to make profit on the transaction. *Id*.

Lastly, under FDUTPA it is a complete defense if a retailer disseminates claims of a manufacturer in good faith, even if those claims violate FDUTPA:

> However, damages, fees, or costs are not recoverable under [FDUTPA] against a retailer who has, in good faith, engaged in the dissemination of claims of a manufacturer or wholesaler without actual knowledge that it violated this part.

§ 501.211(2), Fla. Stat. (2021).

Here, Appellant did not have the evidence to prove a deceptive or unfair business practice by SABBIA or Ms. Friedmann. The actual record testimony showed Appellant could not remember hardly a single detail about her two-month due-diligence period and negotiations to purchase the Sylva & Cie

jewelry art piece—Appellant could not provide clear, competent, or reliable evidence of any particular statement that caused her an actual loss.[99] There was no evidence of a hard sale, misrepresentations, or any sales statements that were unfair, deceptive, fraudulent, or unconscionable. *Id*.

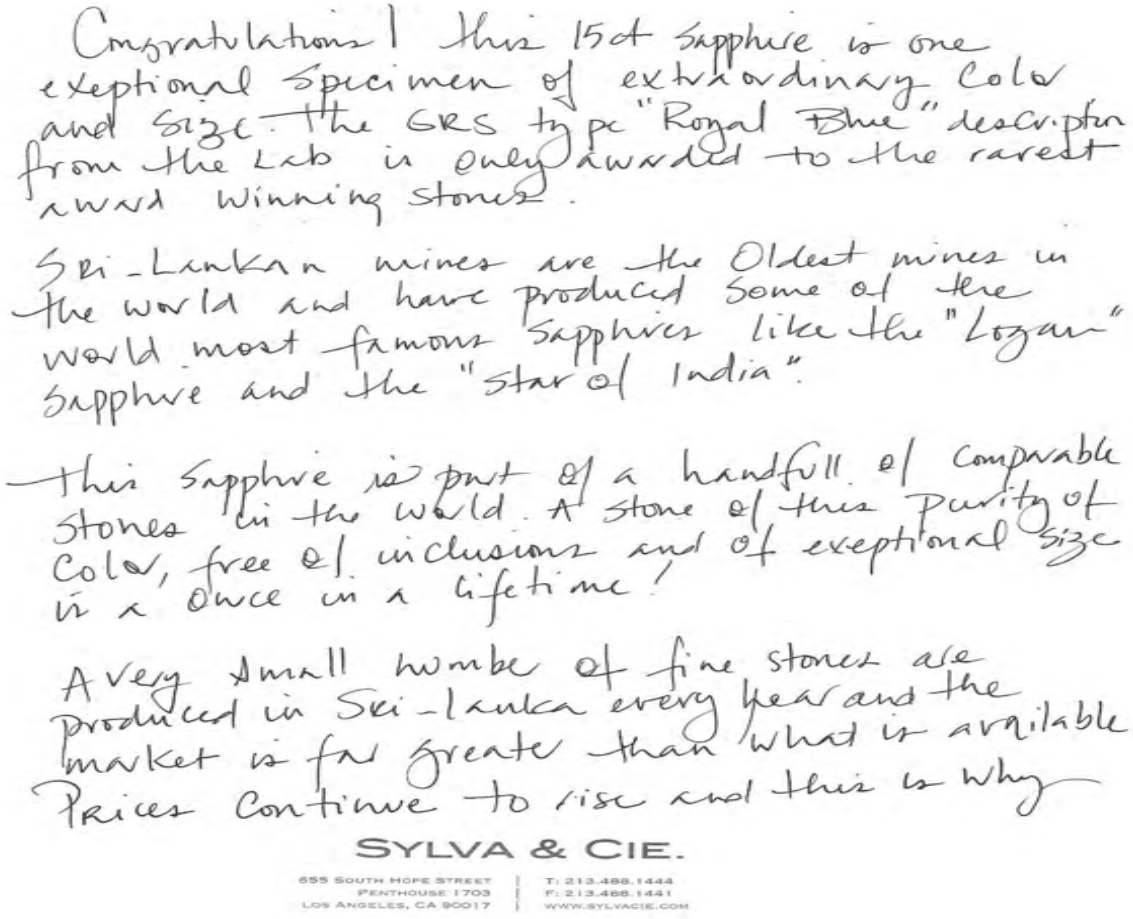
On January 29, 2020, Appellant had decided to buy the jewelry art piece before anybody even spoke to her.[100] Appellant actively negotiated a $90K discount on the jewelry art piece in exchange for paying cash in a final sale.[101] Appellant testified she knowingly forewent an appraisal and further due diligence.[102] After, she confirmed she loved the ring. *Id*. at ¶ 42; R. 670–81 (actual text messages). SABBIA made a **58% retail upcharge** on the ring, **well below the industry standard** for luxury retail jewelry or art. *Id.* Four professionals have testified that Buyer got a great ring, at a great value, for a reduced price to make a great deal, at the fair market value.[103] There was nothing fraudulent, deceptive, unfair, or unconscionable here.

