

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA**

CASE NO. 17-21509-CIV-ALTONAGA/Goodman

**RAPTOR, LLC, and
CONCRETE SERVICES, LLC,**

Plaintiffs,

v.

**ODEBRECHT CONSTRUCTION,
INC., and BARREIRO
CONSTRUCTION CORP.,**

Defendants.

ORDER

THIS CAUSE came before the Court on Defendants, Odebrecht Construction, Inc. and Barreiro Construction Corp.’s¹ Motion to Dismiss Counts I, III, IV, VI, VII and IX of Plaintiffs’ Second Amended Complaint [ECF No. 55], filed November 28, 2017. Plaintiffs, Raptor, LLC and Concrete Services, LLC, filed an Opposition (“Response”) [ECF No. 56], to which Defendants filed a Reply [ECF No. 57]. The Court has carefully considered the parties’ written submissions, the record, and applicable law.

I. BACKGROUND

The allegations in the Second Amended Complaint elaborate on those in Plaintiffs’ original Complaint [ECF No. 1] and first Amended Complaint [ECF No. 28-1], which the Court

¹ The Second Amended Complaint [ECF No. 54] refers to this entity both as “Barreiro Construction Corp.” and “Barreiro Construction, Inc.” (*Compare* 2d Am. Compl. 1, *with id.* ¶ 8). Defendants, too, are inconsistent in their filings as to the correct name of this entity. (*Compare* Defendants’ Motion for Extension of Time to Respond to Discovery [ECF No. 59] 1 (referring to the entity as “Barreiro Construction, Inc.”), *with* Defendants’ Corporate Disclosure Statement and Certificate of Interested Parties [ECF No. 16] ¶ 2 (calling the entity “Barreiro Construction Corp.”)). The Court refers to the entity simply as “Barreiro.”

summarized in its prior orders. (*See* June 22, 2017 Order [ECF No. 22] 1–3; *see also* August 31, 2017 Order [ECF No. 44] 1–4). The Court recapitulates the pertinent facts here.

Plaintiffs are the owner and exclusive licensee of three patents: U.S. Patent 8,920,068 [ECF No. 54-1], entitled “Process for Slip Forming Reinforced Bridge Coping with Exposed Rebars” (the “‘068 Patent”); U.S. Patent 8,956,075 [ECF No. 54-2], entitled “Tunnel Mold, System and Method for Slip Forming Reinforced Concrete Structures with Exposed Rebars” (the “‘075 Patent”); and U.S. Patent 9,435,085 [ECF No. 54-3], entitled “System and Method for Slip Forming Monolithic Reinforced Composite Concrete Structures Having Multiple Functionally Discrete Components” (the “‘085 Patent”) (together, the “Patents-in-Suit”). (*See* 2d Am. Compl. ¶¶ 5–6). The Patents-in-Suit concern a method for constructing concrete barrier walls on roadways that allows the user to construct such barrier walls efficiently and cost-effectively while still maintaining compliance with standards set forth by the Florida Department of Transportation. (*See id.* ¶¶ 21, 32–34, 40).

The FDOT standards require a certain array of steel or iron structures be built and incorporated into the roadway and barrier walls, so that the barrier walls can withstand a threshold amount of force in the event of a vehicle collision. (*See id.* ¶ 11). Where a barrier wall will be incorporated into a concrete road bed, or where the wall will also include an additional structure above the wall, the construction standards require the embedded iron array have parts of the steel or iron structure remain exposed above the concrete after it has been laid down. (*See id.* ¶ 12). The purpose of this requirement is to provide a solid, sound structure onto which additional steel or iron bars may be tied together to create additional steel-reinforced concrete structures above. (*See id.*).

Prior to the invention of Plaintiffs’ patented methods and system, compliant steel-reinforced concrete barrier walls containing exposed steel or iron rebars after an initial concrete pour were created via the placement of stationary molds made of steel or wood. (*See id.* ¶ 13). After the concrete was allowed to sufficiently cure, the stationary molds were removed, moved down to the next segment, and rebuilt to prepare for the next concrete pour. (*See id.*). This technique — known as “piece-wise” construction — requires a significant amount of labor. (*See id.*).

