UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

ANDREA ROSSI and LEONARDO CORPORATION,

Plaintiffs,

v.

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

Defendants.

CASE NO. 1:16-cv-21199-CMA

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

Counter-Plaintiffs,

v.

ANDREA ROSSI and LEONARDO CORPORATION,

Counter-Defendants,

and

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

Third-Party Defendants.

OPPOSITION TO THIRD-PARTY DEFENDANTS' COMBINED MOTION TO DISMISS COUNTS III, IV, AND V OF COUNTER-PLAINTIFFS' SECOND AMENDED COUNTERCLAIMS AND THIRD-PARTY CLAIMS

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COUNTER-PLAINTIFFS' OPPOSITION TO THIRD-PARTY DEFENDANTS' COMBINED MOTION TO DISMISS THIRD-PARTY CLAIMS

Counter-Plaintiffs Industrial Heat, LLC ("Industrial Heat") and IPH International, B.V. ("IPH") (collectively, "Counter-Plaintiffs") hereby respectfully oppose Third-Party Defendants J.M. Products, Inc. ("JMP"), Henry Johnson ("Johnson"), James A. Bass ("Bass"), United States Quantum Leap, LLC ("USQL"), and Fulvio Fabiani's ("Fabiani") (collectively, "Third-Party Defendants") Combined Motion to Dismiss Counts III, IV, and V of Counter-Plaintiffs' Second Amended Counterclaims and Third-Party Claims ([D.E. 69]) ("Motion"). The relevant pleading for purpose of the Motion to Dismiss is the Second Amended Answer, Additional Defenses, Counterclaims and Third-Party Claims ("2nd Amended AACT"). [D.E. 50].

LEGAL STANDARD

Third-Party Defendants fail to state the applicable legal standard. "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Watts v. City of Port St. Lucie, Fla.*, 2015 WL 7736532, at *8 (S.D. Fla. Nov. 30, 2015) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). To plead a plausible claim for relief, a claimant need only "'plead factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.'" *Ashmore v. F.A.A.*, 2011 WL 3915752, at *2 (S.D. Fla. Sept. 2, 2011) (quoting *Iqbal*, 556 U.S. at 678). Furthermore, in ruling on a motion to dismiss, a court considers not only the allegations in the relevant pleading (here, the 2nd Amended AACT), but also the exhibits attached thereto (and documents referenced therein that are central to a claim). *See Geter v. Galardi South Enters., Inc.*, 43 F. Supp.3d 1322, 1328 (S.D. Fla. 2014); *Rodriguez v. Holder*, 2011 WL 2911927, at *1 n.5 (S.D. Fla. Mar. 9, 2011); *Prestige Rests. & Entm't, Inc. v. Bayside Seafood Rest., Inc.*, 2010

WL 680905, at *3 (S.D. Fla. Feb. 23, 2010); *Garcia v. United Auto Credit Corp.*, 2008 WL 141579, at *1 (S.D. Fla. Jan. 11, 2008).

ARGUMENT

I. Count III States A Valid Fraudulent Inducement Claim Against JMP And Johnson.

Third-Party Defendants' argument that Industrial Heat has not pled fraudulent inducement with specificity required by Rule 9(b) is without merit. As to Third-Party Defendants JMP and Johnson, Industrial Heat has alleged with considerable specificity (a) precisely what statements were made either in an specified document or orally at a specified meeting; (b) the time and place of each such statement and the person responsible for making same[1]; (c) the content of such statements and the manner in which they misled Counter-Plaintiffs (*e.g.*, that JMP was an affiliate of Johnson Matthey and was a real customer in Florida who needed steam power for processing its chemical products); and (d) what JMP and Johnson obtained as a result of such fraudulent statements (furtherance of the scheme to enable the 1MW Plant to be operated in Florida away from Counter-Plaintiffs' oversight). *See* 2nd Amended AACT at pp. 43, 45-47, 60-61 & at Ex. 17; *Ziemba v. Cascade Int'l, Inc.*, 256 F.3d 1994, 1202 (11th Cir. 2001); *A1 Procurement, LLC v. Hendry Corp.*, 2012 WL 6214546, at *9 (S.D. Fla. Dec. 12, 2012); *Holser v. Alcon Labs., Inc.*, 2012 WL 4792983, at *10 (S.D. Fla. Oct. 9, 2012).

