

UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF FLORIDA

Case No.: 1:24-cv-21226-RAR

DR. EDWIN A. HERNANDEZ, and EGLA  
CORP.,

JURY TRIAL DEMANDED

*Plaintiffs,*

v.

STINGRAY GROUP INC. f/k/a  
STINGRAY DIGITAL GROUP, INC.  
STINGRAY MUSIC USA, INC., MOOD  
MEDIA LLC f/k/a MOOD MEDIA  
CORPORATION, AT&T ENTERPRISES,  
LLC f/k/a AT&T Corp., MILLICOM  
INTERNATIONAL SERVICES, LLC,  
BLUE STREAM COMMUNICATIONS,  
LLC dba BLUE STREAM FIBER,

*Defendants.*

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**PLAINTIFFS' OPPOSITION TO DEFENDANTS' STINGRAY MUSIC USA, INC.,  
STINGRAY GROUP, INC., MILLICOM INTERNATIONAL SERVICES, LLC, AT&T  
ENTERPRISES, LLC, MOOD MEDIA, LLC, AND BLUE STREAM  
COMMUNICATIONS, LLC'S MOTION TO DISMISS PLAINTIFFS' SECOND  
AMENDED COMPLAINT**

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## I. INTRODUCTION

Defendants' omnibus motion indiscriminately attacks every count in Plaintiffs' second amended complaint ("SAC"). As explained below, none of these attacks have merit.

Defendants first wrongly claim that Dr. Hernandez lacks standing for his claims. They are wrong. There is no dispute that Dr. Hernandez developed the technology at issue and, given that, Defendants fail to show that there was any assignment or transfer of Dr. Hernandez's IP to EGLA Corp. In fact, the documents and emails they cite are entirely consistent with Plaintiffs' allegations that Dr. Hernandez owns the patents and trade secrets and EGLA is an exclusive licensee. At best, Defendants standing argument raises questions of fact that cannot be resolved on a motion to dismiss. Equally problematic for Defendants' trade secret standing argument is that, in the Eleventh Circuit, the rightful owner of a trade secret under the DTSA is not a question of standing and Florida courts have rejected defendants' attempts to dismiss FUTSA claims on ownership grounds. Standing regarding the breach of contract claims is moot because EGLA already has been added to the operative complaint, and Defendants do not dispute EGLA's standing.

Defendants raise the statute of limitations argument but omit that Defendants Mood Media and Stingray repeatedly misled Dr. Hernandez, stating "that "STINGRAY DIGITAL has no knowledge of, nor involvement on, the specifics of MOOD MEDIA's content delivery technology - EGLA's or otherwise - nor has the intention of acquiring or learning such technology." They also threatened Dr. Hernandez with a lawsuit if he did act on his suspicions. Based on Defendants' denials of wrongdoing and threats, Dr. Hernandez was misled to believe he had no claims. Over the next several years, Dr. Hernandez diligently searched for information about Stingray's streaming music service. In particular, he reviewed pleadings filed in a lawsuit between Stingray and a competitor who also accused Stingray's streaming music service of patent infringement. However, that effort proved unsuccessful because Stingray filed its documents under seal to prevent the disclosure of its technical information and heavily redacted the publicly available documents. It was not until April 7, 2021 that Dr. Hernandez discovered a publicly accessible

website related to Stingray's streaming music service that, after examining thousands of pages of technical documents, Dr. Hernandez was able to determine that Defendants had misled him.

Mood Media's attempt to rely on a release in a settlement is misplaced because the settlement was procured by fraud. Even if the release is enforceable (it is not), it excludes "any claims, demands or causes of action which arise against DMX as a result of its breach..." such as those asserted against Mood Media. As explained below, Defendants' additional facial attacks on the legal sufficiency of the allegations in the Second Amended Complaint are without merit.

For these reasons, Defendants' motion to dismiss should be denied in its entirety.

## **II. APPLICABLE LEGAL STANDARD**

For motions under Fed. R. Civ. P. 12(b)(6), courts review the allegations of the complaint to determine if "enough facts to state a claim to relief that is plausible on its face" are alleged. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A claim is facially plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). A court must accept all factual allegations in the complaint as true and draw all reasonable inferences in favor of the plaintiff. *Erickson v. Pardus*, 551 U.S. 89, 93-94 (2007).

## **III. THE COURT HAS SUBJECT MATTER JURISDICTION OVER THIS CASE<sup>1</sup>**

### **A. Plaintiffs' Patent and Trade Secret Claims**

Dr. Hernandez undisputably developed the IP at issue in this case. EGLA Corp. has an exclusive license to the technology, over which Dr. Hernandez has retained ownership. Defendants' challenge to Dr. Hernandez's standing to bring the original complaint therefore fails. Defendants cannot show any transfer of ownership from Dr. Hernandez to EGLA Corp. of Dr. Hernandez's IP. Defendants had to prove that there is a written agreement that transferred enough rights from Dr. Hernandez to EGLA so as to amount to EGLA's ownership and the right to sue, *i.e.*, a virtual assignment. Absent a written transfer of ownership, Dr. Hernandez retained standing

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<sup>1</sup> For ease of reference, Plaintiffs address Defendants' arguments in the order given in Defendants' motion.

to sue over his IP rights in his name. There are no facts in the amended complaint supporting a transfer of all of Dr. Hernandez's rights and, indeed those facts when litigated on the merits will show there was no such license, establishing that Dr. Hernandez owns the IP and has standing for the asserted claims. *Alfred E. Mann Foun. for SCI. v. Cochlear Corp.*, 604 F. 3d 1354, 1361 (Fed. Cir. 2010) ("When there is an exclusive license agreement...but the exclusive license does not transfer enough rights to make the licensee the patent owner, either the licensee or the licensor may sue..."). Discovery will further reveal that the license agreement between Dr. Hernandez and EGLA was a verbal one, further evidence that he retained ownership. *Aspex Eyewear*, 434 F.3d at 1339 ("although 'a license may be written, verbal, or implied, if the license is to be considered a virtual assignment to assert standing, it must be in writing.'"); *see also* 35 U.S.C. § 261 ("Applications for patent, patents, or any interest therein, shall be assignable in law by an instrument ***in writing***." ) (emphasis added).

Here, the SAC alleges that "the company [EGLA] has an exclusive license to the technologies owned by Dr. Hernandez." Dkt. 82 at 20 The SAC further alleges how Dr. Hernandez developed his trade secrets and patented technology over the course of several years and "was the main software developer, architect, solo entrepreneur, test engineer, and sole provider of technologies" at issue. *Id.* at ¶¶ 6-18, 37-54. And, the patents-in-suit list Dr. Hernandez as the "Applicant" and "Inventor," and do not reflect any assignment of the patents. Dkt. 82-1, 82-2 and 82-3. Consistent with this showing, the SAC alleges that "Dr. Hernandez is the owner of all rights, title and interests to the [Asserted] Patent[s], including the right to bring this suit for injunctive relief and damages." *Id.* at ¶¶ 144, 160, 176; *see also* 35 U.S.C. § 281 ("[a] patentee shall have remedy by civil action for infringement of his patent."); 35 U.S.C. § 100(d) ("patentee" is the person to whom the patent was issued and successors). As the owner of the trade secrets and patents-in-suit, Dr. Hernandez retains the right to sue for misappropriation and infringement, even if he exclusively licenses his trade secrets and patents. *Alfred E. Mann Foun. for SCI.*, 604 F. 3d at 1360 (patent owner who retained ownership of patents-in-suit after granting exclusive license had standing to sue); *Aspex Eyewear*, 434 F.3d at 1344 (same); *Abbott Laboratories v. Diamedix*

*Corp.*, 47 F. 3d 1128, 1332 (Fed. Cir. 1995) (patent owner retained patent rights sufficient to preclude the exclusive license agreement from being deemed a virtual assignment). The Court had subject matter jurisdiction at the case inception because Dr. Hernandez retained ownership in the patents, including his right to sue for infringement, and patent infringement is a federal question.<sup>2</sup>

Defendants' claim that Dr. Hernandez did not have standing to assert FUTSA and DTSA claims against Defendants is also unsupported. Under the DTSA, "[a]n owner of a trade secret that is misappropriated may bring a civil action under this subsection if the trade secret is related to a product or service used in, or intended for use in, interstate or foreign commerce." 18 U.S.C. § 1836(b)(1). The DTSA defines an owner as "the person or entity in whom or in which rightful legal or equitable title to, or license in, the trade secret is reposed." 18 U.S.C. § 1839(4). The rightful owner of a trade secret is not a question of standing. *See Highland Consulting Grp., Inc. v. Minjares*, 74 F.4th 1352, 1359 (11th Cir. 2023) (holding plaintiff entity and entity's owner were both trade secret owners for purposes of DTSA). FUTSA, on the other hand, does not contain an ownership provision. Florida courts have rejected defendants' attempts to dismiss FUTSA claims on ownership grounds. *Treco Int'l S.A. v. Kromka*, 706 F. Supp. 2d 1283, 1290 (S.D. Fla. 2010) (rejecting dismissal of FUTSA claim on grounds that the plaintiff did not own the trade secrets).