“Slip forming” of concrete structures is a construction technique in which a quick-setting concrete is poured into the mold cavity of a closed “slip-mold,” and the slip-mold is progressively advanced over an iron work array of rebars. (*See id.* ¶ 14). As the slip-mold slips along, the concrete being poured into the mold moves into the gaps and spaces surrounding the rebars, and eventually fills all gaps until the concrete is pressed against the walls of the mold, leaving behind a concrete structure in the shape of the slip-mold. (*See id.*). Once filled with concrete, the closed mold slips over the concrete, leaving a smooth, continuous structure of concrete with steel rebars embedded below its surface. (*See id.* ¶ 15).

Slip forming enables construction of continuous, cast-in-place — jointless — concrete structures containing superior performance characteristics to piece-wise construction. (*See id.* ¶ 17). Because slip forming does not require the construction of static mold structures, or personnel to move such structures, the labor and time commitments involved in slip forming are significantly reduced as compared to piece-wise construction. (*See id.*).

Slip molding techniques have historically been difficult to implement for larger structures due to the weight of the concrete mixture during the process of filling the mold, as well as the limited ability of the poured concrete to support a forward advancing mass of unset concrete as it

leaves the slip mold. (*See id.* ¶¶ 16, 18). Plaintiffs successfully demonstrated their patented slip molding inventions to the FDOT by building a partial roadway. (*See id.* ¶ 20). Prior to Plaintiffs' demonstration, the FDOT had never approved a slip molding technique to construct composite structures on Florida roadways. (*See id.* ¶ 19). After Plaintiffs' successful demonstration, the FDOT modified its standard to allow for the use of the patented slip molding technique in the construction of composite barrier walls. (*See id.* ¶ 20). To date, the only FDOT approved method for slip forming reinforced concrete structures with exposed rebar is Plaintiffs' patented system and method, which utilizes Plaintiffs' patented and proprietary equipment. (*See id.* ¶ 21).

The inventors of the Patents-in-Suit, Patrick Shawn Free and Eric C. Kontos, applied for patent protection for their "Process for Slip Forming Reinforced Bridge Coping with Exposed Rebars" on November 13, 2014, and were issued the '068 Patent on December 30, 2014. (*See id.* ¶ 22). On January 23, 2014, the inventors filed a related patent application for their invention titled "Tunnel Mold, System and Method for Slip Forming Reinforced Concrete Structures with Exposed Rebars," and on February 17, 2015, the USPTO issued them the '075 Patent. (*See id.* ¶ 23). On May 24, 2015, the inventors filed another related patent application for their "System and Method for Slip Forming Monolithic Reinforced Composite Concrete Structures Having Multiple Functionally Discrete Components," and on September 6, 2016, the USPTO issued the '085 Patent to Raptor, as the Patent's designated assignee. (*See id.* ¶ 24; *see also* '085 Patent 1).

The inventors assigned all right, title, and interest in the inventions, and all patents that issued or could issue from their patent applications, to Raptor. (*See* 2d Am. Compl. ¶ 25; *see also id.*, Ex. 4, Assigning Documents [ECF No. 54-4]). These assignments included the Patents-in-Suit. (*See* 2d Am. Compl. ¶ 25). On January 15, 2015, Raptor granted Concrete Services an

exclusive license to the technology disclosed and claimed in the Patents-in-Suit, including the right to enforce patent rights on that technology. (*See id.* ¶ 26). Plaintiffs have noticed, and “continue to notice[,] the industry, including the Defendants, of their issued patent rights,” and have prominently marked their machinery with the patent numbers of the Patents-in-Suit. (*Id.* ¶ 27 (alteration added)).

The Miami-Dade County Expressway Authority (“MDX”) put to bid a design-build project (the “SR 836 Project”) for the modernization and expansion of State Road 836 between Northwest 57th Avenue and Northwest 17th Avenue. (*See id.* ¶ 30). MDX issued a request for proposals for approximately \$149 million in improvements to State Road 836. (*See id.*). After several companies showed interest in bidding, Odebrecht was ultimately the successful bidder selected for the SR 836 Project. (*See id.* ¶ 31). Odebrecht’s winning bid projected a completion date that was 350 days earlier than the next competitive bid; Odebrecht attributed this efficiency to an “innovative solution.” (*See id.* ¶ 32). Plaintiffs allege Odebrecht won the bid due to this “innovative solution” and its projections for the project’s speed were faster than MDX’s own engineers had forecasted. (*See id.*). According to Plaintiffs, Odebrecht’s purported “innovative solution” produced a time value cost savings of \$17.5 million. (*See id.* ¶ 33).

