CASE NO. 21-1385

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

LS3 INC.

Plaintiff - Appellant,

v.

CHEROKEE FEDERAL SOLUTIONS, L.L.C.; CHEROKEE NATION STRATEGIC PROGRAMS, L.L.C.; CHEROKEE SERVICES GROUP, LLC; KELLY CARPER; DONALD LOPEZ; GWYNETH ROBE; DANIEL CERMAN; STEVE CLARK; DEBRA DIX; LEVI FLINT; GREGORY FRISINA; SIRISHA GANTI; WAYNE HOPKINS; ERICA HOPPE; ALAN HUGGENBERGER; JAKEB HUGGENBERGER; RONALD JACOBSON; KARL LONG; WILLIAM MCKINNEY; ISAAC MIRELES; KEVIN MUIR; FREDERICK PETERS; CAROL SCHREINER; REX STEFFEN; and NICHOLAS STEVENS.

Defendants – Appellees.

On Appeal from the United States District Court
For the District of Colorado
The Honorable Philip A. Brimmer
District Court No. 1:20-cv-3555-PAB-NYW

APPELLANT'S OPENING BRIEF

Appellant Does Not Request Oral Argument.

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CORPORATE DISCLOSURE STATEMENT

Plaintiff-Appellant LS3, Inc does not have a parent corporation nor does any company own 10% or more of its stock.

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PRIOR OR RELATED APPEALS

There are no prior or related appeals.

JURISDICTIONAL STATEMENT

The United States District Court for the District of Colorado had subject matter jurisdiction over this action under 28 U.S.C. § 1332 because the matter in controversy exceeds the sum of $75,000 and is between citizens of different States. The trial court also had subject matter jurisdiction under 28 U.S.C. § 1331 because the action arose under a Federal law, specifically, the Defend Trade Secrets Act, 18 U.S.C. § 1832, and the trial court has supplemental jurisdiction over the state claims.

This appeal is timely because the Notice of Appeal was filed on October 29, 2021, which is within thirty days of the date of the entry of the order and final judgment on September 29, 2021. The final judgment disposed of all of Appellant's claims.

ISSUE PRESENTED FOR REVIEW

Whether the District Court erred under Fed. R. Civ. P. 12(b)(6) and Fed. R. Civ. P. 8 when it reviewed a document outside the Complaint, bypassed the factfinding function of the jury, and dismissed all claims in the Amended Complaint.

STATEMENT OF THE CASE

The District Court erred when it dismissed the case under Fed. R. Civ. P. 12(b)(6) because, under Fed. R. Civ. P. 8, the detailed facts alleged in the

Complaint, taken in the light most favorable to the Plaintiff, plausibly suggest that Plaintiff is entitled to relief.

SUMMARY OF THE ARGUMENT

This is a fairly straightforward case. The trial court erred when it dismissed all of Appellant's claims under Fed. R. Civ. P. 12(b)(6). In dismissing the claims, the trial court failed to view the facts and reasonable inferences therefrom in the light most favorable to Appellant, improperly reviewed a document outside of the Complaint, and improperly made a finding of fact.

Appellant brought a claim for breach of contract against twenty-two of its former employees (the "Individual Defendants"). It brought a claim for intentional interference with contract against the former employees' current employer ("Cherokee"); and it brought claims of conspiracy and misappropriation of trade secrets against all defendants.

The trial court first dismissed the claim for breach of contract. In so doing, it erroneously relied on its misinterpretation of hearsay statements within a document outside of the complaint, in contravention of, among other rules and authorities, Fed. R. Civ. P. 12(d). The claims for intentional interference with contract and conspiracy flowed from the breach of contract claim, so those too were erroneously dismissed. Finally, the court misconstrued the allegations in the Complaint and did

not view them in the light most favorable to Appellant when it dismissed the claim for misappropriation of trade secrets.

Under our legal system, Appellant is entitled to have its day in court with facts determined by a jury. The Federal Rules of Civil Procedure must be construed, administered, and employed by the courts to secure the "just, speedy, and inexpensive" resolution of all civil actions. Fed. R. Civ. P. 1. Of these three principles, justice is of the utmost importance. Because the trial court committed reversible error, Appellant respectfully asks this Court to reverse the order in its entirety, and remand for the parties to continue discovery.