Both the Supreme Court and the Eleventh Circuit have established that the question of trade secret ownership concerns a cause of action for trade secret misappropriation and "does not implicate subject-matter jurisdiction." *Id.* at 1359–60 (quoting *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 128 n.4 (2014)). Defendants' argument here is similar to that of the defendant in *Highland Consulting Group, Inc. v. Minjares*, 74 F.4th at 1352. Like the defendant in *Highland Consulting*, who claimed that the plaintiff lacked standing because the plaintiff did

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<sup>2</sup> Defendants cite to *Wright v. Dougherty Cnty., Ga.*, 358 F.3d 1352 (11th Cir. 2004), wherein the court determined it did not have the power to grant leave to amend because the plaintiffs did not establish injury in fact and therefore lacked standing to bring their claim for violation of the Voting Rights Act. *See* 358 F.3d at 1356. Unlike *Wright*, the Court here had subject matter jurisdiction at the inception of this case because Dr. Hernandez, the rightful owner of the patents, asserted an injury in fact—infringement—and patent infringement is a federal question.

not establish that it owned the trade secrets at issue, Defendants here assert that Court should dismiss Dr. Hernandez's trade secret claims because he is not the owner of the trade secrets and therefore lacks standing, *see* Dkt. 148 at 9–10. In *Highland Consulting Group*, the Eleventh Circuit rejected this argument, finding that “[t]he essence of [the defendant]’s contention, . . . is whether the statutory text of the DTSA ‘grants [the plaintiff] the cause of action that [it] asserts,’” which “is ‘not of standing at all.’” *Highland Consulting Grp., Inc.*, 74 F.4th at 1359 (quoting *Kroma Makeup EU, LLC v. Boldface Licensing + Branding, Inc.*, 920 F.3d 704, 708 (11th Cir. 2019)). The Court here, like the Eleventh Circuit, should reject Defendants’ argument that Dr. Hernandez did not have standing as an owner of the asserted trade secrets.<sup>3</sup>

**1. There Was No Assignment of IP Rights from Dr. Hernandez to EGLA**

The three documents and emails Defendants rely upon do not reflect any transfer of the ownership from Dr. Hernandez to EGLA of his patent and trade secrets. They merely reflect that, as alleged, Dr. Hernandez exclusively licensed his company, EGLA Corp., to provide goods and services utilizing his intellectual property. For example, the Term Sheet says nothing about the ownership, or assignment from Dr. Hernandez, of any trade secrets or patents to EGLA, only that EGLA has exclusive rights to the software licenses. Dkt. 82-9 at 3 (“[a]ny intellectual property rights and the ownership of the licenses regarding the software remain exclusively on EGLA.”). Nor could it. For example, the patents-in-suit were filed in Dr. Hernandez’s name *after* this agreement and did not mature into patents until 2018, 2019 and 2021. Similarly, the references to “EGLA Corp.’s trade secrets” and “our US Patents 10,123,074 and 10,523,002” in Dr. Hernandez’s cease and desist letter to Stingray dated April 20, 2021 are entirely consistent with Dr. Hernandez’s ownership of the trade secrets and patents and EGLA’s exclusive license to them. Dkt. 82 at 20. The same is true of identifying Dr. Hernandez and EGLA as “licensors” in the proposed license, requesting a payment to EGLA, or referring to the intellectual property and trade

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<sup>3</sup> Defendants’ authority is inapposite. The plaintiffs in *Spigot, Inc. v. Hoggatt*, No. 218CV764FTM29NPM, 2020 WL 1955360, at \*10 (M.D. Fla. Apr. 23, 2020), obtained trade secrets by contract, they did not create the technology at issue like Dr. Hernandez here.

secrets as EGLA's in a proposed settlement email to Stingray. Dkt. 3-6 at 95; 82-13 at 3-4. In sum, these statements are consistent with the allegations in the SAC and, even if inconsistent, cannot trump Plaintiffs' well-pled allegations because, at this stage, Plaintiffs' allegations must be accepted as true. *Erickson v. Pardus*, 551 U.S. at 93-94; *Butts*, 512 F. Supp. 3d at 1306.

Defendants' citation to *Schreiber Foods, Inc. v. Beatrice Cheese, Inc.*, 402 F.3d 1198 (Fed. Cir. 2005) is misplaced. Unlike Dr. Hernandez, in *Schreiber Foods*, the plaintiff assigned its rights in the at-issue patent, including "all causes of action," during the pendency of the lawsuit. *See* 402 F.3d at 1200-02. The assignee then granted the plaintiff a non-exclusive license in the patent, which stripped the plaintiff of standing to sue. *See id.* at 1202-03. Defendants' attempts to establish assignment through a series of emails from Dr. Hernandez, who is not a lawyer, do not qualify as an assignment of patent rights, and the emails certainly do not rise to the level of the plaintiff's assignment of "all causes of action" in *Schreiber Foods*.

Defendants' contentions that Dr. Hernandez no longer owns the trade secrets and patents also is, at best, a disputed question of fact, which is not appropriate in a motion to dismiss before any discovery has taken place. *See e.g., Aspex Eyewear*, 434 F.3d at 1344 (existence of license before the filing of the complaint may involve a factual determination).

#### **B. Plaintiffs' Breach of Contract and FDUTPA Claims**

Defendants' argument that Plaintiffs do not have standing to bring claims against Defendants for breach of contract and common law fraud is moot. This Court has permitted plaintiffs a chance to amend their breach of contract and fraud claims following dismissal for lack of standing. *See, e.g., MOTDGD Ltd. v. Playwire, LLC*, No. 0:20-CV-60199-WPD, 2020 WL 5763464, at \*2 (S.D. Fla. Aug. 26, 2020) (granting plaintiff leave to amend after dismissing complaint for breach of contract lack of standing). In *Medimport S.R.L. v. Cabreja*, 929 F. Supp. 2d 1302 (S.D. Fla. 2013), which Defendants cite in their motion, the magistrate judge found that the plaintiff did not have standing because he was not party to the at-issue contract and recommended that the court grant the plaintiff an opportunity to re-plead its contract and fraud claims. *See id.* at 1316. Dr. Hernandez has already amended his complaint to add EGLA, which

was a party to the at-issue contracts and undisputably has standing to sue Defendants for breach of the contracts. As explained above, Defendants' reliance on *Wright* does not support their assertion that "cannot 'cure' [standing] by belatedly adding EGLA as a plaintiff." Dkt. 148 at 11.

Defendants' sole argument for dismissing Plaintiffs' unjust enrichment and FDUTPA claims is that both claims are "premised on the alleged misappropriation of trade secrets that are owned by EGLA." Dkt. 148 at 11. As described above, Defendants failed to show any transfer of ownership of the trade secrets from Dr. Hernandez to EGLA. Regardless, a dispute over trade secret ownership "does not implicate subject-matter jurisdiction." *See Treco Int'l S.A.*, 706 F. Supp. 2d at 1290. Further, as described below, Plaintiffs' unjust enrichment and FDUTPA claims are not premised on Plaintiffs' misappropriation claims. *See, infra*, Section IV.B.1, 3.