Plaintiffs allege Odebrecht had knowledge of Plaintiffs’ slip form method and tunnel molds prior to their bid submission to MDX for the SR 836 Project. (*See id.* ¶ 35). “Upon information and belief, Odebrecht’s bid, touting a significantly earlier completion date . . . was premised . . . on the use of Plaintiffs’ patented slip form method and tunnel molds.” (*Id.* ¶ 34 (alterations added)).

On March 17, 2015, after Odebrecht had already been awarded the contract for the SR 836 project, it solicited Concrete Services to submit a proposal for the “bridge railing” part of the

project. (*See id.* ¶ 36).² Plaintiffs met with Odebrecht on May 7, 2015, and again on July 1, 2015, during which meetings they presented to Odebrecht their patented technology for slip molding of a coping structure with exposed rebars. (*See id.* ¶ 38). Plaintiffs solicited future coping structure work under subcontract from Odebrecht. (*See id.*). According to Plaintiffs, their presentation included a “show [and] tell” video demonstration of their slip molding system and methodology. (*Id.* ¶ 39 (alteration added; internal quotation marks omitted)). This video prominently featured and identified Plaintiffs’ patents and emphasized the cost advantages of using the patented system and methods, including the potential for incentive payments for early completion of the SR 836 Project. (*See id.* ¶¶ 39–40).

Plaintiffs allege Odebrecht was contractually obligated by the MDX General Specifications for Design to disclose the existence of the Patents-in-Suit if Odebrecht intended on using the technology for the SR 836 Project. (*See id.* ¶ 42). Although Odebrecht never sought permission from Plaintiffs to use the technology claimed in the Patents-in-Suit (*see id.* ¶ 43), Odebrecht, in conjunction with its subcontractor, used Plaintiffs’ inventions in undertaking the SR 836 Project (*see id.* ¶¶ 56–73). Plaintiffs placed a notice of the Letters Patent on all their tunnel molds and gave Defendants written notice of patent infringement, but Defendants continued to utilize the patented technology. (*See id.* ¶ 44).

Aside from Concrete Services, Odebrecht also solicited a proposal from one of Concrete Services’s competitors, Barreiro, to build the bridge railing portion of the SR 836 Project. (*See id.* ¶ 45). Odebrecht accepted Barreiro’s proposal and identified Barreiro as one of its subcontractors to MDX. (*See id.* ¶ 47). Odebrecht and Barreiro entered into an agreement for the purpose of meeting Odebrecht’s contractual obligations to MDX. (*See id.* ¶ 48). Odebrecht

² A “bridge railing” is a composite structure made up of a bridge coping and a traffic rail, with embedded reinforcement materials shared by each component of the composite structure. (*See* 2d Am. Compl. ¶ 37).

and Barreiro are currently undertaking these obligations by expanding and rebuilding portions of SR 836 using Plaintiffs' patented technology without their permission. (*See id.* ¶ 49). Odebrecht and Barreiro, through their contractual relationship, have a "common purpose" of completing the SR 836 project and using Plaintiffs' patented inventions in doing so (*id.* ¶¶ 50, 57); a "community of interest" in accomplishing these goals (*id.* ¶ 51, 57); and an "equal right to a voice in the direction of their joint enterprise," as prime contractor and sub-contractor (*id.* ¶ 52).

Beyond their contractual relationship, Odebrecht and Barreiro conspired to wrongfully gain access to Plaintiffs' proprietary information and technology related to their patented slip forming system, and to fabricate Plaintiffs' patented Tunnel Molds using this ill-gotten non-public information. (*See id.* ¶ 53). Odebrecht and Barreiro "surreptitious[ly] inspect[ed]" Plaintiffs' Tunnel Molds on an FDOT job site, arranged for a "former employee" to seek employment with Plaintiffs to gain access to the slip forming system and Tunnel Molds, and "duplicat[ed] . . . the measurements and specifications" of the system and Tunnel Molds. (*Id.* ¶ 54 (alterations added)).

