UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 16-21199-CIV-ALTONAGA/O'Sullivan

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.

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

Counter-Plaintiffs,

v.

ANDREA ROSSI and **LEONARDO CORPORATION**,

Counter-Defendants,

v.

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

Third-Party Defendants.

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ORDER

THIS CAUSE came before the Court upon Third-Party Defendants, J.M. Products, Inc. ("J.M. Products"); Henry Johnson ("Johnson"); James A. Bass ("Bass"); United States Quantum

Leap, LLC ("Quantum Leap"); and Fulvio Fabiani's ("Fabiani['s]," and collectively, the "Third-Party Defendants[']") *Combined* Motion to Dismiss Counts III, IV, and V of Counter-Plaintiffs' Third Amended Counterclaims and Third-Party Claims . . . ("Motion") [ECF No. 90], filed December 19, 2016. Counter-Plaintiffs, Industrial Heat, LLC ("Industrial Heat") and IPH International, B.V. ("IPH International," and, together with Industrial Heat, "Counter-Plaintiffs") filed an Opposition . . . ("Response") [ECF No. 101] on January 3, 2017; and Third-Party Defendants submitted a Reply . . . ("Reply") [ECF No. 110] on January 10, 2017. The Court has carefully considered the parties' written submissions, the record,[1] and applicable law.

I. BACKGROUND[2]

On October 26, 2012, Industrial Heat entered into a License Agreement ("License Agreement" or "Agreement") [ECF No. 1-2] with Andrea Rossi ("Rossi") and Leonardo Corporation ("Leonardo," and together with Rossi, "Counter-Defendants"). The Agreement gave Industrial Heat license to manufacture products and use the intellectual property related to Rossi and Leonardo's energy catalyzer ("E-Cat" or "Plant") technology, which purports to produce energy at a greater rate than that consumed by the Plant, without the harmful byproduct associated with nuclear reaction processes. (*See* Third-Party Claims ¶¶ 2, 34, 36).

The License Agreement provided the grant of the license and sale of the E-Cat would unfold in three phases, and it contemplated Leonardo and Rossi could earn three potential

[1] The Court cites specific pages of record documents and submissions using the pagination provided in the CM/ECF database headers in lieu of the pagination provided in the documents or by the parties in their submissions.

[2] The factual allegations relevant to the third-party claims within the Third Amended Answer, Additional Defenses, Counterclaims, and Third Party Claims ("Third-Party Claims") [ECF No. 78] are accepted as true. *See Brooks v. Blue Cross & Blue Shield of Fla., Inc.*, 116 F.3d 1364, 1369 (11th Cir. 1997). The Court focuses on the facts in the Third-Party Claims specific to the Motion, and directs the parties to its November 16, 2016 Order ("November 16 Order") [ECF No. 76] for a more comprehensive statement of facts.

payments contingent on satisfying the conditions required at each phase. The third and final phase involved a "Guaranteed Performance" test in which Counter-Defendants would have to demonstrate the E-Cat could consistently produce at least four times the energy it consumed for 350 out of 400 days. (*See id.* ¶ 3 (citing License Agreement § 3.2(c))). Counter-Defendants allegedly manipulated the procedures and deceived Counter-Plaintiffs at the first two phases to secure the first two payments, but Industrial Heat refused to make the third payment for $89 million. (*See id.* ¶¶ 4, 144).

Before Industrial Heat discovered any of these allegedly deceptive acts, on September 1, 2013, it entered into a Technical Consulting Agreement ("Quantum Leap Agreement") [ECF No. 78-11] with Quantum Leap, whose sole member is Fabiani. (*See* Third-Party Claims ¶ 63). Quantum Leap was retained as an independent contractor to "provide services related to the manufacture and development" of the Plant and related intellectual property. (*Id.* (internal quotation marks omitted) (quoting Quantum Leap Agreement preamble)). Under the Quantum Leap Agreement, Quantum Leap had the obligation to "promptly disclose to Industrial Heat any and all improvements, inventions, developments, discoveries, innovations, systems, techniques, processes, formulas, programs and other things that may be of assistance to Industrial Heat or its affiliates" related to Quantum Leap's work on the E-Cat for Industrial Heat. (Quantum Leap Agreement § 7). The Agreement stated it was effective from September 1, 2013 to August 31, 2014, unless the parties chose to extend it. (*See id.* § 8). It contained a Joinder binding Fabiani personally to certain provisions of the Agreement to the same extent Quantum Leap was bound. (*See id.* Joinder).