#### **IV. PLAINTIFFS PLED FACTUAL ALLEGATIONS SUFFICIENT TO SUPPORT EACH OF THEIR CLAIMS**

##### **A. Plaintiffs Timely Asserted Their Claims Against Defendants Because the Statute of Limitations on Plaintiffs' Non-Patent Claims was Equitably Tolled**

The statute of limitations on a claim runs when the plaintiff discovers or should have discovered sufficient information upon which it could bring a lawsuit. *See Fla. Stat. § 688.007*; 18 U.S.C. § 1836(d). "[W]hen a party 'has been misled or lulled into inaction, [or] has in some extraordinary way been prevented from asserting his rights,' courts apply the doctrine of equitable tolling to the applicable statute of limitations. *Garcia v. Dep't of Bus. & Pro. Regul., Div. of Real Est.*, 988 So. 2d 1199, 1200 (Fla. Dist. Ct. App. 2008); *Carroll v. TheStreet.com, Inc.*, No. 11-CV-81173, 2014 WL 5474061, at \*6 (S.D. Fla. July 10, 2014) (same). The doctrine of equitable tolling stops the clock on a plaintiff's statute of limitations to safeguard "a plaintiff's right to assert a meritorious claim when equitable circumstances have prevented a timely filing." *Machules v. Dep't of Admin.*, 523 So. 2d 1132, 1133 (Fla. 1988).<sup>4</sup> Defendants here repeatedly assured Plaintiffs

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<sup>4</sup> These facts support that equitable estoppel also operates here to bar the application of the statute of limitations due to Defendants' efforts to mislead Dr. Hernandez believing his trade secrets had not been misappropriated. "Equitable estoppel presupposes a legal shortcoming in a party's case that is directly attributable to the opposing party's misconduct. The doctrine bars the wrongdoer from asserting that shortcoming and profiting from his or her own misconduct. *Major League*

that Defendants had not misappropriated Plaintiffs trade secrets, infringed Plaintiffs' patents, or breached the parties' contracts. Meanwhile, Defendants were actively doing all three. The statute of limitations on Plaintiffs claims was therefore tolled and Defendants should be equitably estopped from raising the statute of limitations as a defense.

**1. Stingray and Mood Media Misled Dr. Hernandez**

As alleged in the SAC, when Dr. Hernandez learned in 2014 that Stingray was acquiring certain business assets of Mood Media, he became concerned that they had gained access to his intellectual property without proper authorization. Dkt. 82 ¶ 60; Dkt. 82-13 at 3-4. Dr. Hernandez sent numerous emails to Mood Media and Stingray representatives to "confirm that there was no unauthorized access and use of his technology." *Id.* ¶¶ 55-68; Dkt. 82-11. At the same time, he also emailed the Department of Homeland Security regarding his concerns. Dkt. 82-18. In response, Mood Media and Stingray representatives unequivocally and falsely represented that no such disclosure and/or use had occurred. For example, on April 10, 2014, Stingray represented that "none of your information has been jeopardized, as Stingray has not been made aware of any material information, or used your services in any way if not through MOOD," Dkt. 82-11 at 7, and "Mood has no reason to believe that anyone at DMX/Mood, including former employees, has violated the non-disclosure agreement," Dkt 82-11 at 3 (statement by Mood Media's attorney and VP of Legal and Business Affairs). Again, on April 14, 2014, Stingray represented to Dr. Hernandez that "STINGRAY DIGITAL has no knowledge of, nor involvement on, the specifics of MOOD MEDIA's content delivery technology - EGLA's or otherwise - nor has the intention of acquiring or learning such technology." Dkt. 82-13 at 3. Despite his concerns, in light of Mood Media's and Stingray's repeated denials, he had no choice but to assume Mood Media was acting

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*Baseball v. Morsani*, 790 So. 2d 1071, 1077 (Fla. 2001) ("The doctrine of estoppel is applicable in all cases where one, by word, act or conduct, willfully caused another to believe in the existence of a certain state of things, and thereby induces him to act on this belief injuriously to himself, or to alter his own previous condition to his injury."); *Carroll*, 2014 WL 5474061, at \*8 (equitable estoppel "arises when "one party lulls another party into a disadvantageous legal position.").

in good faith or, as Stingray repeatedly had threatened, risk being liable for a \$16M transaction between Stingray and Mood Media. Dkt. 82 ¶ 67; Dkt. 82-11 at 7; Dkt. 82-15 at 2.

2. **Dr. Hernandez Reasonably Relied on Mood Media and Stingray's Misrepresentations**

Because the technical details of the technology used in Stingray's streaming music were not public, Dr. Hernandez had little to no information in 2014 – just his concern that Stingray *may have* gained access to his trade secrets in its acquisition of certain Mood Media business assets. Dkt. 82 ¶ 78. For example, while he reviewed pleadings from the patent litigation between Stingray and a competitor involving Stingray's music service, the pleadings were heavily redacted to conceal Stingray's technical information and therefore did not reveal that he was misled. Dkt. 82 at ¶¶ 78-82; Dkt. 82-19. In fact, Dr. Hernandez was attempting in good faith to help Stingray in its patent matter. Dkt. 82-23 at 3. As a result, Dr. Hernandez was forced to believe Mood Media and Stingray's misrepresentations. Dkt. 82 ¶ 67. It was not until about April 7, 2021 when Dr. Hernandez came across a website, [www.trello.com](http://www.trello.com), that Stingray appeared to use to report trouble tickets on its streaming music service that he finally obtained technical details of Stingray's technology. Dkt. 82 ¶¶ 91-93. For the next two weeks, Dr. Hernandez examined the trouble tickets and determined that the content of the tickets was genuine. Upon reading the trouble tickets, Dr. Hernandez discovered that Stingray had misappropriated Plaintiffs' trade secrets and infringed their patents. *Id.* ¶¶ 94-99, 102-107; *see also* Dkt. 82-16, 82-17, 82-25, 82-26, 82-27. Based on this information, Dr. Hernandez timely filed suit against Stingray and Mood Media. Plaintiffs' misappropriation claims under the DTSA were not discovered until about April 20, 2021 when Dr. Hernandez was able to independently confirm his initial concerns, despite repeated denials from Stingray and Mood Media. Dr. Hernandez brought suit on April 2, 2024. Therefore, the claims in the SAC were timely asserted.

Nowhere in their motion do Defendants acknowledge Plaintiffs' allegations that Stingray and Mood Media misled Dr. Hernandez. Dkt. 82 at ¶¶ 60-62, 66-67; Dkt. Nos. 82-13 at 3, 82-11 at 7, 82-15 at 2. Dr. Hernandez's 2014 email to Homeland Security and his contemporaneous

emails to Stingray and Mood Media, cited by Defendants, do not alter these facts; they merely reflect Dr. Hernandez's unsubstantiated beliefs at that time. Indeed, as alleged, Mood Media and Stingray's subsequent misrepresentations and threats had the intended effect of forcing Dr. Hernandez from taking action. Dkt. 67.<sup>5</sup>

Defendants should be equitably estopped from raising this defense. Their assertion that Defendants will be prejudiced by this lawsuit lacks even the faintest credibility considering the facts here and given Dr. Hernandez's prompt notice to Stingray and Mood Media of his potential claims against them. *Madison Highlands, LLC v. Fla. Hous. Fin. Corp.*, 220 So. 3d 467, 472 (Fla. Dist. Ct. App. 2017) ("no prejudice was shown because the opposing parties were on notice that [petitioners] intended to file [a claim]"); Dkt. 148 at 8. Aside from its speculative nature, Stingray's claim of prejudice was due to its own false representations and threats to Dr. Hernandez that caused Dr. Hernandez to delay bringing suit until he had sufficient information to move forward with his claims. Dkt. ¶¶ 94-99, 102-107. Stingray and Mood Media also had possession of the servers in question and knew their importance.