[1] Industrial Heat has alleged that Johnson, both in his individual capacity and on behalf of JMP, made the following two fraudulent statements during his August 2014 meeting with Industrial Heat in North Carolina: (1) that JMP was a confidential subsidiary of Johnson Matthey p.l.c. ("Johnson Matthey") and (2) that Johnson Matthey was interested in using the E-Cat technology in connection with a confidential manufacturing process it wanted to operate in Florida. *See* 2nd Amended AACT at pp. 45-47. Industrial Heat has also alleged that in August 2014, Johnson on behalf of JMP falsely represented in writing that JMP "[was] owned by an entity formed in the United Kingdom, and none of Leonardo, Dr. Andrea Rossi, Henry W. Johnson nor any of their respective subsidiaries, directors, officers, agents, employees, affiliates, significant others, or relatives by blood or marriage [had] any ownership interest" in JMP. *See id.* at p. 46. As noted in the 2nd Amended AACT, the writing is contained as the last page of Plaintiffs' Complaint Exhibit B. *See id*.

Third-Party Defendants' suggestion that Industrial Heat has not distinguished among Counter-Defendants and Third-Party Defendants is equally unavailing. That Industrial Heat alleges that Johnson and JMP made similar fraudulent statements to Counter-Defendants Andrea Rossi ("Rossi") and Leonardo Corporation ("Leonardo") in the August 2014 meeting in North Carolina does not render such allegations insufficiently specific – Industrial Heat is in fact alleging that Rossi (both in his individual capacity and on behalf of Leonardo) and Johnson (both in his individual capacity and on behalf of JMP) made similar fraudulent statements regarding JMP. *See* 2nd Amended AACT at pp. 45-46. Moreover, the 2nd Amended AACT is clear that it was Johnson and JMP that provided the false written certification. *See id*. at p. 46.

Furthermore, Third-Party Defendants' strained argument that all allegations against JMP and Johnson in the 2nd Amended AACT are "conclusory in nature" is plainly incorrect. As acknowledged in the Motion, Industrial Heat specifically alleged that JMP and Johnson made misrepresentations about JMP being a real manufacturing company that had a commercial use for the steam power generated by the 1MW Plant. Contrary to what Third-Party Defendants assert, Industrial Heat is not required to allege independent corroboration that JMP and Johnson's representations were false. *See* Motion at 5-6; 2nd Amended AACT at pp. 46-47; *A1 Procurement, LLC*, 2012 WL 6214546, at *9; *Holser*, 2012 WL 4792983, at *10. Because the allegations pled in the 2nd Amended AACT must be accepted as true, Third-Party Defendants' efforts to avoid or ignore those allegations must be rejected. *See Guarisma v. Microsoft Corp.*, 2016 WL 4017196, at *2 (S.D. Fla. July 26, 2016); *Watts*, 2015 WL 7736532, at *8.

Lastly, Third-Party Defendants' argument that language from Paragraph 2 of the Term Sheet bars Industrial Heat's fraudulent inducement claim is misplaced. The proposition for which Third-Party Defendants cite to *Mac-Gray Servs., Inc. v. DeGeorge*, 913 So.2d 630, 634

(Fla. Dist. Ct. App. 2005), does not apply to the Term Sheet language they quote. Johnson and JMP's false representations about JMP's affiliation with Johnson Matthey are not addressed at all in the Term Sheet. *See* 2nd Amended AACT at pp. 45-46. Separately, Johnson and JMP's false representations that JMP was a real operating company that needed steam power for its manufacturing process are not "expressly contradicted" by Paragraph 2 of the Term Sheet, which simply states that JMP "operates a production facility in Miami, FL, which requires low temperature steam." *See id.* at pp. 46-47 & Ex. 17 ¶ 2; *Mac-Gray Servs.*, 913 So.2d at 634. Paragraph 2 of the Term Sheet thus does not bar (but rather reinforces) Industrial Heat's fraudulent inducement claim.[2]