The alleged statements about the pricing and market value of the Sylva & Cie jewelry as "exceptional," a "great deal," a "minimum rate," and so on, are simply not actionable under Florida law and FDUTPA. *MDVIP* at 561;

[99] R. 493 at Tr. 398, ln. 22–Tr. 400, ln. 14.
[100] R. 978.
[101] R. 978 at ¶ 41 (SABBIA affidavit).
[102] R. 338 at Tr. 115, ln. 2–4.
[103] R. 996–1030 (Exhibits C(1)–(4)).

Addison at 955; *Wasser* at 412; *Warren* at 1328–29; *Dolphin* at 1250. Likewise, "the mere existence of an overcharge does not establish a violation of FDUTPA." *Angelo* at 756; *Lombardo* at 1290; *HRCC* at 1323. This was exactly as the trial court correctly held. R.5194 (6/26/23 judgment at *4).

Most importantly, the evidence showed that SABBIA and Ms. Friedman were merely disseminating indications from manufacturer Sylva & Cie, with no "actual knowledge" that any indication could violate FDUTPA in any way:



Congratulations! This 15ct Sapphire is one exeptional Specimen of extraordinary Color and Size. The GRS type "Royal Blue" description from the Lab is only awarded to the rarest award winning stones.

Sri-Lankan mines are the Oldest mines in the world and have produced some of the world most famous Sapphires like the "Logan" Sapphire and the "Star of India".

This Sapphire is part of a handfull of comparable stones in the world. A stone of this Purity of Color, free of inclusions and of exeptional Size is a Once in a lifetime!

A very small numbe of fine stones are produced in Sri-Lanka every year and the market is far greate than what is available Prices Continue to rise and this is Why

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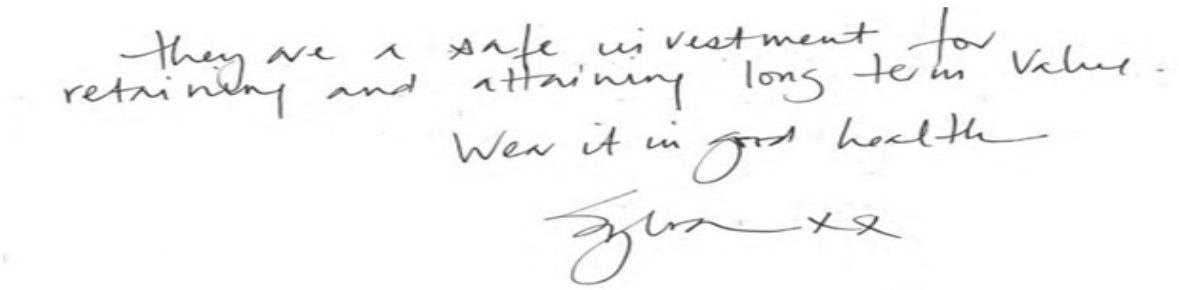

R. 667 (actual letter from Sylva & Cie); R. 978 at ¶ 43 (SABBIA affidavit).

Even Appellant, when comparing Florida Statutes § 501.211(2) with the actual events of this case, changed her opinion in deposition as to the viability of this lawsuit:

> [Q]: If it's true that this is the statute [§ 501.211(2) provides this defense], if that's true, would that change your opinion about your lawsuit, at least as to against Debbie and SABBIA? . . .
>
> [APPELLANT]: Potentially, yes. . . . I would need to do some research on that.
>
> [Q]: But you've just given your opinion that you do believe differently, so I'm asking as you sit here today.
>
> [APPELLANT]: If this is true, yes.