In sum, the start of the limitations period for Plaintiffs' non-patent claims was about April 20, 2021 because (1) the information regarding Stingray's accused streaming music service was not public; (2) Stingray and Mood Media repeatedly, vigorously, and falsely denied any wrongdoing, thus misleading Dr. Hernandez into not asserting his rights; and (3) despite his diligent efforts, Dr. Hernandez was unable to determine the details of Stingray's accused streaming music service until April 20, 2021 when he discovered information on trello.com about Stingray's streaming music service. Dr. Hernandez brought suit on April 2, 2024, well-within the limitations period for each claim. *Accord* Fla. Stat. § 688.007 (three-year period for FUTSA claim would end on April 20, 2024); 18 U.S.C. § 1836(d) (same for DTSA claim); *Thompson Ventures, Inc. v. Brunswick Corp.*, No. 18-60816, 2019 WL 341226, at \*3 (S.D. Fla. Jan. 28, 2019) (five-year period

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<sup>5</sup> Defendants' reliance on Plaintiffs' preliminary injunction reply brief citing the Homeland Security email as being as sent in April 2021 is misplaced and was based on counsel's misunderstanding regarding the date of the email. Dkt. 51 at 5; Dkt. 82-18. As noted, the SAC correctly alleges it was sent in 2014 *before* Defendants denied any trade secret misappropriation.

for breach of contract claim ends April 20, 2026); *Innovative Vehicle Solutions West, LLC v. Renntech, Inc.*, No. 21-14404, 2022 WL 3137029, at \*7 (S.D. Fla. Jun. 16, 2022) (four-year period for unjust enrichment claim ends April 20, 2025); *Bedtow Group II, LLC v. Ungerleider*, 684 F. App'x 839, 841 (11th Cir. 2017) (same for fraud claim); *Casey v. Fla. Coastal School of Law, Inc.*, No. 3:14-cv-1229, 2015 WL 10096084, at \*8 (M.D. Fla. Aug. 11, 2015) (same for FDUTPA claim).

### **3. Defendants Fraudulently Concealed Plaintiffs' Non-Patent Claims**

Defendants' representations to Plaintiffs rise to the level of fraudulent concealment. The statutes of limitations on Plaintiffs' non-patent claims also were tolled because of Stingray and Mood Media's fraudulent concealment. *Simmons v. Ford Motor Co.*, No. 18-CV-81558-RAR, 2023 WL 5978081, at \*4 (S.D. Fla. Sept. 13, 2023) ("Generally, under Florida law, tolling due to fraudulent concealment requires evidence that the defendant 'engage[d] in the willful concealment of the cause of action using fraudulent means to achieve that concealment.'") (quoting *Lewis*, 530 F. Supp. 3d at 1228). As explained above, the SAC alleges that Stingray and Mood Media willfully concealed Mood Media's disclosure to Stingray of Plaintiffs' trade secrets and other tortious acts with their repeated and vigorous denials of wrongdoing. Dkt. 82 at ¶¶ 60-62, 65-67; Dkt. 82-11 at 6-8, 82-13 at 3, 82-15 at 2. They falsely represented that Stingray was not in possession of Plaintiffs' technology and threatened Dr. Hernandez with lawsuit if pursued his claims. *Id.* In spite of Defendants' cover up, Dr. Hernandez diligently investigated whether Stingray was using his technology and timely brought suit when he obtained information confirming his suspicions. Dkt. ¶¶ 94-99, 102-107; Dkt. 82-16, 82-17, 82-25, 82-26, 82-27.

### **4. Dr. Hernandez's Diligence in Discovering Defendants' Tortious Acts is a Question of Fact That Cannot be Resolved on a Motion to Dismiss**

Defendants' arguments that Dr. Hernandez's emails should override the well-pleaded allegations in the SAC regarding Dr. Hernandez's discovery in April 2021 of his misappropriation claims are inappropriate to resolve on a motion to dismiss. The same is true with Plaintiffs' allegations of fraudulent concealment. *Hines v. A.O. Smith Harvestore Prods., Inc.*, 880 F.2d 995,

999 (8th Cir. 1989) (whether party exercised due diligence is question of fact unsuited for summary judgment, much less on motion to dismiss); *Am. Home Assur. Co. v. Weaver Aggregate Transp., Inc.*, 990 F. Supp. 2d 1254, 1272–73 (M.D. Fla. 2013) (factual disputes regarding whether elements of fraudulent concealment are met can prevent Court from ruling on tolling issue). Therefore, Plaintiffs timely asserted their claims against Defendants and the Court should deny Defendants motion to dismiss.

**B. FUTSA Does Not Preempt Plaintiffs’ Unjust Enrichment, Fraud, or FDUTPA Claims**

FUTSA preempts “conflicting tort, restitutory, and other [Florida law] providing civil remedies for misappropriation of a trade secret,” Fla. Stat. § 688.008(1), but not “(a) Contractual remedies, whether or not based upon misappropriation of a trade secret; [or] (b) Other civil remedies that are not based upon misappropriation of a trade secret . . .” *Id.* § 688.008(2). Further, “FUTSA does not preempt tort claims that involve conduct other than trade secret misappropriation.” *City Commc’ns, Inc. v. DailyTel, Inc.*, No. 22-CV-81813, 2024 WL 3105929, at \*11 (S.D. Fla. June 12, 2024), report and recommendation adopted, No. 9:22-CV-81813, 2024 WL 3103365 (S.D. Fla. June 24, 2024) (FUTSA claim did not preempt FDUTPA claim).

To determine whether allegations of trade secret misappropriation preempt a plaintiff from sufficiently pleading a separate, but related tort, the Court must evaluate “whether allegations of trade secret misappropriation **alone** comprise the underlying wrong.” *Allegiance Healthcare Corp. v. Coleman*, 232 F.Supp.2d 1329, 1335–36 (S.D. Fla. 2002) (internal citation omitted) (emphasis added). FUTSA does not preempt claims that merely relate to trade secret misappropriation. See *Am. Honda Motor Co. v. Motorcycle Info. Network, Inc.*, 390 F. Supp. 2d 1170, 1181 (M.D. Fla. 2005) (denying dismissal on grounds that FUTSA preempted fraud and other claims because while related to FUTSA claim, fraud claim was materially distinct). At the pleading stage, FUTSA does not preempt causes of action that incorporate facts underlying a FUTSA claim *in addition to* other facts. See *Alphamed Pharms. Corp. v. Arriva Pharms., Inc.*, 391 F. Supp. 2d 1148, 1167 (S.D. Fla.

2005). As set forth below, Plaintiffs' claims of unjust enrichment, fraud, and unfair competition are materially distinct from Plaintiffs' FUTSA claim.

**1. FUTSA Does Not Preempt Plaintiffs' Claim for Unjust Enrichment**

FUTSA does not preempt Plaintiffs' claim for unjust enrichment because Plaintiffs' allegations of trade secret misappropriation do not *alone* comprise their unjust enrichment claim. FUTSA does not preempt an unjust enrichment claim when "facts in support of the[] unjust enrichment claim [] extend beyond merely misappropriation of trade secrets." *Veitch v. Virgin Mgmt. USA, Inc.*, No. 15-CV-20989-KMM, 2015 WL 13808110, at \*7 (S.D. Fla. Sept. 18, 2015) (denying motion to dismiss unjust enrichment claim because allegations included benefits conferred from "contributions of labor, money, relationships, time, and expertise"). Here, Plaintiffs allege unjust enrichment based on Defendants' use of certain of Plaintiffs' proprietary information that, at the time, was neither a trade secret nor patented. Dkt. 82 ¶ 205. As such, it is not protected under FUTSA and it does not preempt Plaintiffs' claim that Defendants were unjustly enriched through their use of this information. *See Veitch*, 2015 WL 13808110, at \*7.<sup>6</sup>