Background

This case involves four claims brought by Appellant LS3, Inc ("Appellant" or "LS3"). Appellant filed this action against, on the one hand, Cherokee Federal Solutions L.L.C., Cherokee Nation Strategic Programs, L.L.C., and Cherokee Services Group, LLC (collectively "Cherokee"); and, on the other hand, twenty two of its former employees: Kelly Carper, Donald Lopez, Gwyneth Robe, Daniel Cerman, Steve Clark, Debra Dix, Levi Flint, Gregory Frisina, Sirisha Ganti, Wayne Hopkins, Erica Hoppe, Alan Huggenberger, Jakeb Huggenberger, Ronald Jacobson, Karl Long, William McKinney, Isaac Mireles, Kevin Muir, Frederick Peters, Carol Schreiner, Rex Steffen, and Nicholas Stevens (the "Individual Defendants").

The defendant parties were represented by counsel in two groups. The first group, represented by PilieroMazza, PLLC, consists of Cherokee and fourteen of the Individual Defendants—Daniel Cerman, Debra Dix, Gregory Frisina, Sirisha Ganti, Wayne Hopkins, Erica Hoppe, Alan Huggenberger, Jakeb Huggenberger, Karl Long, William McKinney, Kevin Muir, Frederick Peters, Carol Schreiner, and Rex Steffen. In the motion to dismiss pleadings, this group referred to itself as "Certain Defendants." Aplt. App. Vol. II at 32-57[1]. The second group is represented by Greenberg Traurig, LLP and consists of eight of the Individual Defendants; Kelly Carper, Donald Lopez, Gwyneth Robe, Steve Clark, Levi Flint, Ronald Jacobson, Isaac Mireles, and Nicholas Stevens. In the motion to dismiss pleadings, this group referred to itself as "Remaining Defendants." Aplt. App. Vol. II at 112-124.

The Individual Defendants had all signed employment contracts with Appellant (the "contracts"). Aplt. App. Vol. II at 12-13, ¶¶ 35-56. The gravamen of Appellant's complaint was for breach of these contracts on the part of the Individual Defendants, as well as intentional interference with contract on the part of Cherokee. Appellant also brought a derivative claim for conspiracy against all of the defendants, as well as a claim for misappropriation of trade secrets, on the same set of facts, against all defendants. *See generally* Aplt. App. Vol. II at 8-23

[1] References to Appellant's Appendix are cited as "Aplt. App. Vol. ___ at ___".

Appellant's Amended Complaint set out its legal claims in detail. In sum, Appellant asserted that it lost a large contract (the "ICAM" contract) with the federal government. Aplt. App. Vol. II at 13, ¶ 57-58. The contract award was protested by a third party who was Appellant's business partner. *Id.* ¶ 58. During the time period of the protest, the federal government needed to award a "Bridge Contract," meaning a contract to bridge the gap as the protest was resolved. *Id.* ¶ 58.

Prior to the award of the Bridge Contract, Appellant's employees disloyally, and in breach of their contracts, began working with one or all of the Cherokee Appellees[2] to undermine Appellant, disclosing confidential information and trade secrets in the process. *Id.* at 13-16, 18, ¶¶ 57-73, 89. As a result of this wrongful conduct, the Bridge Contract was awarded to Cherokee instead of Appellant, at great loss to Appellant. *Id.* at 13-16, ¶¶ 60, 72-73. Appellant alleged that the Bridge Contract should naturally have gone to it (with the least amount of disruption to the service), because it was performing on the contract at that time. *Id.* ¶ 60 (referring to the Bridge Contract). On information and belief, the ICAM contract's protest was ultimately resolved in favor of Cherokee's partner (and hence, Cherokee), rather than Appellant and its partner. *See* Aplt. App. Vol. II at 13, ¶¶ 57-59.

[2] The Cherokee entity most directly involved appears to have been Cherokee Nation Strategic Programs or "C.N.S.P." though the relationship between the Cherokee parties remains unclear at this stage of the litigation.

Standard of Review

The appellate court reviews a Fed. R. Civ. P. 12(b)(6) dismissal *de novo*. *George v. Urban Settlement Servs.*, 833 F.3d 1242, 1247 (10th Cir. 2016). A complaint must contain a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). Under Fed. R. Civ. P. 12(b)(6), claims may be dismissed as a matter of law only if the complaint does not contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "In reviewing the complaint, [the Court] 'accept[s] all facts pleaded by the non-moving party as true and grant[s] all reasonable inferences from the pleadings in favor of the same.'" *Wasatch Equality v. Alta Ski Lifts Co.*, 820 F.3d 381, 386 (10th Cir. 2016) (citation omitted). The Court should also "liberally construe the pleadings." *Reznik v. inContact, Inc.*, 18 F.4th 1257, 1260 (10th Cir. 2021).