R. 600 at Tr. 505, ln. 2–19.

Although Appellant now attack's this complete statutory defense, Appellant lacks the record proof and case law for her arguments. Initial Br. at *56–57. As discussed, heat treatment *increases* a particular stone's value. *Ferreira,* 130 F. Supp. 3d at 481–82. Appellant tries to confuse this Court by noting flawless gemstones without any heat treatment are very rare. Yet, the

record evidence also proved that a 15-carat Ceylon natural sapphire in a Sylva & Cie designer jewelry art piece was too. Appellant found no 15-carat natural Ceylon sapphire in any private sale, anywhere, whatsoever. The few that SABBIA's experts found were priced the same as Sylva's. R. 996–1089.

Ms. Friedmann and SABBIA testified that they disseminated Sylva & Cie's manufacturer information in good faith, and that information was specifically supported and confirmed as true by four experts under oath. *Id*. Appellant had no record evidence that Ms. Friedmann or SABBIA had any reason to doubt Sylva & Cie's indications beforehand. Accordingly, the FDUTPA statutory safe-harbor applied, and this Court must affirm.

B. Appellant improperly relies on case law that directly and dispositively dismantles her own arguments, in particular *Ferreira v. Sterling Jewelers*.

Appellant improperly relies on FTC Guides even though the FTC's own code makes clear they do not confer any rights whatsoever. 16 C.F.R. §§ 23.0 ("They do not confer any rights on any person and do not operate to bind the FTC or the public."). They are not binding on this Court and Appellant's own personalized interpretation is neither law nor controlling for any purpose.

Appellant's interpretation of FTC guidelines is inaccurate and directly contravened by *Ferreira v. Sterling Jewelers, Inc*., 130 F. Supp. 3d 471, 477

(D. Mass. 2015). The *Ferreira* court systematically cuts apart Appellant's legal position, explaining jewelry buyers like Appellant cannot sustain a claim for loss of bargain or price premium;[104] for overpayment;[105] disclosure of stone treatment is not required;[106] stone treatment increases value of a particular gem; [107] experts' opinions on value are altogether speculative and of limited evidentiary significance; [108] it is difficult or impossible to determine what a gem's value would have been had it not been treated;[109] this evidentiary impossibility destroys ability to prove causation;[110] even manipulation into purchasing on false belief of a bargain does not have an actionable economic harm; [111] the law does not recognize injury in a buyer's

[104] *Id*. at 479–82.
[105] *Id*. at 479–82.
[106] *Id*. at 480–82.
[107] *Id*. at 481.
[108] *Id*. at 482 ("The experts' opinions on value are altogether speculative and therefore of limited evidentiary significance. . . . This is akin to the speculative injury that Judge Saylor recently rejected as non-cognizable).
[109] *Id*. at 482 ("it would be difficult—if not impossible—to determine what the emerald's value would have been had it not been treated, and therefore to compare its value treated to its value if it were untreated.").
[110] *Id*. at 482 n.16 ("This evidentiary deficiency as to her injury also compromises her ability to prove causation.").
[111] *Id*. at 482 ("the fact that the Buyer may have been manipulated into purchasing the sweater because she believed she was getting a bargain does not necessarily mean she suffered economic harm; she arguably got exactly what she paid for, no more and no less.").

subjective belief as to the value received;[112] minimum statutory damages for a purported FTC statutory violation cannot substitute the requirement that a jewelry buyer prove injury and causation; [113] and claims such as this Appellant's "cannot prove a cognizable injury" and are thus entitled to summary judgment of dismissal. [114]

In particular, the *Ferreira* court explained that stone treatment makes that particular stone more valuable. *Id.* at 481–82 (emphasis added). This is the exact opposite of Appellant's argument here. Appellant's cite to *Millennium Commc'ns*, 761 So. 2d 1256, 1264 (Fla. 3d DCA 2000), also holds against Appellant's "wishful thinking." *Id*. The Court must affirm.