**2. FUTSA Does Not Preempt Plaintiffs' Fraud Claim**

Plaintiffs' allegations in support of their fraud claim extend beyond those facts underlying Plaintiffs' FUTSA claim. For example, Plaintiffs allege that: Mood Media had no intention of honoring the terms of the NDA and Term Sheet when it entered into them, *see* Dkt. 82 ¶¶ 209–10; Mood Media knowingly or recklessly made false representations to Plaintiffs that it would not disclose, transfer, or use Dr. Hernandez's confidential and proprietary information, *see id.* ¶ 210; Mood Media's false representations were intended to induce Plaintiffs to furnish Mood Media (and by extension, Stingray) with Plaintiffs' confidential and proprietary information, *see id.* ¶ 211; Plaintiffs provided Mood Media with their confidential information in reliance on Mood Media's

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<sup>6</sup> Defendants' cited authority is inapposite because the plaintiff in *Allegiance Healthcare Corp.* alleged *only* trade secret information, 232 F. Supp. 2d at 1336. Further, the plaintiff's complaint in *Gonzalez-Hernandez v. Orbay*, No. 08-21782-CIV, 2009 WL 10668626, at \*3 (S.D. Fla. Jan. 15, 2009), unlike Plaintiffs' complaint here, did not allege any facts beyond a single meeting where the plaintiff disclosed and the defendant subsequently stole the plaintiff's alleged trade secrets.

false representations that it would treat the information as confidential, *see id.*; and that “Mood Media’s false representations to Plaintiffs were a substantial factor” in causing Plaintiffs’ harm, *see id.* ¶ 212. Courts repeatedly hold that similar allegations are materially distinct from and extend beyond claims of misappropriation. *See, e.g., Advice Interactive Grp., LLC v. Web.com Grp., Inc.*, No. 3:17-CV-801-J-39MCR, 2017 WL 6554409, at \*11 (M.D. Fla. Oct. 20, 2017), *aff’d*, 734 F. App’x 712 (11th Cir. 2018) (holding allegations that defendant induced plaintiff to disclose trade secrets and that defendant intended to misuse trade secrets in violation of NDA were materially distinct from allegations underlying FUTSA claim); *Am. Honda Motor Co.*, 390 F. Supp. 2d at 1181 (denying motion to dismiss fraud claim because allegations of intentional inducement differentiated fraud claim from FUTSA claim). Defendants’ motivation in misrepresenting their intent—to obtain Plaintiffs’ trade secrets—is not the only basis for Plaintiffs’ fraud claim. *See Am. Honda Motor Co.*, 390 F. Supp. 2d at 1181 (“While these allegations certainly relate to the misappropriation of trade secrets, the Court is convinced ... that there are material distinctions between these claims and the FUTSA claim”). Further, FUTSA does not preempt Plaintiffs’ fraud claim because Defendants’ fraudulent acts include those related to proprietary information other than Plaintiffs’ trade secrets.<sup>7</sup>

### 3. **FUTSA Does Not Preempt Plaintiffs’ FDUTPA Claim**

Plaintiffs allege facts to support their FDUTPA claim that extend beyond the facts underlying their FUTSA claim. For example, Plaintiffs allege that Stingray and Mood Media engaged in unfair and deceptive practices in the use of Plaintiffs’ trade secrets *and* the use of its proprietary information that are not trade secrets. *See* Dkt. 82 ¶ 215. Plaintiffs also allege that Stingray and Mood Media engaged in unfair and deceptive practices in breaching Mood Media’s agreements with Plaintiffs and in Defendants’ related fraudulent acts. *See id.* Plaintiffs further

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<sup>7</sup> Defendants’ authority is inapposite. In *Taxinet, Corp. v. Leon*, No. 16-24266-CIV, 2018 WL 3405243, at \*1 (S.D. Fla. July 12, 2018), the plaintiff alleged only that it “conferred a benefit on Defendant Leon and has not received fair compensation for that benefit.” *Id.* at \*7. Because the plaintiff in *Taxinet* did not identify a benefit conferred on the defendant, the court had to assume that the plaintiff’s claim was based on the wrongdoing alleged to support its trade secret claim. *Id.*

allege that Defendants’ unfair and deceptive practices harmed consumers. *See id.* ¶ 216. While Plaintiffs’ allegations include the facts underlying their trade secret claims, those facts *alone* do not comprise Plaintiffs’ FDUTPA claim. FUTSA therefore does not preempt Plaintiffs’ FDUTPA claim. *See Alphamed Pharms. Corp.*, 391 F. Supp. 2d at 1167 (FUTSA does not preempt claims that include facts underpinning FUTSA claim and additional facts); *Advice Interactive*, 2017 WL 6554409, at \*1 (FUTSA did not preempt the FDUTPA claim). Further, as with Plaintiffs’ unjust enrichment and fraud claims, Plaintiffs’ FDUTPA claim expressly includes allegations about proprietary information that is not protected by FUTSA.

**C. Plaintiffs Did Not Waive Their Claims Against Mood Media**

Under Florida law, “[i]t is a fundamental proposition that a contract induced by fraud is voidable.” *Lance Holding Co. v. Ashe*, 533 So. 2d 929 (Fla. Ct. App. 1988). Here, Plaintiffs allege several instances in which Mood Media falsely represented that it did not provide Stingray with Plaintiffs’ trade secrets and that Mood Media procured the settlement by its fraudulent misrepresentations. *See e.g.*, Dkt. 82 at ¶ 71 (“Mood Media had no intention to honor the agreement and instead intended to provide Stingray access to Dr. Hernandez’s Trade Secrets and intellectual property upon completion of Stingray’s acquisition of Mood Media/DMX”); ¶ 73 (“Mood Media later asked Plaintiffs to sign a ‘settlement’ agreement under the false and fraudulent premise that Dr. Hernandez’s intellectual property had not been tampered with, stolen, or provided to Stingray.”); *see also* Dkt. 82 at ¶¶ 61-62, 66-67; 82-11 at 6-8; 82-13 at 3; 82-15 at 2.

The release in question also was limited to Plaintiffs’ claims regarding the “amounts owed to EGLA pursuant to the Term Sheet” and does not mention Plaintiffs’ claims of trade secret misappropriation, unjust enrichment, fraud, and unfair competition. Dkt. 148-3 at 1 (“The parties have agreed to resolve all issues related to the amounts owed EGLA pursuant to the Term Sheet.”). Even if the release is enforceable (it is not), it excludes “any claims, demands or causes of action which arise against DMX as a result of its breach...” such as those asserted against Mood Media. Dkt. 82 ¶ 194 (“Mood Media violated the NDA and term sheet by transferring Dr. Hernandez’s confidential information to Stingray and/or allowing Stingray to use Dr. Hernandez’s confidential

information.”); *see also id.* ¶¶ 55-74, 190-203.

Finally, Mood Media’s arguments regarding the scope and enforceability of the term sheet’s release raises disputed issues of fact that are not appropriately resolved on a motion to dismiss. For these reasons, Mood Media’s motion to dismiss should be denied.

**D. Plaintiffs Sufficiently Alleged Patent Infringement**

**1. Plaintiffs Sufficiently Pled Direct Infringement**

Plaintiffs’ SAC and the attached 63 pages of detailed claim charts allege ownership of the patent (SAC, ¶¶ 109-111; 144, 160, 176); the identity of the infringing defendants (SAC, ¶¶ 30, 13-117); the patents allegedly infringed and the means by which the defendants allegedly infringe (SAC, ¶¶ 142-189, Dkt. Nos. 82-25, 82-26 and 82-27); and the patent laws invoked (SAC, ¶¶ 28, 154-156, 170-172, 186-188, Prayer for Relief ¶ D). Nothing more is required. *Hall v. Bed Bath & Beyond, Inc.*, 705 F.3d 1357, 1362 (Fed. Cir. 2013); *see also Zamora Radio, LLC v. Last.FM Ltd.*, No. 09-Civ-20940, 2010 WL 11505226, at \*4 (S.D. Fla. Jan. 27, 2010) (explaining that there are no additional pleading requirements for patent infringement beyond the Federal Circuit’s test).