As a result of Plaintiffs' presentation to Odebrecht, as well as Plaintiffs' prior successful use of their technology in another FDOT project, Defendants knew Plaintiffs' Tunnel Mold would meet FDOT standards if used in the SR 836 Project. (*See id.* ¶ 55). "[I]n order to meet the strict timing considerations that Odebrecht promised to MDX for completion of the SR 836 Project," Odebrecht contracted with Barreiro to "make and/or use the inventions of the Patents-in-Suit." (*Id.* ¶ 56 (alteration added)). Odebrecht continues to receive the benefit of Barreiro's infringement of the Patents-in-Suit. (*See id.*).

In paragraphs 58 through 67 of the Second Amended Complaint, Plaintiffs describe in detail how Barreiro's construction undertaken for the SR 836 Project infringed at least one claim

of each of the Patents-in-Suit. (*See id.* ¶¶ 58–67). Plaintiffs assert Odebrecht is liable for Barreiro’s infringement because it acted in a joint enterprise with Barreiro and induced Barreiro into infringing each Patent-in-Suit. (*See id.* ¶¶ 68–73).

The Second Amended Complaint includes nine counts: Counts I, IV, and VII are brought against Odebrecht for direct infringement of the ‘068, ‘075, and ‘085 Patents, respectively, by virtue of Odebrecht’s joint enterprise with Barreiro (*see id.* ¶¶ 74–80, 94–100, 113–19); Counts II, V, and VIII are brought against Barreiro for direct infringement of the ‘068, ‘075, and ‘085 Patents, respectively (*see id.* ¶¶ 81–87, 101–06, 120–26); and Counts III, VI, and IX are brought against Odebrecht for indirect infringement of the ‘068, ‘075, and ‘085 Patents, respectively, under a theory Odebrecht induced Barreiro to infringe the patents (*see id.* ¶¶ 88–93, 107–12, 127–30). Plaintiffs seek injunctive relief and damages. (*See id.* 33–34).

Odebrecht and Barreiro bring the present Motion seeking dismissal of Counts I, III, IV, VI, VII, and IX under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim. (*See generally* Mot.).³ Defendants contend, like Plaintiffs’ first Amended Complaint, the Second Amended Complaint fails to allege facts satisfying the elements of joint enterprise liability, and as a result, Odebrecht is not liable for direct infringement of the ‘068 and ‘085 Patents as alleged in Counts I and VII. (*See* Mot. 4–8). Defendants further argue Plaintiffs do not plead facts sufficient to make a claim for vicarious liability of a system patent, and therefore Count IV, alleging direct infringement of the ‘075 Patent against Odebrecht, should be dismissed. (*See id.* 8–9). Finally, Defendants assert Odebrecht is not liable for indirect infringement of any of the Patents-in-Suit because Plaintiffs fail to allege Odebrecht had a specific intent to induce

³ Although Barreiro appears in the Motion, Defendants do not request dismissal of Plaintiffs’ claims against Barreiro stated in Counts II, V, and VIII.

infringement by Barreiro, and as a result, Counts III, VI, and IX should be dismissed. (*See id.* 9–11).

II. LEGAL STANDARD

Rule 8(a) requires a pleading contain “a short and plain statement of the claim showing that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2). Although this pleading standard “does not require ‘detailed factual allegations,’ . . . it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (alteration added) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). Pleadings must contain “more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.” *Twombly*, 550 U.S. at 555 (citation omitted).

“To survive a motion to dismiss [under Rule 12(b)(6)], a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Iqbal*, 556 U.S. at 678 (alteration added) (quoting *Twombly*, 550 U.S. at 570). Indeed, “only a complaint that states a plausible claim for relief survives a motion to dismiss.” *Id.* at 679 (citing *Twombly*, 550 U.S. at 556). 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.* at 678 (alteration added) (citing *Twombly*, 550 U.S. at 556).

Apart from the factual allegations of the Amended Complaint, which are construed in the light most favorable to Plaintiffs, the Court also properly considers the attachments to the pleading. *See Griffin Indus., Inc. v. Irvin*, 496 F.3d 1189, 1205 (11th Cir. 2007) (“[E]xhibits [to the complaint] are part of the pleading ‘for all purposes[,]’” including a Rule 12(b)(6) motion. (alterations added) (quoting Fed. R. Civ. P. 10(c); then citing *Solis-Ramirez v. U.S. Dep’t of Justice*, 758 F.2d 1426, 1430 (11th Cir. 1985))).