The allegations supporting Industrial Heat's fraudulent inducement claim in the 2nd Amended AACT are detailed and clear, and the allegations regarding JMP and Johnson's fraudulent statements are more than sufficient to meet the heightened pleading standard of Rule 9(b) and allow JMP and Johnson to frame a response to the allegations. *Leisure Founders, Inc. v. CUC Int'l, Inc.*, 833 F. Supp. 1562, 1574 (S.D. Fla. 1993). Accordingly, as to Count III, the Motion should be denied.

II. Count IV States A Valid Florida Deceptive And Unfair Trade Practices Act ("FDUTPA") Claim Against The Third-Party Defendants.

A. Industrial Heat And IPH Have Standing To Bring A FDUTPA Claim Against The Third-Party Defendants.

Third-Party Defendants' argument that Industrial Heat and IPH lack standing to bring a FDUTPA claim against them is without merit. Even assuming that Industrial Heat transferred all of its rights in the License Agreement to IPH (which it did not), and even assuming IPH does not

[2] Paragraph 2 is in the form of a recital to a contract: It declares what JMP does (*i.e.*, operate a production facility requiring low temperature steam), but it does not impose a condition on JMP that Industrial Heat could enforce by means of a breach of contract action.

have any right to enforce the Term Sheet, Industrial Heat and IPH would still have standing to bring a FDUTPA claim against Third-Party Defendants because a FDUTPA claim does not require the existence of contractual privity. *See* Fla. Stat. § 501.204(1) (2015); *Nature's Prods., Inc. v. Natrol, Inc.*, 990 F. Supp.2d 1307, 1322 (S.D. Fla. 2013) ("'A claim under FDUTPA is not defined by the express terms of a contract, but instead encompasses unfair and deceptive practices arising out of business relationships" (quoting *Siever v. BWGaskets, Inc.*, 669 F. Supp.2d 1286, 1292 (M.D. Fla. 2009))); *see also Kenneth F. Hackett & Assocs. v. G.E. Capital Info. Tech. Solutions*, 744 F. Supp.2d 1305, 1313 (S.D. Fla. 2010) (upholding FDUTPA claim against contracting party and non-contracting party because claim was based on deceptive and unfair acts of both, even though the acts also supported a breach of contract against contracting party). As alleged in the 2nd Amended AACT, Third-Party Defendants engaged in a variety of deceptive acts and/or unfair practices against both Industrial Heat and IPH, and such acts and practices have caused both Industrial Heat and IPH to suffer harm. *See* 2nd Amended AACT at pp. 27-28, 43-50, 61-63; *see also* page 11 *infra*. Therefore, both Industrial Heat and IPH have standing to bring a FDUTPA claim against Third-Party Defendants.

B. Counter-Plaintiffs Are Allowed To Bring A FDUTPA Claim And A Breach Of Contract Claim Based On Overlapping Conduct.

Third-Party Defendants' argument that Counter-Plaintiffs are prohibited from bringing both a breach of contract claim and a FDUTPA claim based on the same or overlapping conduct is meritless. Under Florida law, a claimant may bring both a breach of contract claim and a FDUTPA claim based on the same or overlapping conduct so long as the conduct underlying the breach of contract is itself unfair and/or deceptive. *See PNR, Inc. v. Beacon Prop. Mgmt., Inc.*, 842 So.2d 773, 777 n.2 (Fla. 2003) ("To the extent an action giving rise to a breach of contract . . . may also constitute an unfair or deceptive act, such a claim is and has always been cognizable

under the FDUTPA."); *Delgado v. J.W. Courtesy Pontiac GMC-Truck, Inc.*, 693 So.2d 602, 609 (Fla. Dist. Ct. App. 1997) (finding that economic loss rule did not apply to bar FDUTPA claim based on a written sales contract); *see also N. Am. Clearing, Inc. v. Brokerage Comp. Sys., Inc.*, 666 F. Supp.2d 1299, 1310 (M.D. Fla. 2009) (holding that conduct amounting to a breach of contract can also support a FDUTPA claim "if the conduct underlying the breach is, by itself, unfair or deceptive" (citing *PNR, Inc.*, 842 So.2d at 777 n.2)).