Despite these allegations, Defendants<sup>8</sup> incorrectly assert that the infringement charts “simply state that ‘Still Pict[ures]’ are generated and fail to identify how UbiquiCAST OSE2 allegedly practices [the] ‘temporal sequence/dynamic change’ limitation.” Dkt. 148 at 16. In fact, the detailed allegations – ignored by Defendants – explain that the accused OSE2 server uses module “GalaxieStillPicGenerator” to capture screen images of rendered webpages, *i.e.*, the claimed temporal sequence of screen captures of [a] rendered web page. The captured screens are then used to generate a video, *i.e.*, the claimed dynamic change limitation. *See* Dkt. Nos. 82-25 at 5 (element 1[d]) (“The \_GalaxieStillPicGenerator captures screens that includes a ‘Logo File’, ‘Ads URL’ to generate a /data/video\_realtime/061735.tar file...As shown in EGLA-TRELLO-000648 the class <SimpleVideoLoader> contains a videopath as /data/video\_linear/AV\_MP15K and point to the ffmpeg-path with the MPEG2VIDEO encoding.”). Contrary to Defendants’

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<sup>8</sup> The patent claims are asserted against Stingray Group, AT&T, Millicom and Blue Stream.

assertions, the ‘441 patent infringement charts refer to the use of a video: “The Stingray Music Method transmits a data packet (*e.g.*, an HTML or XML file) comprising a **video image specification**...while the audio data...is being transmitted...” Dkt. 82-19 at 12 (quoting MC-EGLA-000033). The still image shown in the infringement chart is a video capture of one frame of the video. These allegations provide more than is necessary. *See, VPR Brands, LP v. HQDTech USA LLC*, Case No. 21-cv-21678-BLOOM/Otazo-Reyes, 2021 U.S. Dist. LEXIS 207912, at \*14-19 (S.D. Fla. Oct. 28, 2021) (pleading standards do not require detailed explanations).

**2. The Customer Defendants’ Infringement is Based on Their Use of Stingray’s Infringing OSE2 Platform**

Defendants next argue that there is no explanation regarding how the Customer Defendants infringe. Not so. Defendants acknowledge that Plaintiffs’ infringement claims are directed to Stingray’s UbiquiCAST OSE2 platform. Dkt. 148 at 17; *see also* claim charts at Dkt. 82-25, 82-26, and 82-27. The SAC alleges that the Customer Defendants’ **use** of the OSE2 platform infringes the Asserted Patents. *See e.g.*, SAC at p. 32 (captioned “Defendants Stingray, AT&T and Millicom’s **Use** of the Patented Technology”); Dkt. 82 ¶ 1 (“This case arises from the theft of Plaintiffs’ proprietary technologies (trade secrets and **patented technology**) **used in the** distribution of music channels...**to subscribers of AT&T, Millicom, Blue Stream.**”); Dkt. 82 ¶ 115 (AT&T’s use of the accused Stingray platform); *id.* ¶ 117 (same as to Millicom). A party’s use of infringing system is an infringement regardless of whether they own the system. 35 U.S.C. § 271 (defining infringing activities to include *using* the patented invention). These allegations give the Customer Defendants “fair notice of what activity stands accused of infringement.” *Askan v. Faro Techs., Inc.*, No. 6:23-cv-920, 2023 WL 7411243, at \*3 (M.D. Fla. October 6, 2023).

**3. Plaintiffs Sufficiently Pled Joint Infringement**

Plaintiffs’ allegations are that each of the Defendants perform all of the method steps of the Asserted Patents (Dkt. 82 at ¶¶ 147, 163, 179), but that, to the extent that someone other than Defendants perform one or more of those steps, the SAC alleges that they are attributable to

Defendants because they are under the direction and control of Defendants. Dkt. 82 ¶¶ 147-151.<sup>9</sup> In *VOIT Technologies, LLC v. Bluegate, Inc.*, Case No. 1-17-cv-22472, slip op. at 3 (S.D. Fla. Oct. 27, 2017), the Florida district court found that less detailed allegations sufficiently plead joint infringement. *Id.* (“even if the Defendant did not actually perform these steps itself, the Defendant directs or controls a third party to perform such steps on its behalf” and “Defendant has a valid contract with a third party to perform these steps pursuant to a service agreement where payment is contingent upon the third party’s performance...”).

#### 4. **Plaintiffs Sufficiently Pled Indirect Infringement**

Defendants do not appear to dispute that they had knowledge of the patents-in-suit, only that the SAC “fails to make any allegation of the required ‘specific intent’ for inducement or provide any factual basis for the conclusory assertion that Defendants ‘knowingly’ induced or contributed to any infringement. Dkt. 148 at 20. Defendants’ contention is baseless. The SAC alleges that “at least since [a specified date], **Defendants have knowingly and actively induced the infringement** of one or more of the [asserted] patent claims **by, inter alia, marketing, promoting, and offering for use the Accused Streaming Platforms, knowingly and intending** that the use of such instrumentalities by Defendants’ customers and by users infringes the [asserted] patent.” Dkt. 82 ¶¶ 152-153, 168-169, 184-185. Stated differently, Plaintiffs allege that Defendants, despite having actual knowledge of the Asserted Patents (*see e.g.*, Dkt. 82 ¶¶ 84-90), marketed and promoted the Accused Streaming Services to their subscribers. *Id.* ¶¶ 113-117, 146, 162, 177. Florida district courts repeatedly have held such allegations sufficiently plead indirect infringement. *VPR Brands*, 2021 WL 5013803, at \* 8 (holding as sufficient allegations of indirect infringement “by **requesting and encouraging and inducing** customers **to purchase and use** the products listed..”); *Targus International LLC v. Group III International, Inc.*, Case No. 1-20-cv-21435, 2020 WL 6212520 (S.D. Fla. Oct. 22, 2020) (holding as sufficient allegations that identify distributors, that defendant instructed distributors to sell or offer for sale the products in the U.S.,

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<sup>9</sup> Defendants’ out of district authority did not involve such allegations.

and that the distributors sold the infringing products); *Glob. Tech LED, LLC v. Every Watt Matters, LLC*, Case No. 15-CV-61933, 2016 WL 8739321, at \*6–7 (S.D. Fla. Aug. 1, 2016) (same).

#### **5. Plaintiffs Sufficiently Pled Willful Infringement**

For willful infringement, a plaintiff is “required to prove, by a preponderance of the evidence,” that a defendant knew of the issued patent “and then engaged in ‘deliberate or intentional infringement.’” *Ironburg Inventions Ltd. v. Valve Corp.*, 64 F.4th 1274, 1296 (Fed. Cir. 2023). Here, Plaintiffs allege that the Defendants have the requisite knowledge and intent. *See e.g.*, Dkt. 82 ¶¶ 152-153 (prior knowledge of inducing and contributing to infringement of the ‘074 patent claims); ¶¶ 168-169, (same as to the ‘002 patent); ¶¶ 184-185 (same as to the ‘441 patent).

#### **E. Plaintiffs Sufficiently Allege a Claim for Breach of Contract**

Plaintiffs sufficiently alleged a plausible claim for relief for Mood Media’s breach of their contracts. Mood Media takes issue only with the sufficiency of the material breach allegations. Dkt. 148 at 20-21. *First*, contrary to Defendants’ assertion, the Term Sheet includes an “End User Licensing Agreement (EULA),” which includes confidentiality provisions. *See* Dkt. 82-9 at 2; Dkt. 82 ¶ 59; Dkt. 82-12 at 3–4. By disclosing Dr. Hernandez’s confidential information to Stingray, Mood Media violated these confidentiality provisions of the Term Sheet’s EULA. Dkt. 82 at ¶ 194. *Second*, on the NDA, Mood Media asserts that while Plaintiffs allege that “Mood Media ‘transferred’ or ‘allowed Stingray to use’ that information through an alleged transfer or sale of those servers,” they purportedly do not explain the specific details. Dkt. 148 at 21. This argument is misplaced because Plaintiffs do not have to prove their case at the pleading stage and the existing factual allegations are sufficient to state a plausible claim for relief. Dkt. 82 ¶¶ 55-68, 71-74, 91-107. At this stage, Plaintiffs do not have the benefit of discovery on communications between or the activities of Mood Media and Stingray at that time. *Third*, Mood Media argues that a claim for breach of the NDA is prohibited by the merger clause in the term sheet. A merger clause in one contract does not extinguish a previous, separately entered, NDA. *See Parsons & Whittemore Enters. Corp. v. Cello Energy, LLC*, 615 F. Supp. 2d 1296, 1305 (S.D. Ala. 2009) (holding NDA still valid despite merger clause in later contract). *Fourth*, the settlement agreement

was breached because it was a settlement of the Term Sheet, which included confidentiality obligations that were violated. Dkt. 82 ¶¶ 194-195.