In 2014, Rossi and Leonardo lobbied Industrial Heat to allow the Plant to be moved to Florida and enlisted Johnson's help in urging for the transfer, in attempts to obtain the final

payment under the License Agreement. (*See* Third-Party Claims ¶ 70). Johnson created a company to pose as a Miami-area customer in need of the steam produced by the Plant (*see id.*), registering the company, J.M. Products, as a Florida corporation in June 2014. (*See id.*). Rossi pressed Industrial Heat to permit the move in a July 5, 2014 email. At an August 2014 meeting in North Carolina, Rossi and Johnson, on behalf of themselves and their companies, represented J.M. Products was wholly owned by Johnson Matthey, a U.K. corporation interested in using the E-Cat technology for a confidential manufacturing process in Florida. (*See id.* ¶ 74). Acting on behalf of J.M. Products, Johnson warranted in writing in August 2014 that J.M. Products was "owned by an entity formed in the United Kingdom;" and neither Leonardo, Rossi, Johnson, nor any affiliated parties had "any ownership interest" in the company. (Compl., Ex. B [ECF No. 1-2] 25).

As a result of these statements, Industrial Heat, J.M. Products, and Leonardo executed a Term Sheet [ECF No. 78-17], which provided for delivery of the Plant to Miami, Florida. (*See* Third Party Claims ¶ 75). Counter-Plaintiffs later uncovered the purpose for moving the Plant and all representations made regarding J.M. Products were complete fabrications. (*See id.*). After the Plant's transfer to Miami, J.M. Products, Johnson, Bass, Fabio Penon[3] ("Penon"), Leonardo, and Rossi allegedly obstructed Counter-Plaintiffs' access to the Miami facility housing the Plant and misrepresented the actual goings-on at the facility. (*See id.* ¶¶ 77–93). Their deceptive acts were apparently aimed at concealing the Plant's failure to produce energy at the rate required by the License Agreement in order to secure the final $89 million payment and other related expenses contemplated by the Agreement. (*See id.* ¶ 84). Counter-Plaintiffs further allege Fabiani and Quantum Leap disregarded their contractual obligations to Industrial Heat

[3] Penon is a named third-party defendant, but Counter-Plaintiffs have not provided proof of service on him and the deadline to perfect service has long since passed.

under the Quantum Leap Agreement by assisting Rossi and Leonardo's deceptive operations in Florida and failing to disclose complete and accurate information related to their work on the Plant. (*See id.* ¶¶ 86–88, 153–55).

Counter-Plaintiffs filed the Third-Party Claims on November 16, 2016, following the Court's Order [ECF No. 76] granting in part and denying in part Counter-Defendants' Motion to Dismiss . . . ("Counter-Defendants' Motion to Dismiss") [ECF No. 56]. With regard to the Third-Party Defendants, Counter-Plaintiffs allege: (1) J.M. Products and Johnson fraudulently induced Industrial Heat to enter into the Term Sheet ("Count III"); (2) all Third-Party Defendants violated the Florida Deceptive and Unfair Trade Practices Act ("FDUTPA"), Florida statute section 501.204 ("Count IV"); and (3) Fabiani and Quantum Leap breached the Quantum Leap Agreement ("Count V"). (*See generally* Third-Party Claims). Counter-Defendants seek dismissal of all counts for failure to state claims for relief.

II. 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.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). To meet this "plausibility standard," a plaintiff must "plead[] factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (alteration added) (citing *Twombly*, 550 U.S. at 556). "[I]t simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal [behavior]." *Twombly*, 550 U.S. at 556 (alterations added). The mere possibility a defendant acted unlawfully is insufficient to survive a motion to dismiss. *See Chaparro v. Carnival Corp.*, 693 F.3d 1333, 1337 (11th Cir. 2012) (citing *Iqbal*, 556 U.S. at 678).