Following the amendments to the Federal Rules of Civil Procedure, which took effect December 1, 2015 and abrogated Rule 84 and Form 18,⁴ claims for direct patent infringement are subject to the *Iqbal/Twombly* standard applied to most other civil pleadings. *See Thermolife, Int'l, LLC v. Vitamin Shoppe, Inc.*, No. 0:16-CV-60693-UU, 2016 WL 6678525, at *2 (S.D. Fla. June 8, 2016) (collecting cases).

III. ANALYSIS

Defendants argue Plaintiffs fail to state claims against Odebrecht for direct and indirect patent infringement because they fail to allege facts showing (1) Odebrecht was in a joint enterprise with Barreiro, such that Odebrecht could be said to have directly infringed the '068 and '085 Patents; (2) Odebrecht directed or controlled the actions of Barreiro, such that Odebrecht is liable for direct infringement of the '075 Patent; and (3) Odebrecht possessed a specific intent to induce Barreiro to infringe Plaintiffs' patents, such that Odebrecht is liable for indirect infringement of the Patents-in-Suit. (*See generally* Mot.).

A. Direct Infringement of the '068 and '085 Patents

Plaintiffs accuse Odebrecht of direct infringement of Claim 1 of the '068 Patent (*see* 2d Am. Compl. ¶¶ 68, 74–80), and Claim 1 of the '085 Patent (*see id.* ¶¶ 72, 113–19), both of which appear to be method claims. “Direct infringement requires proof by preponderant evidence that the defendant performs . . . or uses . . . each element of a claim, either literally or under the doctrine of equivalents.” *Cheese Sys., Inc. v. Tetra Pak Cheese & Powder Sys., Inc.*, 725 F.3d 1341, 1348 (Fed. Cir. 2013) (alterations added; citation omitted). The Federal Circuit has set forth the framework to evaluate direct infringement of a method claim by multiple entities:

⁴ Prior to the abrogation of Rule 84 and Form 18, a complaint which made “proper use of [Form 18] . . . effectively immunize[d] a claimant from attack regarding the sufficiency of the pleading.” *K-Tech Telecomms., Inc. v. Time Warner Cable, Inc.*, 714 F.3d 1277, 1283 (Fed. Cir. 2013) (alterations added; citation omitted).

Direct infringement under [section] 271(a) occurs where all steps of a claimed method are performed by or attributable to a single entity. . . . Where more than one actor is involved in practicing the steps, a court must determine whether the acts of one are attributable to the other such that a single entity is responsible for the infringement. . . . [A]n entity [is] responsible for others' performance of method steps in two sets of circumstances: (1) where that entity directs or controls others' performance, and (2) where the actors form a joint enterprise.

Akamai Techs., Inc. v. Limelight Networks, Inc., 797 F.3d 1020, 1022 (Fed. Cir. 2015) (“*Akamai III*”) (alterations added; citation and footnote call number omitted). Plaintiffs assert liability under a joint enterprise theory. (*See* 2d Am. Compl. ¶¶ 68, 72, 76, 115).

A joint enterprise requires proof of four elements:

- (1) an agreement, express or implied, among the members of the group;
- (2) a common purpose to be carried out by the group;
- (3) a community of pecuniary interest in that purpose, among the members; and
- (4) an equal right to a voice in the direction of the enterprise, which gives an equal right of control.

Akamai III, 797 F.3d at 1023 (citing Restatement (Second) of Torts § 491 cmt. c).

Defendants first argue “there are no factual allegations of an agreement, express or implied, among Odebrecht and Barreiro to construct concrete bridge railings for the MDX 836 Project using Plaintiffs’ patented methods.” (Mot. 5). Not true. Paragraph 56 of the Second Amended Complaint alleges precisely that: “[u]pon information and belief, Odebrecht has contracted with Barreiro . . . to make and/or use the inventions of the Patents-in-Suit in order to meet the strict timing considerations that Odebrecht promised to MDX for completion of the SR 836 Project.” (2d Am. Compl. ¶ 56 (alterations added)). While Defendants contend “[t]he only agreement that is *factually supported* is the one arising from Odebrecht’s acceptance of Barreiro’s proposal in response to Odebrecht’s Request for Proposal to construct bridge railings” (Mot. 5 (alteration and emphasis added)), and “Plaintiffs[’] attempt to transmogrify this

subcontract into an agreement between Odebrecht and Barreiro to use Plaintiffs' slip forming process . . . has no basis in fact" (*id.* 5–6 (alterations added)), it matters not what the "facts" are according to Defendants. The Court must accept Plaintiffs' factual allegations as true at the motion to dismiss stage. *See, e.g., Dusek v. JPMorgan Chase & Co.*, 832 F.3d 1243, 1246 (11th Cir. 2016) (citing *Erickson v. Pardus*, 551 U.S. 89, 94 (2007)). Plaintiffs sufficiently allege an agreement in satisfaction of *Akamai III*'s first prong.