**F. Plaintiffs Sufficiently Allege a Claim for Fraud**

Defendants initial assertion that the fraud Plaintiffs allege is not directed to Stingray is untrue. Plaintiffs' fraud claim incorporates certain preceding allegations (Dkt. 82 ¶ 208), which allege that "Mood Media and Stingray worked together to gain access to Dr. Hernandez's Trade Secrets, including his source code," see Dkt. 82 ¶ 70, and further allege that Mood Media representatives actually were Stingray employees at the time of the representations. *See id.* ¶ 57.<sup>10</sup>

Contrary to Defendants' contentions, the SAC describes Defendants' fraudulent acts with particularity. *First*, the SAC describes precisely what statements were made and the documents and/or oral representations in which they were made. Dkt. 82 ¶ 210 ("representations to Plaintiffs that it would not disclose, transfer, or use of Dr. Hernandez's confidential and proprietary information to any other party other than Mood Media/DMX."). Further, Plaintiffs attached the NDA and term sheet to their SAC. *See* Dkt. 82-5, 82-9. *Second*, Plaintiffs allege that Defendants' fraudulent conduct occurred in March 2012 by DMX, *see* Dkt. 82 ¶ 7, and in Fall 2013 by Messrs. Cacciola and Tonelli, *see* Dkt. 82 ¶¶ 55, 57. *Third*, the SAC provides the content of Defendants' fraudulent conduct and the manner in which that conduct misled Plaintiffs. For example, Plaintiffs allege that Mood Media misled Plaintiffs to believe that they were granting Mood Media/DMX, and not Stingray, access to and use of Plaintiffs' technologies because Stingray employees Messrs. Cacciola and Tonelli falsely posed as Mood Media/DMX contacts. *See* Dkt. 82 ¶ 57. Plaintiffs also allege that Mood Media misled Plaintiffs to believe the truth of Mood Media's representation that "Dr. Hernandez's intellectual property had not been tampered with, stolen, or provided to Stingray." Dkt. 82 ¶ 73. *Fourth*, Plaintiffs alleged that Defendants obtained as a consequence of their fraud Plaintiffs' "confidential and proprietary strategies, architecture documents, and software strategies," *see* Dkt. 82 ¶ 7, a license to Plaintiffs' platforms and an option for future

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<sup>10</sup> If necessary, Plaintiffs can readily clarify its fraud allegations (*e.g.*, ¶¶ 211-213) to add Stingray.

platform development, *see id.* ¶ 55, and Plaintiffs’ agreement to release and waive all claims against Mood Media, *see id.* ¶ 73, Dkt. 148-3. In sum, Plaintiffs pleaded sufficient facts with requisite particularity to support a plausible claim for fraud.

Defendants’ argument that the independent tort doctrine bars Plaintiffs’ fraud claim also fails. “Florida courts recognize the specific intentional tort of fraud in the inducement as an independent fraud claim that can be brought despite the existence of contractual privity.” *Altamonte Pediatric Assocs., P.A. v. Greenway Health, LLC*, No. 8:20-CV-604-T-33JSS, 2020 WL 5350303, at \*5 (M.D. Fla. Sept. 4, 2020) (citation omitted). For these reasons, Plaintiffs pleaded sufficient facts to establish that Defendants committed fraudulent acts separate and apart from, and in some instances preceding, Defendants performance of the contracts. Plaintiffs also do not assert any contract claim against Stingray, so the doctrine is inapplicable to Stingray’s fraud.

**G. Plaintiffs Sufficiently Allege a Claim for Violations of FDUTPA**

The SAC establishes a plausible claim for relief against Defendants for FDUTPA violations. Defendants only attack Plaintiffs’ allegation that they suffered actual damages. *See* Dkt. 148 at 23–24. But they conveniently ignore Plaintiffs’ allegations that Plaintiffs incurred “expenses connected with [their] attempts to undo the harm caused by Defendants Stingray and Mood Media.” Dkt. 82 ¶ 217. At the pleading stage, actual damages include expenses incurred to cure diminution in value caused by Defendants’ conduct. *See Buckley v. Moore*, No. 20-CIV-61023-RAR, 2021 WL 3173185, at \*10 (S.D. Fla. July 26, 2021) (holding plaintiffs adequately alleged actual damages because “[p]laintiffs allege that they expended money on reputation management services as a result of Defendants’ conduct, which is sufficient to plead actual damages under FDUTPA”); *PODS Enterprises, LLC v. U-Haul Int’l, Inc.*, 126 F. Supp. 3d 1263, 1286 (M.D. Fla. 2015) (holding corrective advertising expenses incurred to recover diminished value of plaintiff’s brand constituted actual damages under FDUTPA).

Defendants’ second argument, that Plaintiffs’ FDUTPA claim does not allege an independent tort, also fails. First, as described above, Plaintiffs allege that Defendants committed deceptive and unfair practices through their various wrongful acts, including fraudulent

misrepresentation, misappropriation of trade secrets and other proprietary and confidential non-trade secret information, and breach of the parties' contracts. Second, the independent tort doctrine may apply where a plaintiff fails to allege harm to a property interest. Plaintiffs have property rights in their trade secrets and patents. Third, Plaintiffs allege facts supporting their FDUTPA claim that far exceed Defendants' breach of contract, as described above. Finally, as with their fraud claim, Plaintiffs allege that Stingray violated FDUTPA but do not allege a breach of contract claim against Stingray. Therefore, the independent tort doctrine does not apply to Stingray.<sup>11</sup>

## **V. THE COURT HAS JURISDICTION OVER DEFENDANT STINGRAY GROUP**

As a threshold issue, Defendant Stingray Group's jurisdictional challenge fails because it did not present any affidavits, documents or testimony in support of its position that this Court lacks jurisdiction over it. Dkt 148 at 24-25. In *Head Kandy LLC v. McNeill*, this Court recognized that "[a] defendant challenging personal jurisdiction must present evidence to counter the plaintiffs' allegations." 2023 WL 7323284, at \*2; *see also Kemin Foods, L.C. v. Omniactive Health Techs., Inc.*, 654 F. Supp. 2d 1328, 1333 (M.D. Fla. 2009) ("By alleging patent infringement in [] Florida, Plaintiffs made a prima facie case for jurisdiction against Defendants . . . if Defendants had filed a simple motion to dismiss, the motion would have then failed."). For this reason, Stingray Group's unsupported, one-page motion should be denied.