III. ANALYSIS

A. Count III: Fraudulent Inducement

Counter-Plaintiffs claim J.M. Products, Johnson, and Counter-Defendants fraudulently induced Industrial Heat to enter into the Term Sheet by falsely representing J.M. Products was a manufacturing company with real commercial use for the steam power generated by the Plant. (*See* Third-Party Claims ¶¶ 134–39).

To state a claim for fraudulent inducement in Florida, a plaintiff must plead: "(1) the defendant made a false statement about a material fact; (2) the defendant knew the statement was false when he made it or was without knowledge of its truth [or] falsity; (3) the defendant intended that the plaintiff rely and act on the false statement; and (4) the plaintiff justifiably relied on the false statement to his detriment." *Persaud v. Bank of Am., N.A.*, No. 14-21819-CIV, 2014 WL 4260853, at *12 (S.D. Fla. Aug. 28, 2014) (alteration added) (quoting *Barrett v. Scutieri*, 281 F. App'x 952, 953 (11th Cir. 2008)). Additionally, Rule 9(b) requires plaintiffs to plead the circumstances constituting fraud with particularity, *see* FED. R. CIV. P. 9(b), setting forth the precise oral and written statements made, when and where these statements were made, to whom and by whom they were made, and/or what was obtained as a result. *See Ziemba v. Cascade Int'l, Inc.*, 256 F.3d 1194, 1202 (11th Cir. 2001) (quoting *Brooks*, 116 F.3d at 1371).

To support their fraudulent inducement claim, Counter-Plaintiffs rely on Johnson's and J.M. Products's representations at the August 2014 meeting (*see* Third-Party Claims ¶ 74), and a written representation made by Johnson on behalf of J.M. Products (*see id.*).[4] Third-Party

[4] Johnson and J.M. Products represented J.M. Products was a subsidiary of Johnson Matthey at the August 2014 meeting in North Carolina (*see* Third-Party Claims ¶ 74), and indicated Johnson Matthey was interested in using the E-Cat technology in connection with a confidential manufacturing process it wanted to operate in Florida (*see id.*). In an August 2014 document, Johnson on behalf of J.M. Products certified Johnson Matthey was owned by a U.K. entity and neither the Counter-Defendants, Johnson, nor any affiliated parties held any ownership interest in the company. (*See id.*).

Defendants argue Counter-Plaintiffs fail to comply with Rule 9(b) because: (1) they do not "specify when, specifically, or to whom, specifically, [the meeting] statements were made" (Mot. 6 (alteration added)), and (2) the allegation false statements were made in "August 2014, generally" is insufficient given the Term Sheet's effective date on August 13, 2014.[5]

The November 16 Order already determined Counter-Plaintiffs adequately pleaded their fraudulent inducement claim with respect to the August meeting statements. (*See* November 16 Order 13). The purpose of the meeting, per Counter-Plaintiffs, was to convince Industrial Heat to permit the Plant to be moved to Miami, Florida. (*See* Third Party Claims ¶ 74 (stating the meeting was "in furtherance of [the] scheme" to remove the Plant for Industrial Heat's control (alteration added)). The meeting would not have occurred if the Term Sheet had already been signed; hence the Third Party Claims sufficiently allege the August meeting occurred before the execution of the Term Sheet.

The same cannot be said for J.M. Products's written representation regarding J.M. Matthey in the document titled "Compliance with OFAC." (*See* Compl., Ex. B 25). In the document, Johnson, acting on behalf of J.M. Products, certifies to Industrial Heat that J.M. Products is in compliance with the rules and regulations of the Office of Foreign Asset Control (OFAC). (*See id.*). The document further states J.M. Products is owned by a U.K. entity and neither the Counter-Defendants, Johnson, nor any affiliated parties hold any ownership interest