Counter-Plaintiffs' FDUTPA claim pleads much more than a mere breach of either the License Agreement or the USQL Agreement – the claim pleads in detail a deceptive and unfair scheme to mislead Counter-Plaintiffs, conceal relevant information from them, and manipulate them. *See* 2nd Amended AACT at pp. 28, 49-50, 61-63. Thus, even though Counter-Plaintiffs' FDUTPA claim is supported by Johnson and JMP's conduct in fraudulently inducing Industrial Heat to enter into the Term Sheet and USQL and Fabiani's conduct in breaching the USQL Agreement, the FDUTPA claim is broader than just a simple breach of contract and involves clear and extensive allegations of deceptive and unfair conduct. The FDUTPA claim against the Third-Party Defendants is thus perfectly permissible under Florida law. *See, e.g., Kenneth F. Hackett & Assoc.*, 744 F. Supp.2d at 1312 ("Florida law permits a FDUTPA claim to travel with a related breach of contract claim if the FDUTPA claim challenges the acts underlying or giving rise to the breach, and does not rely solely on a violation of the Agreement as a basis for assertion of a FDUTPA claim" (internal quotation marks and citation omitted)).

C. Counter-Plaintiffs Are Not Required To Satisfy Rule 9(b)'s Heightened Pleading Standard In Count IV, But They Do.

Third-Party Defendants erroneously assert that Counter-Plaintiffs are required to satisfy Rule 9(b)'s heightened pleading standard for their FDUTPA claim. Rule 9(b), however, does not apply to FDUTPA claims. *See Deere Constr., LLC v. Cemex Constr. Materials Fla., LLC*, 2016

WL 4374970, at *8 (S.D. Fla. July 26, 2016) ("[t]he requirements of Rule 9(b) do not apply to claims under the FDUTPA" because, among other things, FDUTPA does not require the elements of fraud and it reaches deceptive and unfair practices that need not involve fraud (quoting *Gastaldi v. Sunvest Cmtys. USA, LLC*, 637 F. Supp.2d 1045, 1058 (S.D. Fla. 2009))); *Sanchez-Knutson v. Ford Motor Co.*, 52 F. Supp.3d 1223, 1239 (S.D. Fla. 2014) (citing *Toback v. GNC Holdings, Inc.*, 2013 WL 5206103, at *2 (S.D. Fla. Sept. 13, 2013) ("[T]his Court is persuaded that Rule 9(b) does not apply to FDUTPA claims.").

Moreover, even if Rule 9(b)'s heightened pleading standard applied to FDUTPA claims, Counter-Plaintiffs have more than satisfied it by specifically alleging that Third-Party Defendants engaged in a variety of deceptive acts and/or unfair practices against both Counter-Plaintiffs, and that such acts and practices have caused both Counter-Plaintiffs to suffer harm. They have pled extensive details about, among other things, Third-Party Defendants manipulating them into allowing the Plant to be moved to Florida, deceiving them about JMP and its ownership, manipulating the operations of the Plant in Florida, concealing information from Counter-Plaintiffs, refusing to provide information that was promised to Counter-Plaintiffs,[3] and improperly charging Counter-Plaintiffs for services, expenses, and equipment.[4]

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[3] Fabiani and USQL claim that they do not know what information they failed to provide Counter-Plaintiffs, but the 2nd Amended AACT is clear that they failed and continue to fail to provide, among other things, records, tests and results relating to their engagement under the USQL Agreement, a report "that would 'bring to light all the flaws and functional deficiencies'" in the 1MW Plant system, and raw data Fabiani and USQL collected on the Plant's operation. 2nd Amended AACT at pp. 49-50.