The Fed. R. Civ. P. 12(b)(6) standard "does not require that Plaintiff establish a prima facie case in [its] complaint." *Khalik v. United Air Lines*, 671 F.3d 1188, 1192 (10th Cir. 2012). "[The] standard is still fundamentally one of notice pleading intended to ensure that a defendant is placed on notice of his or her alleged misconduct sufficient to prepare an appropriate defense." *Howl v. Alvarado*, 783 Fed. Appx. 815, 818 (10th Cir. 2019) (citation omitted). Granting a

motion to dismiss is a "harsh remedy which must be cautiously studied, not only to effectuate the spirit of the liberal rules of pleading but also to protect the interests of justice." *Id.* (citation omitted); *see also Reznik*, 18 F.4th at 1260.

ARGUMENT

I. The Trial Court Erroneously Dismissed the Claim for Breach of Contract.

The trial court erroneously dismissed Appellant's claim that there was a breach of the Individual Defendants' contracts based on their respective breaches of the duty of loyalty and duty of confidentiality provisions.[3] *See* Aplt. App. Vol. III at 254-258; *see* Aplt. App. Vol. II at 17-18, ¶¶ 85-89. Appellant alleged sufficient facts that, viewed in the light most favorable to Appellant, stated a plausible claim against the Individual Defendants for breach of contract on the basis of the allegations of breach of the contractual duties of loyalty and confidentiality.

A. The Trial Court Erroneously Dismissed the Claim for Breach of Loyalty.

The trial court committed reversible error when it dismissed the claim against the Individual Defendants for breach of loyalty (i.e., the contractual duty not to compete against Appellant *during* the employment) because the court (1)

[3] Appellant does not challenge the part of the order dismissing the claim that the defendants breached the noncompete provisions of the contracts. Aplt. App. Vol. III at 250-254

improperly relied on hearsay to make a disputed factual finding, and (2) did so on the basis of its review of a document outside of the complaint. Aplt. App. Vol. III at 256-258. The trial court thereby violated the United States Constitution, the Federal Rules of Civil Procedure, and the Federal Rules of Evidence. *See* U.S. Const. Amend. VII ("In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved"); Fed. R. Civ. P. 12(b)(6), 12(d), 38(a), 56; Fed. R. Evid. 801.

1. The Trial Court Committed Reversible Error When It Relied on Hearsay and Made an Incorrect Finding on a Disputed Fact.

The trial court based its decision to dismiss the claim for breach of the duty of loyalty on its (erroneous) determination of a disputed fact. Specifically, the trial court held as follows: "[B]ecause plaintiff had already lost the contracts, individual defendants could not have violated the duty of loyalty provisions, and, as a result, plaintiff has failed to state a claim for breach of contract based on these provisions." Aplt. App. Vol. III at 257. Whether Plaintiff had "already lost" the contracts is disputed and contrary to Appellant's allegations in the Amended Complaint. *See, e.g.*, Aplt. App. Vol. II at 15-16, ¶¶ 71-73. In short, the trial court reviewed a document outside the complaint (an email) and relied on a hearsay statement contained therein to make the disputed factual finding that Appellant "had already lost the contracts." Aplt. App. Vol. III at 257. From this, the trial

court concluded that Appellant had failed to state a claim. *Id.* This was reversible error. Fed. R. Civ. P. 12(d).

The document that the trial court reviewed, and which forms the basis of its finding that "plaintiff had already lost the contracts," is an email sent by Laura Evans, a Cherokee representative, dated August 13, 2020. Aplt. App. Vol. III at 256-257 (citing Aplt. App. Vol. II at 104-108) ("the email"). Cherokee (and the first set of Individual Defendants) attached the email to their Motion to Dismiss. Aplt. App. Vol. II at 104-108.

The trial court should not have considered this document at all under Fed. R. Civ. P. 12(d). *See supra*. But even if that issue is set aside, the trial court simply had no authority to make a finding on a disputed fact prior to discovery and trial. U.S. Const. Amend. VII; Fed. R. Civ. P. 38(a), 12(b)(6), 12(d), 56(a); *Sparf v. United States*, 156 U.S. 51, 183 (1895). While under Fed. R. Civ. P. 12(b)(6), there are limited circumstances where a trial court may review a document outside of the complaint, such review is for the purpose of issuing a ruling as a matter of law. The court simply may not decide disputed factual issues.