[5] Additionally, Industrial Heat argues Johnson and J.M Products have failed to plead the knowledge element of the FDUTPA claim. (*See* Mot. 7). Because the claim involves Johnson and J.M. Products's false representations about themselves, at the very least they ought to have known of the falsity of their statements, which is sufficient to establish the knowledge element. *See Thor Bear, Inc. v. Crocker Mizner Park, Inc.*, 648 So. 2d 168, 172–73 (Fla. 4th DCA 1994) (finding knowledge element is satisfied when "the representor ought to have known, if he did not know, of the falsity" of statements (internal quotation marks omitted) (quoting *Alexander/Davis Properties, Inc. v. Graham*, 397 So. 2d 699, 706 (Fla. 4th DCA 1981))).

in the company. (*See id.*). This is the portion of the document Counter-Plaintiffs fixate on to support of the fraudulent inducement claim.

However, the document is undated and it is not facially apparent why it was produced (for instance, if it was signed after the execution of the Term Sheet or as part of another agreement between J.M. Products and Industrial Heat). Although Counter-Defendants submitted the document in the same CM/ECF exhibit as the License Agreement and its attachments (*see* Compl., Ex. B), it is not listed as an attachment and does not appear to be a part of that Agreement (*see* License Agreement § 16.15 (listing exhibits and schedules)). Without more information, most importantly, the date of signing, the Compliance with OFAC document cannot support the contention Third-Party Defendants intended Counter-Plaintiffs to rely on the misrepresentation to enter the Term Sheet; thus, the document does not meet the heightened pleading standard of Rule 9(b). Nevertheless, because the August meeting statements are sufficient to state a claim, Count III remains intact.

B. Count IV: the FDUTPA

Counter-Plaintiffs allege Counter-Defendants, Third-Party Defendants, and Penon violated the FDUTPA by engaging in a common scheme focused on moving the Plant to Florida and creating the false impression the Plant was performing at exceptional levels in order to obtain the final $89 million available under the contract as well as other related payments. (*See generally* Third-Party Claims ¶¶ 140–48). Third-Party Defendants' main argument is Counter-Plaintiffs fail to establish all the elements of a FDUTPA claim.[6] (*See* Mot. 7, 9–15).

[6] Third-Party Defendants also begin attacking the FDUTPA claim by echoing an argument rejected in the November 16 Order. They contend Counter-Plaintiffs improperly recast their contract claims as FDUTPA tort claims. (*See* Mot. 7–8; *see also* Counter-Defendants' Motion to Dismiss 21). The November 16 Order rejected this argument, finding claims giving rise to a breach of contract may also constitute an unfair or deceptive act under the FDUTPA (*see* November 16 Order 15–16); and Counter-Plaintiffs adequately described deceptive practices "related to but separate from their breach of contract

To state a claim for a FDUTPA violation, a plaintiff must show: (1) a deceptive act or unfair practice; (2) causation; and (3) actual damages. *See Medimport S.R.L. v. Cabreja*, 929 F. Supp. 2d 1302, 1319 (S.D. Fla. 2013) (quoting *Blair v. Wachovia Mortg. Corp.*, No. 5:11-CV-566-OC-37TBS, 2012 WL 868878, at *3 (M.D. Fla. Mar. 14, 2012)). "[A] deceptive act occurs when 'there is a representation, omission, or practice that is likely to mislead the consumer acting reasonably in the circumstances, to the consumer's detriment.'" *Gavron v. Weather Shield Mfg., Inc.*, 819 F. Supp. 2d 1297, 1302 (S.D. Fla. 2011) (alteration added) (quoting *PNR, Inc. v. Beacon Prop. Mgmt., Inc.*, 842 So. 2d 773, 777 (Fla. 2003)).