[4] As with Count III, Third-Party Defendants erroneously contend that Counter-Plaintiffs are required to allege independent corroboration for the facts which they have alleged in support of their FDUTPA claim. *See* page 3 *supra*; Motion at 9-11. Again, because the 2nd Amended AACT's allegations must be accepted as true, the Court must reject Third-Party Defendants' efforts to dispute the allegations. *See Guarisma*, 2016 WL 4017196, at *2; *Watts*, 2015 WL 7736532, at *8. In any event, if there are any allegations in the 2nd Amended AACT that the

See 2nd Amended AACT at pp. 27-28, 43-50, 61-63. Counter-Plaintiffs have also alleged actual harms they suffered as a result of these deceptive and unfair acts. *See* page 11 *infra*. Counter-Plaintiffs have more than adequately pled a FDUTPA claim against Third-Party Defendants.[5]

D. Count IV Otherwise Adequately Pleads A Violation Of FDUTPA.

Section II.D of the Motion relies on many of the same arguments as Sections II.B and II.C of the Motion (namely, Counter-Plaintiffs cannot bring both a breach of contract claim and a FDUTPA claim based on the same conduct; Rule 9(b) applies to FDUTPA claims; Counter-Plaintiffs are required to allege independent corroboration for the facts which they have already alleged in support of their FDUTPA claim; and the absence of contractual obligations requiring Third-Party Defendants to refrain from the conduct which Counter-Plaintiffs allege is unfair and/or deceptive is fatal to Counter-Plaintiffs' FDUTPA claim). *See* Motion at 7-11, 12-15. Counter-Plaintiffs have already rebutted these arguments in Sections II.B and II.C *supra*.

The only arguments raised in Section II.D that arguably are not already raised in prior sections are that (1) the specific conduct alleged by Counter-Plaintiffs is not deceptive and/or unfair; (2) the business relationships upon which FDUTPA claims can be based are limited to the scope of whatever contractual agreements the parties have; and (3) Counter-Plaintiffs have failed to adequately allege causation and damages. *See* Motion at 12-14. None of these additional arguments, however, is meritorious.

Court concludes require independent corroboration, Counter-Plaintiffs can and will provide such corroboration in a subsequent amendment.

[5] Third-Party Defendants argue that Industrial Heat was not entitled under the Term Sheet to access JMP's section of the Doral facility, but this argument is irrelevant. Counter-Plaintiffs are not claiming that Johnson or JMP breached the Term Sheet by not allowing Industrial Heat to access JMP's section of the Doral facility. Rather, they plead that the Counter-Defendants and Third Party Defendants, as part of their scheme to deceive the Counter-Plaintiffs, prevented such access under a claim that JMP was engaged in a secretive manufacturing process when in fact that was false. *See* 2nd Amended AACT at p. 49. That is deceptive conduct, regardless of whether it also breached the Term Sheet.