IV. The Court must affirm the Counterclaim judgment because the undisputed summary judgment evidence showed that the parties had an enforceable contract in writing and conduct, Appellant breached without justification, and caused SABBIA losses.

To obtain judgment for breach of contract under Florida law, a claimant must only show: (1) an agreement; (2) a material breach of the agreement;

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[112] *Ferreira* at 482–83 ("no Massachusetts case has ever found an injury . . . where the alleged injury was based entirely on the plaintiff's subjective belief as to the nature of the value she received.").

[113] *Ferreira* at 486 ("[The plaintiff's] claim for minimum statutory damages is based solely on her claim of a per se chapter 93A violation. But the Supreme Judicial Court has made clear that statutory damages cannot substitute for the requirement that a plaintiff prove injury and causation in a chapter 93A claim.").

[114] *Ferreira* at 487 ("I will accordingly grant summary judgment for the defendant.").

and (3) damages. *Deauville Hotel Mgmt., LLC v. Ward*, 219 So. 3d 949, 953 (Fla. 3d DCA 2017).

A. The evidence showed Appellant and SABBIA had an enforceable contract (element 1).

Appellant entered into a purchase agreement for the Sylva & Cie 15-carat Ceylon sapphire jewelry art piece, with manufacturer's set retail price of $350,700.00, a $90,000.00 price reduction and alteration/accommodation, in exchange for an agreement that the sale was a final cash sale with no returns.[115] The parties arrived at these terms over a two-month due-diligence period, confirmed repeatedly in writing, conduct, video, and testimony.

Appellant testified that there was an enforceable contract consummated in a final sale with irrevocable exchange of consideration. R. 340–41 at Tr. 124–127; R. 342 at Tr. 133, ln. 2–10; R. 500 at Tr. 405, ln. 8–14; R. 505 at Tr. 410, ln. 5–12. The trial court even had clips of the video of Appellant buying the Sylva & Cie jewelry art piece:

[115] R. 978 at ¶¶ 14–20, 33–37 (SABBIA affidavit).


Video Jan 29, 4 16 57 PM.mov


Video Jan 29, 4 16 57 PM.mov


Video Jan 29, 4 16 57 PM.mov


Video Jan 29, 4 16 57 PM.mov


Video Jan 29, 4 16 57 PM.mov

After the purchase, Appellant re-confirmed the contract terms, including that "no returns" was a material term of her contract.[116] There is an *overwhelming* record evidence against Appellant.[117] The trial court properly held as much. R. 5190 (6/26/23 judgment at *1, 4–6); R. 5197 (8/16/23 judgment at *1, 3–9). This Court must affirm.

B. Appellant breached the contract without justification, out of buyer's remorse that was all in her head and "purely insane" (element 2).

Appellant then breached by demanding to return when she had a bout of buyer's remorse which Appellant admitted was "purely insane," even though SABBIA had already paid the manufacturer and altered the jewelry. The Appellant then further breached by sending three law firms against SABBIA to coerce a return and repurchase of the ring by SABBIA, in breach of their contract terms.

C. Appellant's breach caused SABBIA losses, including the $90K lost profit from the manufacturer's set retail price list

[116] R. 978 at ¶¶ 42, 48 (SABBIA affidavit); R. 670–81 (Exhibit A(15) (actual text messages)).