It is a bedrock principle that "factual issues must be decided by the trier of fact." *Kelley v. LaForce*, 288 F.3d 1, 7 (1st Cir. 2002).

> It may not be amiss, here, Gentlemen, to remind you of the good old rule, that on questions of fact, it is the province of the jury, on questions of law, it is the province of the court to decide… For, as on the one hand,

> it is presumed, that juries are the best judges of facts; it is, on the other hand, presumable, that the court are the best judges of law.

State of Georgia v. Brailsford, 3 U.S. 1, 4 (1794). Where there is an issue of material fact in dispute, a party is "entitle[d] . . . to proceed to trial." *First Nat. Bank of Ariz. v. Cities Serv. Co.*, 391 U.S. 253, 289 (1968). It is for a jury or judge acting as factfinder to "resolve the parties' differing versions of the truth at trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986) (quoting *First Nat. Bank of Ariz.*, 391 U.S. at 289). It is therefore improper for a trial court to decide questions of fact on a motion to dismiss, even where that court permissibly reviews a document outside of the complaint.

The document in question is an email sent by Laura Evans, a Cherokee representative, and it is dated August 13, 2020. Aplt. App. Vol. III at 256-257 (citing Aplt. App. Vol. II at 104-108). The recipients of the email cannot be seen. *Id.* In the email, Ms. Evans states that "Cherokee Nation Strategic Programs (CNSP) has been notified we *are being* awarded a bridge (interim) contract." Aplt. App. Vol. II at 104-108 (emphasis added). Misinterpreting this piece of evidence and going well beyond the hearsay words in the email, the trial court found that "[the] email states that Cherokee defendants had already been awarded the bridge contract." Aplt. App. Vol. III at 256; *see also* Aplt. App. Vol. III at 257 ("[P]laintiff had already lost the contracts . . . ."). This is untrue and disputed.

This was error because the trial court made a dispositive determination of material fact on a Fed. R. Civ. P. 12(b)(6) motion, which was not within its authority and which was counter to the United States Constitution, governing caselaw, and the rules of civil procedure. U.S. Const. Amend. VII; Fed. R. Civ. P. 38(a), 12(b)(6), 12(d), 56(a); *Brailsford*, 3 U.S. at 4; *Kelley*, 288 F.3d at 7. The question of whether the Bridge Contract had been awarded on August 13, 2020, is at best disputed and at worst simply incorrect (it is Appellant's belief that reliable evidence to be produced in discovery will almost certainly prove that the Bridge Contract was in fact awarded later). In short, the trial court had no authority to make this factual finding. Even if it had such authority, the finding is itself flawed on many levels.

First: the email is hearsay. Hearsay is defined as "a statement that: (1) the declarant does not make while testifying at the current trial or hearing; and (2) a party offers in evidence to prove the truth of the matter asserted in the statement." Fed. R. Evid. 801(c). "Hearsay is generally inadmissible as evidence because it is considered unreliable." *United States v. Lozado*, 776 F.3d 1119, 1121 (10th Cir. 2015); Fed. R. Evid. 802. Here, the trial court took an out of court statement made by a Cherokee representative, Ms. Evans, and accepted it to prove the truth of the matter asserted: namely, that the Bridge Contract had been awarded to Cherokee on or before August 13, 2020. *See* Aplt. App. Vol. III at 256-257

("That email states that Cherokee defendants had already been awarded the bridge contract during the pendency of the protest period. *See* Docket No. 26-9 at 2 [Aplt. App. Vol. II at 105]."). No exception to the rule against hearsay applies. In short, the Court dismissed Appellant's claim under Fed. R. Civ. P. 12(b)(6) on the basis of a disputed factual finding that was inadmissible hearsay. This alone was reversible error.

Second: Even if the email were not inadmissible hearsay, the trial court simply misinterpreted and mischaracterized the email. The trial court wrote "[t]hat email states that Cherokee defendants had already been awarded the bridge contract." Aplt. App. Vol. III at 256. The email does not say that. In fact, if anything, the email says the exact opposite. Ms. Evans stated "we *are being*" awarded a Bridge Contract. Aplt. App. Vol. II at 105. She did not use the past tense, she used the future tense. Accordingly, her use of "are being," understood plainly, actually shows that Cherokee had not been awarded the Bridge Contract when Ms. Evans sent the email. At best, the email is unclear and ambiguous—a clear question of interpretation for a factfinder. Presumably, the question of when the Bridge Contract was in fact awarded is one that can be determined from some existing document—but this email is not that document.