As to the first argument, Third-Party Defendants cite to no authority (because there is none) stating that the specific conduct alleged by Counter-Plaintiffs in support of their FDUTPA claim is not deceptive and/or unfair as a matter of law. To the contrary, "deceptive" and "unfair" in the FDUTPA context are defined in exceptionally broad terms, and whether conduct is "deceptive" and/or "unfair" is based on the circumstances. *See Degutis v. Fin. Freedom, LLC*, 978 F. Supp.2d 1243, 1264 (M.D. Fla. 2013) ("A deceptive practice is one that is 'likely to mislead' consumers" (quoting *Davis v. Powertel, Inc.,* 776 So.2d 971, 974 (Fla. Dist. Ct. App. 2000))); *PNR, Inc.*, 842 So.2d at 777 ("An unfair practice is 'one that 'offends established public policy' and one that is 'immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers'" (quoting *Samuels v. King Motor Co. of Fort Lauderdale*, 782 So.2d 489, 499 (Fla. Dist. Ct. App. 2001))). Furthermore, Third-Party Defendants take the pled individual acts and practices out of context and ignore Counter-Plaintiffs' allegations that each act and practice was part of an elaborate scheme among Counter-Defendants and Third-Party Defendants to deceive and manipulate Counter-Plaintiffs. For example, Johnson and JMP's deception about the operations of JMP was used to induce Counter-Plaintiffs to allow the 1MW Plant to be moved to Florida out of their direct control. Likewise, Johnson, Bass, and JMP's false statements about the power they were receiving and using from the 1MW Plant were designed, among other things, to reinforce Rossi and Leonardo's false claims about how successfully the Plant was operating. And Fabiani and USQL's refusal to disclose information they were required to provide under the USQL Agreement prevented Counter-Plaintiffs from using that information as a check on Rossi and Leonardo's false claims or to know what was actually taking place at the Doral facility. *See id.*; 2nd Amended AACT at 43, 45-47, 49-50, 61-63. Because the allegations as pled in the 2nd Amended AACT must be accepted as true, Third-Party Defendants' request

that the Court question or dispute those allegations is improper. *See Guarisma*, 2016 WL 4017196, at *2; *Watts*, 2015 WL 7736532, at *8 (quoting *Iqbal*, 556 U.S. at 678).

As to their second argument, Third-Party Defendants again cite to no authority stating that a FDUTPA claim against a defendant is limited to the scope of the contractual or business relationship that defendant has with a plaintiff. *See* Motion at 12-13. As explained above, a FDUTPA claim does not require the existence of contractual privity and may be based on a broad variety of conduct. *See* Fla. Stat. § 501.204(1); *Nature's Prods., Inc.*, 990 F. Supp.2d at 1322; *Kia Motors Am. Corp. v. Butler*, 985 So.2d 1133, 1140 (Fla. Dist. Ct. App. 2008) (citing *Rollins, Inc. v. Butland*, 951 So.2d 860, 869 (Fla. Dist. Ct. App. 2006)); *see also Degutis*, 978 F. Supp.2d at 1264; *PNR, Inc.*, 842 So.2d at 777. While Counter-Plaintiffs' contracts with Third-Party Defendants may help define the scope of the parties' business relationships, they do not impose a limit on the scope of a FDUTPA claim Counter-Plaintiffs can bring. *See Dorestin v. Hollywood Imports, Inc.*, 45 So.3d 819, 832 (Fla. Dist. Ct. App. 2010) ("Although the express terms of a contract shed light upon the course of the business dealings that may give rise to a claim under FDUTPA, they are not dispositive."). Counter-Plaintiffs may rely in support of their FDUTPA claim on any of Third-Party Defendants' unfair and/or deceptive acts or practices "in the conduct of any trade or commerce," even if outside the scope of their contractual agreements with Third-Party Defendants. *See* 2nd Amended AACT at pp. 27-28, 43-50, 61-63; Fla. Stat. § 501.204(1); *Nature's Prods., Inc.*, 990 F. Supp.2d at 1322; *Kenneth F. Hackett & Assoc.*, 744 F. Supp.2d at 1312-13.

Finally, as to Third-Party Defendants' third argument, they mischaracterize the 2nd Amended AACT as merely alleging Counter-Plaintiffs "have suffered and continue to suffer actual damages." Motion at 14-15. In reality, the 2nd Amended AACT pleads multiple harms to

Counter-Plaintiffs in support of the FDUTPA claim, including (a) the transfer of the Plant to Florida to be outside Counter-Plaintiffs' direct control, (b) the instant litigation whereby Rossi and Leonardo are suing Counter-Plaintiffs, and (c) Counter-Plaintiffs paying "for work that one or more of the [Counter- or Third-Party] Defendants was performing not to benefit Counter-Plaintiffs, but in fact with the goal of harming Counter-Plaintiffs" (such as "service payments to USQL, Fabiani, and Penon; expense reimbursements to Leonardo, Rossi, USQL, Fabiani, and Penon (including for travel, apartment rentals, visa-related costs, repair work to the Plant, patent attorneys, and patent application fees); and payments for equipment (or the transportation of equipment) to be used – or purportedly to be used – by the [Counter- or Third-Party] Defendants"). 2nd Amended AACT at pp. 61-62.