To plead the second element of a FDUTPA claim, a plaintiff must show causation, stating how an alleged deceptive or unfair practice actually resulted in damage. *See Kais v. Mansiana Ocean Residences, LLC*, No. 08-21492-CIV-MORENO, 2009 WL 825763, at *1 (S.D. Fla. Mar. 26, 2009) (citation omitted). At the time of trial, the plaintiff need not prove reliance on deceptive acts, but "causation must be direct, rather than remote or speculative." *Lombardo v. Johnson & Johnson Consumer Cos, Inc.*, 124 F. Supp. 3d 1283, 1290 (S.D. Fla. 2015) (quoting *Hennegan Co. v. Arriola*, 855 F. Supp. 2d 1354, 1361 (S.D. Fla. 2012); citing Fla. Stat. § 501.211(2) (A "person who has suffered a loss *as a result of* a violation of this part . . . may recover actual damages." (emphasis and alteration added))). Finally, to satisfy the third element of a FDUTPA claim, a plaintiff must show actual damages which "directly flow" from the deceptive or unfair act; consequential damages are not recoverable. *Hennegan*, 855 F. Supp. 2d at 1361.

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claims" (*id.* 16).

Fabiani and Quantum Leap. The crux of the alleged FDUTPA violation is the manipulation of testing and performance data in order to obtain the final $89 million payment and related payments. (*See* Third-Party Claims ¶¶ 142–45). Even accepting the allegations of the Third-Party Claims as true, Counter-Plaintiffs have not satisfied the first element as to Fabiani and Quantum Leap. While Counter-Plaintiffs lump Fabiani and Quantum Leap into the "FDUTPA Defendants" group, these Third-Party Defendants were not involved in the substantive acts mentioned in Count IV. The allegations as to Fabiani and Quantum Leap focus on and are based on these parties' failure to provide information in breach of the Quantum Leap Agreement (*See* Mot. 15). At most, the Third-Party Claims suggest in conclusory fashion the failure to provide information was tantamount to affirmatively misrepresenting the nature of operations at the facility. Counter-Plaintiffs do not attribute any specific deceptive statements or acts to Fabiani or Quantum Leap. (*See* Third-Party Claims ¶¶ 84–88). Accordingly, Count IV is dismissed as to Fabiani and Quantum Leap.

Johnson, J.M. Products, and Bass. With regard to Johnson, J.M. Products, and Bass, Counter-Plaintiffs plead the first element of a FDUTPA claim, stating these Third-Party Defendants engaged in at least some deceptive acts or unfair practices. For instance Johnson, J.M. Products, and Bass represented a confidential manufacturing process was being conducted at the Doral facility by a real customer in need of the steam generated by the Plant. (*See* Third-Party Claims ¶¶ 74, 79). This and other representations were "likely to mislead" Counter-Plaintiffs about the actual operations at the facility.[7]

[7] Third-Party Defendants assert Johnson, J.M. Products, and Bass's relationship with Industrial Heat was limited to mere "rental of the Plant." (Mot. 11). These Third-Party Defendants maintain the hiring of a fake engineer and the restriction of access to the Doral facility were "not deceptive or unfair . . . pursuant to the Term Sheet" because "access to [the] facility or operation was never promised or required" and "the Term Sheet does not require [them] to provide Counter-Plaintiffs with any details concerning [the] facility or its operations therein." (*Id.* (alterations added)). First, an unfair or deceptive act need not be

Turning to the second and third elements, Counter-Plaintiffs fail to plausibly allege causation between Johnson's, J.M. Products's, and Bass's complained-of deceptive acts and actual damages in the form of service payments, expense reimbursements, and equipment costs.[8]

According to Counter-Plaintiffs, Johnson and J.M. Products contributed to the scheme by inducing the Plant's move to Florida, while Bass allegedly made false statements about J.M. Products and the confidential operations at the facility. While these actions may have contributed to the scheme, none directly resulted in Counter-Plaintiffs' damages. Counter-Plaintiffs suffered damages as a result of a scheme that engendered the belief the Plant was performing at the rate specified in the License Agreement. The damages did not "directly flow" from the Plant's transfer to Florida. The Florida location may have made it more difficult to monitor its operations, but it was Rossi's and Leonardo's[9] alleged manipulation of the Plant's operations and deception about its ability to achieve "Guaranteed Performance"[10] that caused the identified damages. (*See* Third-Party Claims ¶¶ 80, 142–44, 146c–d). Similarly, Counter-

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based on a contractual relationship. Further, Third-Party Defendants' characterizations directly contradict the plain language of the Term Sheet. The Term Sheet expressly provides: "[Industrial Heat] will be allowed to visit the [Plant] at any time" (Term Sheet ¶ 13 (alterations added)), and "J.M. Products will keep records of the operation of the [Plant] as reasonably requested by Leonardo or [Industrial Heat] and will provide copies of such records to Leonardo and [Industrial Heat] upon request" (*Id.* ¶ 19 (alterations added)).