Third: the trial court's factual finding is not only improper, hearsay, and a facially inaccurate mischaracterization of the evidence, but it goes against the

allegations in the Complaint, which should have been accepted as true for purposes of the motion. In multiple places in the Amended Complaint, Appellant asserted that the Bridge Contract had not yet been formally or definitively awarded at the time that CNSP unlawfully solicited the employees and the employees breached their duty of loyalty. Aplt. App. Vol. II at 14-16, ¶¶ 61, 71-73.

- Appellant alleged that Ms. Evans told employees that Cherokee "*was to be* awarded a 'bridge' contract." *Id.* ¶ 61.

- Appellant also alleged that Ms. Evans later told employees: "[o]nce we get the go-ahead from the government, we will be moving with lightning speed." *Id.* ¶ 71.

- Appellant then set forth its theory of the case when it stated that at the time Ms. Evans emailed employees, Cherokee was "actively pursuing" the Bridge Contract, which, necessarily, had yet to be awarded. *Id.* ¶ 72.

- Appellant alleged further that the reason Cherokee was attempting to obtain "LS3's capabilities and manpower" was to allow it to obtain the Bridge Contract and provide "assurances" that Cherokee would have LS3's employees for continuity (and so on). *Id.*

- Appellant alleged that Cherokee's ability to secure LS3's workforce was a "precursor" to the government giving Cherokee the Bridge Contract. *Id.* ¶ 73. With respect to the Individual Defendants, Appellant plausibly alleged that by working with Cherokee during their employment by Appellant, they were disloyal in breach of their contracts. *See* Aplt. App. Vol. II at 15-16, 18-19, ¶¶ 72, 73, 89, 95.

Because the trial court considered a hearsay document outside the complaint to make a finding on a disputed fact, the trial court committed reversible error when it

applied the law to that fact and dismissed the claim. Aplt. App. Vol. III at 257. This Court should reverse.

2. The Trial Court Should Not Have Reviewed a Document Outside the Complaint When it Dismissed the Claim for Breach of the Duty of Loyalty.

If the court considers matters outside the complaint that do not fall within one of these limited exceptions, it must treat the motion as a Fed. R. Civ. P. 56 motion for summary judgment. Fed. R. Civ. P. 12(d). "[F]ailure to convert to a summary judgment motion and to comply with Rule 56 when the court considers matters outside the plaintiff's complaint is reversible error.'" *Jackson v. Integra Inc.*, 952 F.2d 1260, 1261 (10th Cir. 1991) (citation omitted). Subject to very limited exceptions, "the sufficiency of a complaint must rest on its contents alone." *Gee v. Pacheco,* 627 F.3d 1178, 1186 (10th Cir. 2010); Fed. R. Civ. P. 12(d). Outside of the complaint itself, a court may only consider (1) documents that the complaint incorporates by reference or attaches as exhibits to the complaint; (2) documents referred to in the complaint if the documents are central to the claim and their authenticity is not disputed and (3) matters appropriate for judicial notice. *Pacheco*, 627 F.3d at 1186. "The court's function on a Rule 12(b)(6) motion is not to weigh potential evidence that the parties might present at trial, but to assess whether the plaintiff's [amended] complaint alone is legally sufficient to state a

claim." *Strauss v. Angie's List, Inc.*, 951 F.3d 1263, 1267 (10th Cir. 2020) (citation omitted).

The email is indisputably a document outside of the complaint. It was entirely improper for the Court to rely on it because the document does not fit within any of the exceptions to Fed. R. Civ. P. 12(d). *See Pacheco*, 627 F.3d at 1186.

a. The Document Was Not Incorporated in the Complaint by Reference.

The document reviewed by the court (the email) was referred to in the Amended Complaint but it was neither incorporated by reference nor attached as an exhibit. *See* Aplt. App. Vol. II at 14, ¶¶ 61-65. The Court's review of the email was therefore improper under Fed. R. Civ. P. 12(d) because the email does not fit any of the limited exceptions to Fed. R. Civ. P. 12(d).