[117] *Infra*; *supra*; R. 1065 (actual cashier's check from Appellant to SABBIA); R.644 (Check); R. 667 (actual Sylva letter); R. 670–81 (Appellant's actual text messages); R. 861 at Tr. 72; R. 406 at Tr. 311, ln. 19–22 (8/18/22 deposition of Appellant) ("[Q]: So is it fair to say that the origin of the sapphire was not of great importance to you before you bought it? [Appellant]: Correct."); R. 480 at Tr. 358, ln. 3–6 (Appellant depo admitting she bought ring on 1/29/20); R. 978 at ¶¶ 14–20, 33–37, 40–43, 48, 77 (SABBIA affidavit); R. 439 at Tr. 344–45 (Appellant depo) (Appellant had banker hand-deliver $260K cashier's check to buy the ring).

in exchange for the final sale with no returns and alteration (element 3).

Lost profits and lost prospective profits is the proper measure for damages on breach of contract. *Katz Deli of Aventura, Inc. v. Waterways Plaza, LLC*, 183 So. 3d 374, 382 (Fla. 3d DCA 2013) (affirming award of lost prospective profits for breach of contract); *W.W. Gay Mech. Cont., Inc. v. Wharfside Two, Ltd*., 545 So. 2d 1348, 1351 (Fla. 1989) (business can recover lost prospective profits regardless of whether it established any track record).

Here, Appellant caused SABBIA to lose the $90K off the manufacturer's set retail price, plus the alteration, shipping, and insuring of the jewelry, by seeking return (repurchase) after SABBIA paid the manufacturer $153,280.00 and sent out the ring for Appellant's alterations/accommodation in reliance on their contract terms.[118]

Multiple independent and unpaid professionals and experts have testified that the jewelry's industry upcharge bracket was up to 500% or more, substantially more than SABBIA got (at 58% upcharge for a final sale with no returns).[119] As these professionals testified, Appellant got this ring at a discounted rate below the retail mark-up regularly charged in the jewelry

[118] R. 861 at Tr. 72; R. 644 (Check to Sylva); R. 978–1030 (SABBIA affidavit).
[119] R. 996–1030 (C(1)–(4) (Affidavits)).

retail industry, both for common and luxury jewelry items (which ranges from 100% to 500% or more). *Id*.; R. 978 at ¶¶ 64–72; R. 996–1030.

These confirm SABBIA's losses for anything less than $350K retail given that the Appellant breached her contract. The proper minimum measure of damages is her $90K in lost profits under this contract from the undisputed artist manufacturer's set retail price (on the price tag), although the expert testimony showed for even more. *Katz* at 382; *W.W. Gay* at 1351. The Court must affirm.

Although Appellant insufficiently cites the statute of frauds, she failed to address the entire statute, which states that a contract that is not signed by the buyer is still valid and enforceable where: (a) the goods are specially made for the buyer and the seller has made commitments for their procurement; or (b) the buyer admits that a contract for sale was made. § 672.201(3), Fla. Stat. (2021).

Appellant failed to address the record evidence and the trial court's findings and holdings that Appellant admitted she had an agreement to purchase this Sylva & Cie jewelry art piece, and that SABBIA made commitments and had the art piece made and altered for Appellant alone. R. 5190 (6/26/23 judgment at *1, 4–6); R. 5197 (8/16/23 judgment at *1, 3–9).

This record evidence fulfills the two safe-harbor provisions of the statute of frauds: (a) the goods were specially altered to be made for Appellant and SABBIA made commitments for their procurement through Sylva & Cie; or (b) Appellant admitted that a contract for sale was made. § 672.201(3), Fla. Stat. (2021).

The trial court went to great lengths to cite and quote the substantial record evidence showing breach of contract and damages. R. 5190 (6/26/23 judgment at *1, 4–6); R. 5197 (8/16/23 judgment at *1, 3–9). Appellant has conceded and waived these arguments. *D.H.*, 271 So. 3d at 888; *Polyglycoat*, 442 So. 2d at 960. Accordingly, the Court must affirm the summary judgment.

CONCLUSION

For the reasons stated, the Court must affirm.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I CERTIFY that, in accordance with Fla. R. Jud. Admin. 2.516, a copy of this document was served on March 11, 2024.

CERTIFICATE OF COMPLIANCE

I CERTIFY that the foregoing document is in compliance with the Rule's font and word count requirements.