Defendants next argue Plaintiffs fail to show Barreiro and Odebrecht had a "common purpose." (Mot. 6). Plaintiffs allege the parties had a "common purpose" to complete the SR 836 Project (2d Am. Compl. ¶ 50), and to build and use Plaintiffs' patented inventions in fulfilling their obligations to each other and MDX (*see id.* ¶ 57). Defendants argue these allegations do not satisfy the "common purpose" prong, because Odebrecht's job as prime contractor is "to ensure the completion of the entire modernization and expansion of SR 836," while Barreiro's purpose "to construct the bridge railing for the project" is "much narrower." (Mot. 6). Defendants do not direct the Court to any case law supporting the proposition that two parties cannot have a common purpose sufficient to find joint liability where one party's purpose is merely a limited subset of the other party's broader purpose. As the Court is unaware of any precedent from this Circuit or the Federal Circuit, it declines to read the "common purpose" requirement so narrowly. Defendants do not meet their burden to show Plaintiffs' "common purpose" allegations are insufficient.

Third, Defendants contend "beyond another mere conclusory statement, Plaintiffs allege no facts showing that Odebrecht and Barreiro have a 'community of pecuniary interest' together." (Mot. 6). Defendants argue this factor requires showing "the parties equally share in the monetary benefits of an enterprise's success." (*Id.* (citing *In re Genetically Modified Rice*

Litig., No. 4:06-MD-1811, 2010 WL 3927497, at *8 (E.D. Mo. Oct. 4, 2010); *Lord v. Chew*, 373 P.3d 937, 939 (Nev. 2011); *St. Joseph Hosp. v. Wolff*, 94 S.W.3d 513, 532 (Tex. 2003)). Defendants have not shown any case in the Eleventh Circuit or the Federal Circuit requires the respective pecuniary interests between joint enterprisers to be equal, and this requirement appears to the Court to go beyond *Akamai III*'s elements. Accordingly, the Court will not require *equality* of pecuniary interest, only a "community."

It appears Plaintiffs have minimally alleged such in their pleading. Odebrecht, as prime contractor, was awarded a contract on the SR 836 Project by MDX after promising to efficiently carry out the project by utilizing Plaintiffs' slip form method and tunnel molds. (*See* 2d Am. Compl. ¶¶ 30–34). Barreiro was awarded a subcontract with Odebrecht to carry out the project, in which Barreiro agreed to make or use Plaintiffs' patented inventions. (*See id.* ¶¶ 45–48, 56). These allegations allow the Court to draw the "reasonable inference" Defendants had a community of pecuniary interest. *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 556).

Next, Defendants argue Plaintiffs fail to allege facts satisfying the fourth prong of joint enterprise liability (*see* Mot. 7–8), which requires "an equal right to a voice in the direction of the enterprise, which gives an equal right of control," *Akamai III*, 797 F.3d at 1023 (citing Restatement (Second) of Torts § 491 cmt. c). Defendants assert "the default assumption is that a prime contractor does not have control over an independent contractor, such as a subcontractor," and therefore Barreiro and Odebrecht do not have an equal right of control of the joint enterprise. (Mot. 7 (citing *Sterling Fin. & Mgmt., Inc. v. Gitenis*, 117 So. 3d 790, 794 (Fla. 4th DCA 2013))). First, the Court agrees with Plaintiffs it is possible for two entities to have an equal right of control over a project without one entity having control over the other. (*See* Resp. 10).