For all of the reasons stated above, Counter-Plaintiffs have more than adequately stated a FDUTPA claim against Third-Party Defendants and the Motion as to Count IV should be denied.

III. Count V States A Valid Breach Of Contract Claim Against USQL And Fabiani.

A. The USQL Agreement Was In Force During The Relevant Period.

USQL and Fabiani's argument that the USQL Agreement was not in effect during 2015 and 2016 is unavailing. Exhibit 21 to the 2nd Amended AACT contains various emails from 2016 involving Fabiani and Industrial Heat personnel demonstrating that the USQL Agreement had been extended into 2016. *See* 2nd Amended AACT Ex. 21. Specifically, within these emails Fabiani proposes in April 2016 continuing, and even provides a draft of his proposed renewal of, the USQL Agreement. *See id.* at pp. 2-4. He also sends an invoice for the services he performed in March 2016 pursuant to the operative USQL Agreement. *See id.* at p. 3-4. As these emails are attached as an exhibit to the 2nd Amended AACT, their content must be considered (and indeed, accepted as true) for purposes of the instant Motion. *See Geter*, 43 F. Supp.3d at 1328; *Rodriguez*, 2011 WL 2911927, at *1 n.5; *Prestige Rests. & Entm't, Inc.*, 2010 WL 680905, at *3;

Garcia, 2008 WL 141579, at *1. Accepted as true, the emails in Exhibit 21 demonstrate and allow the Court to draw the reasonable inference that the USQL Agreement was in effect in 2015 and early 2016, and thus Counter-Plaintiffs may allege that USQL and Fabiani breached the USQL Agreement during that time. *See* 2nd Amended AACT Ex. 21 at pp. 2-4; *Watts*, 2015 WL 7736532, at *8; *Ashmore*, 2011 WL 3915752, at *2.[6]

B. The Technical Consulting Agreement Is Enforceable As To Fabiani.

Fabiani's argument that the USQL Agreement is not enforceable as to him for lack of consideration is without merit. Contrary to Fabiani's narrow interpretation of consideration, "for a contract to be supported by consideration, 'it is not necessary that a benefit should accrue to the person making the promise.'" *Terzis v. Pompano Paint & Body Repair, Inc.*, 127 So.3d 592, 596 (Fla. Dist. Ct. App. 2012) (quoting *Real Estate World Fla. Commercial, Inc. v. Piemat, Inc.*, 920 So.2d 704, 706 (Fla. Dist. Ct. App. 2006)). Instead, "'[i]t is sufficient that something of value flows from the person to whom it was made, or that [the person] suffers some prejudice or inconvenience and that the promise is the inducement to the transaction.'" *Id*. Indeed,

> [t]he consideration required to support a simple contract need not be money or anything having monetary value, but may consist of either a benefit to the promisor or a detriment to the promisee. . . . ["T]here is consideration if the promisee, in return for the promise, does anything legal which he is not bound to do, or refrains from doing anything which he has a right to do, whether there is any actual loss or detriment to him or actual benefit to the promisor[.]"

Dorman v. Publix-Saenger-Sparks Theatres, 184 So. 886, 290-91 (Fla. 1938) (quoting 13 C.J., Contracts § 150, at pp. 315, 316).

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[6] There is also a written extension of the USQL Agreement that is signed by Fabiani but was not attached to the 2nd Amended AACT. Counter-Plaintiffs will produce that extension in discovery, and they can, if the Court so instructs, include that document as an exhibit to a 3rd Amended AACT.