First, Florida's long-arm statute confers specific jurisdiction over Defendant when it commits a tortious act within Florida. Fla. Stat. § 48.193(1)(a)(2). Under the "committing a tortious act" prong, a court may assert jurisdiction over a "nonresident defendant who commits a tort outside of the state that causes injury inside the state," meaning "[t]he defendant's physical presence is not required if the tort causes an injury in Florida." *Brennan v. Roman Catholic Diocese of Syracuse New York, Inc.*, 322 F. App'x 852, 854 (11th Cir. 2009). Here, jurisdiction exists under

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<sup>11</sup> Defendants cite *Skywing Cap. Invests. LLC v. Prior2IPO Consulting, LLC* in support of their argument that Plaintiffs' FDUTPA claim is barred by the independent tort doctrine. No. 22-80112-CIV, 2022 WL 3682215, at \*4 (S.D. Fla. Apr. 21, 2022). But the plaintiff's FDUTPA allegations in *Skywing* are distinguishable because the plaintiff there merely stated that the defendant intended to breach the contract and that its conduct was a routine business practice. *See id.*

Florida’s long-arm statute because Plaintiffs allege that Stingray Group committed numerous tortious acts within and outside of Florida, including trade secret misappropriation, patent infringement, common law fraud and unfair competition, that harmed Plaintiffs, who are residents of Florida. Dkt. 82 ¶¶ 19-20, 30, 123-189, 208-218.<sup>12</sup>

Turning to the Due Process test, specific jurisdiction exists if the following three prongs are satisfied: (1) the plaintiff has established that his claims “arise out of or relate to” at least one of the defendant’s contacts with the forum; (2) the plaintiff has demonstrated that the defendant “purposefully availed” itself of the privilege of conducting activities within the forum state; and (3) the exercise of jurisdiction would not violate traditional notions of fair play and substantial justice. *Louis Vuitton Malletier, S.A. v. Mosseri*, 736 F.3d 1339, 1355 (11th Cir. 2013).<sup>13</sup> “The plaintiff bears the burden of establishing the first two prongs, and if the plaintiff does so, ‘a defendant must make a ‘compelling case’ that the exercise of jurisdiction would violate traditional notions of fair play and substantial justice.’” *Id.* As this Court recognized, “whether the claims ‘arise out of or relate to’ one of the defendant’s contacts—does not require direct causation. Rather, it ‘contemplates that some relationships will support jurisdiction without a causal showing.’” *Head Kandy, LLC*, 2023 WL 7323284, at \*7 (citing *SkyHop Techs., Inc. v. Narra*, 58 F.4th 1211, 1229 (11th Cir. 2023)).

Here, Plaintiffs allege that Stingray Group provides its misappropriating and infringing products and services to Florida customers, such as Defendants AT&T, Millicom and Blue Stream. Dkt. 82 ¶¶ 30, 113-117; 82-16 at 459. Courts have held that such activities sufficiently show that Plaintiffs’ claims arise from or relate to Stingray Group’s contact with the forum and that Stingray

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<sup>12</sup> “Patent infringement constitutes a tort within the meaning of [Florida’s long-arm] statute.” *Andersons, Inc. v. Enviro Granulation, LLC*, No. 8:13-cv-3004-T-33MAP, 2015 U.S. Dist. LEXIS 56883 (M.D. Fla. Apr. 30, 2015); *Bovie Med. Corp. v. Livneh*, 2010 WL 5297172, \*6 (M.D. Fla. Dec. 20, 2010) (“Misappropriation of trade secrets is an intentional tort in the state of Florida.”).

<sup>13</sup> In patent cases, courts use a similar three-part test. *Silent Drive v. Strong Indus., Inc.*, 326 F.3d 1194, 1201 (Fed. Cir. 2003). Given the similarity in the tests, courts have analyzed both tests together. See *Atmos Nation, LLC v. BnB Enterprise, LLC*, Case No. 16-62083, 2017 WL 3763949 (S.D. Fla. Apr. 24, 2017). For brevity’s sake, Plaintiffs will refer to the Eleventh Circuit’s test.

Group has purposely availed itself of the privilege of conducting activities within Florida. *Atmos Nation*, 2017 WL 3763949, at \*5 (defendant's contacts with the Florida forum satisfy the first two prongs of Eleventh Circuit and Federal Circuit tests); *Kemin Foods, L.C.*, 654 F. Supp. 2d at 1335-1336 (both prongs met where defendant parent company designed, tested, and manufactured allegedly infringing products and directed subsidiary to provide products to specific customer in Florida). Stingray Group did not provide any affidavit contradicting these allegations. As such, the court should accept the facts alleged in the complaint as true. *Posner v. Essex Ins. Co.*, 178 F.3d 1209, 1214 (11th Cir. 1999). Even if Stingray Group had submitted an affidavit that a subsidiary provides the accused streaming music platform to Florida customers, Florida district courts have rejected such a "formalistic" division as a shield to the Court's jurisdiction. *See Kemin Foods*, 654 F. Supp. 2d at 1336 (rejecting "formalistic" parent/subsidiary division to shield parent from the Court's jurisdiction).

Stingray Group has additional contacts with the forum that arise out of or relate to Plaintiffs' claims against it and show Stingray's purposeful avilment in this jurisdiction. In particular, Stingray Group repeatedly communicated with Dr. Hernandez regarding his claims, including his concerns of trade secret misappropriation, fraud, and unfair competition. Dkt. 82 ¶¶ 61-62, 66; *see supra*, § IV.A.1. Later, in March of 2016, Stingray Group's General Manager once more emailed Dr. Hernandez to again state that Stingray did not have access to his technology and threatened him: "MOOD will sue you for breaching the agreement without proper notice, and it will seek (and most likely get, because you don't have a case) damages for all the money STINGRAY will sue them for." Dkt. 82-15 at 2.

Stingray Group is the successor in interest to agreements between Plaintiffs and DMX, Inc., including an NDA and Term Sheet. Dkt. 82-5, 82-9. These relate to Plaintiffs' claims against Stingray for trade secret misappropriation, fraud, and unfair competition. Dkt. 82 ¶¶ 55-74, 209, 215-216. Beginning in 2017, Stingray Group corresponded directly with Dr. Hernandez from his office in Florida about licensing his technology at issue here, signed an NDA, and received information about his technology. Dkt. 82 ¶¶ 86-89; Dkt. Nos. 82-20, 82-21, 82-22, 82-23, 82-24.

These forum-related contacts show Stingray Group's knowledge of Plaintiffs' trade secrets and patents relevant to the alleged willful infringement and misappropriation claims. Taken together, these documents and allegations sufficiently demonstrate that Plaintiffs' claims arise from or relate to Stingray Group's contact with Plaintiffs, both residents of Florida. Therefore, Stingray purposely availed itself of the privilege of conducting activities within Florida.<sup>14</sup>

Having established the first two prongs of the due process test for specific jurisdiction, Stingray Group must demonstrate that this Court's exercise of personal jurisdiction over it violates "traditional notions of fair play and substantial justice." *Head Kandy*, 2023 WL 7323284, \*11. In its motion, Stingray Group makes no such showing. Dkt. 148 at 11. Nor could it, as Stingray Group deliberately provides its goods and services to Florida residents, whether directly or through its subsidiaries. *Kemin Foods*, 654 F. Supp. 2d at 1336. For this reason, Stingray Group's motion should be denied.

#### **VI. IF THE MOTION IS GRANTED, LEAVE TO AMEND SHOULD BE GRANTED**

If the Court grants Defendants' motion, which it should not, the Court should grant Plaintiffs leave to amend the SAC pursuant to the liberal standard of Fed. R. Civ. P. 15(a)(2), which permits leave to amend if the Court decides that the SAC is insufficient in any respect. This case remains in its earliest stages with the Court only recently issuing a scheduling order. Dkt. 154 at 2; *see Delgado v. Bloomberg, L.P.*, Case No. 17-21192-CIV-WILLIAMS/TORRES, 2018 U.S. Dist. LEXIS 251255, at \*12 (S.D. Fla. Sept. 13, 2018) (amendment allowed for case in early stages). Plaintiffs have not sought to amend the complaint to address any determination of insufficient pleading. Given the early stage of the case, Defendants are not unduly prejudiced by amendment nor would amendment be futile.

#### **VII. CONCLUSION**

For the foregoing reasons, Defendants' motion to dismiss should be denied in its entirety. To the extent that the Court finds the SAC deficient, Plaintiffs respectfully request leave to amend.

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<sup>14</sup> Also relevant to this determination is that that during this time Stingray Group maintained an office in Miami Beach, Florida, presumably to service its Florida customers. Dkt. 82-13 at 3.

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Respectfully submitted,

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