[8] Counter-Defendants and Third-Party Defendants charged for work and equipment related to the Plant's operation, causing Counter-Plaintiffs to pay for expenses not truly incurred for their benefit. (*See* Third-Party Claims ¶ 145; Resp. 12 n.12). These expenses at least constitute actual damages, which flowed directly from the false representation the E-Cat was performing at exceptional levels.

[9] Counter-Plaintiffs also allege Penon engaged in similar acts to manipulate measurements and misrepresent the performance of the E-Cat. (*See* Third-Party Claims ¶¶ 90–92).

[10] Even accepting Counter-Plaintiffs' allegations as to the deceptive nature of these acts, issuing falsified invoices (*see* Third-Party Claims ¶ 77); posing as an employee (*see id.* ¶ 78); and/or expressing satisfaction with a non-existent product (*see id.* ¶ 78), do not provide information about the *rate* at which the Plant generates the energy. (*See* Mot. 11). This is the relevant inquiry when assessing the Plant's performance, and the Plant's supposedly high-level performance is part of the reason Counter-Plaintiffs incurred certain expenses.

Plaintiffs do not allege how Bass's statements and his posing as an employee — while misleading — directly caused Counter-Plaintiffs to believe the Plant was performing at the promised productivity rate, and hence, did not directly cause them to incur damages. As a result, Count IV is dismissed as to all Third-Party Defendants.

C. Count V: Breach of Contract

Counter-Plaintiffs allege Fabiani and Quantum Leap breached the Quantum Leap Agreement by disregarding contractual obligations to Industrial Heat in assisting Rossi and Leonardo's deceptive operations in Florida and failing to disclose complete and accurate information related to their work on the Plant. (*See id.* ¶¶ 86–88, 153–55). Third-Party Defendants argue Count V should be dismissed because: (1) it does not state a cause of action since the alleged breaches occurred after the Quantum Leap Agreement terminated on August 31, 2014; (2) the contract is void as a matter of law with regard to Fabiani; and (3) Fabiani is not bound by the entire agreement, since the Joinder only bound him to certain sections. (*See* Mot. 17–19). Although the first issue is dispositive, the Court addresses each argument in turn.

Under North Carolina law,[11] "[i]n interpreting a contract the intent of the parties is [the] polar star[.]" *Davis v. Woodlake Partners, LLC*, 748 S.E. 2d 762, 768 (N.C. App. 2013) (alterations added; citation omitted). The intent of the parties is inferred from the words of the contract if the plain language of the contract is clear. *See Tyndall-Taylor v. Tyndall*, 580 S.E. 2d 58, 60–61 (N.C. App. 2003).

The Quantum Leap Agreement unambiguously states it commenced on September 1,

[11] Although it makes no difference to the result, the Court notes the parties rely on Florida contract law, but the Quantum Leap Agreement states it "shall be construed and enforced in accordance with and governed by the laws of the State of North Carolina." (Quantum Leap Agreement § 14). Without knowing if any of the purported contract renewals alter this choice of applicable law, the Court hews to the terms of the contract and interprets the Quantum Leap Agreement under North Carolina law.