The allegations of the 2nd Amended AACT and the language of the USQL Agreement and Joinder demonstrate that the Joinder caused both (1) a benefit or something of value to flow from Industrial Heat directly to Fabiani (*e.g.*, access to Industrial Heat's confidential and valuable business information; access to records and other types of documents relating to Industrial Heat's business; and the opportunity to participate in the development of technology with Industrial Heat) *and* (2) a detriment, prejudice, or inconvenience to be imposed upon Industrial Heat (*e.g.*, disclosure of its confidential and valuable information to Fabiani and less control over its records and other types of documents related to its business to the extent provided to Fabiani; further limitations on its ability to acquire new intellectual property; and further obligations to pay for the protection of new technological developments). *See* 2nd Amended AACT at pp. 40, 49-50, 63-66 & Ex. 11; *Dorman*, 184 So. at 290-91; *Terzis*, 127 So.3d at 596. Such allegations and language, accepted as true and construed in the light most favorable to Counter-Plaintiffs, establish sufficient consideration for the Joinder. *See* 2nd Amended AACT Ex. 11.

Furthermore, while Fabiani claims that the consideration to be paid to USQL cannot be considered in connection with his Joinder because the USQL Agreement is dated prior to his execution of the Joinder, this ignores the language and structure of the USQL Agreement. The Joinder is not separate from the USQL Agreement, but part thereof, and it clearly identifies Fabiani as entering the Joinder as "the sole member and the sole manager of USQL." *Id.* Ex. 11, at p. 9. It is thus clear that the requirement of the Joinder was part and parcel of the USQL Agreement and that Fabiani, as the sole member and manager of USQL, reaped the benefits that were bestowed upon USQL pursuant to the USQL Agreement (including the consultant fee paid to USQL and the reimbursement for Fabiani's apartment rental). *See id.* Ex. 11, at p. 7.

C. Count V States Sufficient Bases For Fabiani's Breach Of The USQL Agreement.

Finally, Fabiani argues that he is not bound by Section 3 of the USQL Agreement requiring USQL to "perform the services described in this Agreement in good faith and in a manner reasonably believed by USQL to be in and not opposed to the best interests of Industrial Heat." This argument, however, provides no benefit to Fabiani.

First, the 2nd Amended AACT alleges that Sections 3, 6 and 7 of the USQL Agreement were breached, and Fabiani makes no argument that he is not bound by Sections 6 and 7. As a consequence, the breach of contract claim stands in any event against Fabiani.

Second, Fabiani reads the allegations in the 2nd Amended AACT too narrowly. While Industrial Heat states that Section 3 of the USQL Agreement was breached by USQL and Fabiani assisting Rossi and Leonardo in their deceptive operations in Florida, it also alleges that such conduct violated Section 7 of the USQL Agreement. *See* 2nd Amended AACT at p. 65 ("USQL and Fabiani also breached the USQL Agreement by failing to provide Industrial Heat with information relating to the scheme to manipulate the operation and testing of the Plant. USQL and Fabiani had an affirmative obligation to inform Industrial Heat of the scheme to manipulate the Plant's operations and the testing. Such information would constitute a 'New Development' that USQL and Fabiani were required to disclose to Industrial Heat pursuant to the USQL Agreement."). There is no requirement that Fabiani's conduct can only violate one section of the USQL Agreement or another; the same conduct can violate multiple provisions of the USQL Agreement. That is the case here, where Sections 3 and 7 of the USQL Agreement are not only consistent with one another, but in fact are to be construed together and overlap to a degree. *See Specialized Mach. Trans., Inc. v. Westphal*, 872 So.2d 424, 426 (Fla. Dist. Ct. App. 2004) (the meaning of a contract "is not to be gathered from any one phrase, but from a general

view of the whole writing, with all of its parts being compared, used, and construed, each with reference to the others").

CONCLUSION

For the foregoing reasons, this Court should deny Third-Party Defendants' Motion to Dismiss the Third-Party Claims in the 2nd Amended AACT in its entirety.

Dated: November 7, 2016

Respectfully submitted,

/s/ Christopher R. J. Pace

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on November 7, 2016, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system which will send a notice of electronic filing to all counsel of record for the parties.

/s/ Christina T. Mastrucci
Christina T. Mastrucci