Second, the Court must disregard any “default assumptions” regarding traditional roles of prime contractor and subcontractor, where, as here, the pleading contains factual allegations regarding the level of control each party enjoyed. *Cf. Dusek*, 832 F.3d at 1246 (“In deciding a Rule 12(b)(6) motion to dismiss, the court must accept all factual allegations in a complaint as true and take them in the light most favorable to plaintiff.” (citing *Erickson*, 551 U.S. at 94)). The Second Amended Complaint explicitly states Odebrecht and Barreiro have “an equal right to a voice in the direction of their joint enterprise” (2d Am. Compl. ¶ 52), giving them “an equal right of control” (*id.* ¶ 57). Assuming these allegations to be true, the fourth and final joint enterprise prong is satisfied.

Finally, in their Reply, Defendants contend “[i]t is . . . highly implausible that Odebrecht knew about Plaintiffs’ patents when it submitted its bid to MDX months before Plaintiffs’ presentation” (Reply 3 (alterations added; footnote call number omitted)), and “taking Plaintiffs’ allegations as true, it is possible that *none* of Plaintiffs’ patents had even been issued” at that time (*id.* 3 n.1 (emphasis in original)). Defendants note the ‘085 Patent was not granted until more than a year after MDX awarded Odebrecht the contract for the SR 836 Project, and the ‘068 Patent was only issued two months before the contract was awarded. (*See id.*). Even if these arguments had been properly presented — they appear for the first time in Reply, which must “be strictly limited to rebuttal of matters raised in the memorandum in opposition,” S.D. Fla. L.R. 7.1(c) — they do not exonerate Odebrecht from liability for direct infringement of the ‘068 and ‘085 Patents. Odebrecht need not have known of the existence of each Patent at the time it submitted its bid to be liable under a joint infringement theory; it is enough Odebrecht had notice of Plaintiffs’ Patents at a later time, when it agreed with Barreiro to make or use Plaintiffs’ patented inventions in the SR 836 Project. (*See* 2d Am. Compl. ¶ 56). Defendants’ perceived

inconsistencies in Plaintiffs' timeline do not doom the Second Amended Complaint. As Plaintiffs have sufficiently stated claims of direct infringement of the '068 and '085 Patents under a joint enterprise theory of liability, the Court declines to dismiss Counts I and VII.

B. Direct Infringement of the '075 Patent

Plaintiffs accuse Odebrecht of directly infringing Claim 15 of the '075 Patent, which covers a tunnel mold comprising a specific sort of mold housing and means for supporting the mold housing on a slip mold transporter. (*See* 2d Am. Compl. ¶¶ 63, 70, 96). Plaintiffs appear to premise this direct infringement cause of action on joint enterprise liability. (*See id.* ¶ 95; *see generally* Resp. 5–11). Nevertheless, Claim 15 is a system claim, not a method claim, and as the Court already instructed the parties in the August 31, 2017 Order, “[t]he *Akamai III* joint enterprise framework does not apply to system claims, which are directly infringed where a party ‘put[s] the invention into service, *i.e.*, control[s] the system as a whole and obtain[s] benefit from it.’” (August 31, 2017 Order 6 (first alteration in original) (quoting *Lyda v. CBS Corp.*, 838 F.3d 1331, 1339 (Fed. Cir. 2016))).

Defendants argue Plaintiffs fail to state a claim a claim against Odebrecht for direct infringement of a system patent because “the Second Amended Complaint does not contain any allegations that Odebrecht directed or controlled the actions of Barreiro, or that Barreiro acted as Odebrecht’s agent.” (Mot. 8–9). Plaintiffs do not address this argument in their Response. (*See generally* Resp.).

Plaintiffs do not allege anywhere that Odebrecht controlled the tunnel mold system as a whole. (*See generally* 2d Am. Compl.). At most, Plaintiffs allege Odebrecht had “an equal right to a voice in the direction” of its joint enterprise as did Barreiro (2d Am. Compl. ¶ 52), giving the former “an equal right of control” (*id.* ¶ 57); and Odebrecht “directed and/or had knowledge that

. . . Barreiro[?]s . . . tunnel mold was made and used utilizing Plaintiffs’ patented invention” (*id.* ¶ 71 (alterations added)). These allegations do not allow the reasonable inference Odebrecht controlled the system as a whole, as is required to state a claim for direct infringement of a system patent. *See Lyda*, 838 F.3d at 1339. Accordingly, and given Plaintiffs’ lack of any argument or analysis to the contrary, Count IV, alleging direct infringement of the ‘075 Patent against Odebrecht, is dismissed.