2013 and continued until August 31, 2014, at which point it terminated unless the parties agreed in writing to extend it. (*See* Quantum Leap Agreement § 8). Thus, unless the parties chose to extend the agreement in writing, it terminated before any of the alleged breaches occurring in 2015 and 2016. Counter-Plaintiffs argue several 2016 emails included as exhibits with the Third-Partly Claims (*see* Third Party Claims, Ex. 21 [ECF No. 78-21]), "demonstrate and allow the Court to draw the reasonable inference that the USQL Agreement was in effect in 2015 and early 2016" (Resp. 19). The Court disagrees such inference can be drawn.[12]

Counter-Plaintiffs do not provide the actual writing in which the Quantum Leap Agreement was renewed. The 2016 emails at most propose renewal of *an* agreement with Quantum Leap, but considering the gap in time between the 2014 termination date and the 2016 date of these emails, and lacking an actual writing or allegation (as opposed to a proposal) showing the continued vitality of the Quantum Leap Agreement's provisions, the Court cannot infer the parties extended the original termination date clearly stated in the original agreement. Count V is thus dismissed on this ground.

Third-Party Defendants' two other arguments attacking Count V relate specifically to the contract as enforced against Fabiani, stating first, it is void as to Fabiani because no consideration was given at the time Fabiani executed the Joinder on September 9, 2013, and second, even if it is a valid agreement, only some provisions are enforceable against Fabiani.

[12] The Court may consider documents attached to the pleadings on a motion to dismiss if they are central to the claims and undisputed. *See Fiegl v. Graphic Packaging Int'l*, No. 1:13-CV-4125-TWT, 2014 WL 3854223, at *1 n.3 (N.D. Ga. Aug. 5, 2014) (citing *Day v. Taylor*, 400 F.3d 1272, 1276 (11th Cir. 2005)). The Quantum Leap Agreement is discussed in both parties' written submissions and is central to Count V's breach-of-contract claim; the parties do not dispute the original contract terminated on August 31, 2014; they merely disagree as to whether it was extended. (*See* Mot. 16–17; Resp. 19–20). Counter-Plaintiffs argue the Court must also consider and accept as true the emails attached as exhibits to the Third-Party Claims (Resp. 19–20). Even disregarding the content of the emails appears to be disputed, and accepting Counter-Plaintiffs' interpretation of the emails as true, the emails do not support the inference the original contract was extended for the reasons discussed in this section.

In North Carolina, the essential elements of a valid and enforceable contract are: offer, acceptance, and consideration. *See Lewis v. Lester*, 760 S.E. 2d 91, 93–94 (N.C. App. 2014). "[A]ny benefit, right, or interest bestowed upon the promisor, or any forbearance, detriment, or loss undertaken by the promisee, is sufficient consideration to support a contract." *Burton v. Williams*, 689 S.E. 2d 174, 178 (N.C. App. 2010) (alteration in original; internal quotation marks omitted) (quoting *Brenner v. Little Red School House, Ltd.*, 274 S.E. 2d 206, 212 (N.C. 1981))). It is plausible the "requirement of the Joinder was part and parcel of the [Quantum Leap Agreement] and Fabiani, as the sole member and manager of [Quantum Leap], reaped the benefits" bestowed on the company under the agreement. (Resp. 21 (alterations added)). These benefits include a $126,000 payment for consulting services and reimbursements for a North Carolina–area apartment rental for Fabiani. (*See* Quantum Leap Agreement § 9). Read this way, consideration was provided.

Finally, Third-Party Defendants argue even if the contract is enforceable, Fabiani is not bound by the entire Quantum Leap Agreement because the Joinder explicitly limits and binds him only to provisions related to confidentiality (section 5), rights to materials (section 6), and new developments (section 7). It is no matter Fabiani is bound by only some provisions of the agreement because Counter-Plaintiffs allege he violated at least one of the provisions included in the Joinder. (*See* Third-Party Claims ¶¶ 152–55; Resp. 21–22).

IV. CONCLUSION

For the foregoing reasons, it is

ORDERED AND ADJUDGED that the Motion **[ECF No. 90]** is **GRANTED in part** and **DENIED in part** as follows:

1. Count IV is **DISMISSED** as to Third-Party Defendants, J.M. Products, Inc.; Henry Johnson; James A. Bass; United States Quantum Leap, LLC; and Fulvio Fabiani.
2. Count V is **DISMISSED**.
3. Count III remains intact.

DONE AND ORDERED in Miami, Florida this 17th day of January, 2017.

CECILIA M. ALTONAGA
UNITED STATES DISTRICT JUDGE

cc: counsel of record