C. Indirect Infringement of the ‘068, ‘075, and ‘085 Patents

Defendants argue the Court should dismiss Counts III, VI, and IX, which allege Odebrecht indirectly infringed the ‘068, ‘075, and ‘085 Patents, respectively, because the “Second Amended Complaint fails to allege sufficient facts showing that Odebrecht had a specific intent to encourage Barreiro’s alleged infringing activities.” (Mot. 9). Defendants contend because the Second Amended Complaint does not contain “evidence of specific intent, there is no claim for indirect infringement.” (*Id.* 11).

“Whoever actively induces infringement of a patent shall be liable as an infringer.” 35 U.S.C. § 271(b). To be liable for indirect infringement pursuant to section 271(b), a defendant must know “that the induced acts constitute patent infringement,” *Global-Tech Appliances, Inc. v. SEB S.A.*, 563 U.S. 754, 766 (2011), and possess “specific intent to encourage another’s infringement,” *DSU Med. Corp. v. JMS Co.*, 471 F.3d 1293, 1305 (Fed. Cir. 2006) (footnote call number omitted). Thus, “to survive [a] motion to dismiss,” a plaintiff pleading induced infringement must allege facts plausibly showing the inducer “specifically intended [the direct infringer] to infringe [a] patent and knew that the [infringer’s] acts constituted infringement.” *In re Bill of Lading Transmission & Processing Sys. Patent Litig.*, 681 F.3d 1323, 1339 (Fed. Cir.

2012) (alterations added). Importantly, however, “[t]his does not mean . . . that [a plaintiff] must prove its case at the pleading stage.” *Id.* (alterations added; citations omitted).

Plaintiffs allege Odebrecht knew of their patent rights from its meetings with Plaintiffs on May 7, 2015 and July 1, 2015 (*see* 2d Am. Compl. ¶¶ 38–40); and through written notice by Plaintiffs sent to the industry and to Defendants specifically (*see id.* ¶¶ 27, 44). Plaintiffs allege Odebrecht contracted with Barreiro to “make and/or use the inventions of the Patents-in-Suit” for the completion of the SR 836 Project. (*Id.* ¶ 56). These allegations are sufficient to plausibly state a claim for indirect infringement.

Defendants argue paragraphs 54 and 55 of the Second Amended Complaint, which describe Defendants’ scheme to have a former employee surreptitiously gain access to Plaintiffs’ patented information and slavishly duplicate the proprietary tunnel molds, are as “vague and conclusory” as the allegations in the First Amended Complaint, and remain “devoid of allegations as to which Defendant did what.” (Mot. 10 (internal quotation marks omitted) (quoting August 31, 2017 Order 7)). The Court agrees these particular paragraphs do not satisfy Rule 8’s notice pleading requirement, as they lump Defendants’ actions together without specifying which Defendant’s employee sought employment with Plaintiffs or which Defendant covertly inspected Plaintiffs’ non-public job site. (*See* 2d Am. Compl. ¶¶ 54–55).

Even so, it does not follow, as Defendants urge, that “it is impossible to divine from the Second Amended Complaint what actions, if any, [] Odebrecht took that indicate it had a specific intent to induce Barreiro’s infringement.” (Mot. 11 (alteration added)). Plaintiffs plainly allege Odebrecht “contracted with Barreiro” to replicate Plaintiffs’ patented inventions (2d Am. Compl. ¶ 56), and a reasonable inference may be drawn from the Second Amended Complaint this agreement was made with knowledge that Plaintiffs’ inventions were patented (*see, e.g., id.* ¶¶

27, 38–40, 44). Accepting as true the factual allegations, and construing ambiguities in favor of Plaintiffs, specific intent to infringe is shown. Accordingly, the Court will not dismiss Counts III, VI, and IX – the indirect infringement claims against Odebrecht.

IV. CONCLUSION

For the foregoing reasons, it is

ORDERED AND ADJUDGED that the Motion [ECF No. 55] is **GRANTED in part** and **DENIED in part**. Count IV of the Second Amended Complaint is **DISMISSED**. The remaining causes of action survive. Defendants, Odebrecht and Barreiro, shall file their answers to the Second Amended Complaint no later than **February 13, 2018**.

DONE AND ORDERED in Miami, Florida, this 31st day of January, 2018.



CECILIA M. ALTONAGA
UNITED STATES DISTRICT JUDGE

cc: counsel of record