There are three exceptions that allow a court to review documents outside the complaint. They are: (1) "documents that the complaint incorporates by reference," (2) documents "referred to in the complaint" if they are "central to the plaintiff's claim" and undisputedly "authentic," and (3) matters for judicial notice. *Wasatch Equality*, 820 F.3d at 386 (citation omitted); *see also Pacheco*, 627 F.3d at 1186 (same); *Doe v. Sch. Dist. No. 1, Denver, Colo.*, 970 F.3d 1300, 1304 (10th Cir. 2020) (same).

A document incorporated in a complaint by reference must be something different from a document that is only referred to in the complaint. *See generally Doe*, 90 F.3d at 1304. If it were otherwise, the second exception would be redundant and in conflict with the first exception. While the first exception allows plenary review of anything "incorporated by reference;" the second exception, for documents "referred to" in the complaint, is limited only to those documents that are both central to the claim and authentic. *See generally Pacheco*, 627 F.3d at 1186. It would not make sense for the first exception to swallow the second.

Furthermore, the common understanding of the concept of "incorporation by reference" sets it apart from mere reference. Black's Law Dictionary defines "incorporation by reference" in the way it is usually understood, namely: "A method of making a secondary document part of a primary document by including in the primary documents a statement that the secondary document should be treated as if it were contained within the primary one." *Incorporation by Reference*, Black's Law Dictionary (11th ed. 2019). The Second Circuit underscored this common-sense understanding of "incorporation by reference" under Fed. R. Civ. P. 12(d) when it explained that "[l]imited quotation does not constitute incorporation by reference." *See Cosmas v. Hassett*, 886 F.2d 8, 13 (2d Cir. 1989) (citation omitted).

Here, the Appellant paraphrased and quoted from the email as part of its allegations that Cherokee had reached out to its employees while they were employed and had made certain representations to those employees. Aplt. App. Vol. II at 14, at ¶¶ 61-65. Nowhere in the Complaint did Appellant expressly incorporate the email by reference. *See generally* Aplt. App. Vol. II at 8-23. And certainly, nowhere in the Complaint did Appellant incorporate by reference the truth of any statements contained in the email. Thus, the trial court could not have properly considered the email under the exception for incorporation by reference.

b. The Document Was Not Central to the Plaintiff's Claim.

Documents "referred to in the complaint" may be considered, but only if they are "central to the plaintiff's claim" and undisputedly "authentic." *Wasatch Equality*, 820 F.3d at 386. While the email is referred to in the complaint, and while it plays a role in Appellant's claim of breach of contract by disloyalty, the email is not "central" to this issue, which necessarily will be shown by many separate pieces of evidence, including the Individual Defendants' actions as well as (under the Court's reasoning[4]) the timing of the award of the Bridge Contract. *See*

[4] Appellant does not concede the trial court's premise that there could be no breach of the respective duty of loyalty obligations as a matter of law if the Bridge Contract had not yet been awarded at the time of the Cherokee solicitation. The employees were obligated to be loyal during their employment even if the Bridge Contract had been awarded at the time they were solicited by Cherokee (though it had not). The trial court's contrary premise contradicts the language of the contract as well as the common law duty of loyalty inherent in employment relationships. It

Aplt. App. Vol. III at 257. Moreover, while the email may be an authentic email, Appellant in no way agrees that the hearsay statements contained therein are "authentic" in the sense of being accurate for the truth of the matter asserted. Fed. R. Evid. 801. The email does not prove when the Bridge Contract was awarded. In short, the email *as an email* may be authentic; the meaning of the words within it are disputed. Appellant's disloyalty claim hinges on the Individual Defendants' response to the email. The timing of the award of the Bridge Contract, to the extent relevant, will be proven by dated documents evidencing that award. A hearsay email sent by a representative of Cherokee is not competent evidence to show the timing of the Bridge Contract. At most, it shows that it was sent. Notably, Appellant didn't refer to the email in the Complaint for the purpose of proving timing; and it does not prove timing. Accordingly, it is not a document "central" to the question of the timing of the award of the Bridge Contract.

The email and its (hearsay) contents are also quite clearly not proper for judicial notice, so this exception likewise provides no justification for the trial court's decision to consider the document. In conclusion, because the trial court both decided a disputed issue of fact and relied on a document outside of the complaint to do it, it committed reversible error when it dismissed the claim for

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also ignores the fact that Appellant alleged that not only was the Bridge Contract pending, but the ICAM contract was under protest and thus the subject of competition at the same time. *See* Aplt. App. Vol. II at 13, 15-16, 18, ¶¶ 60, 73, 90.

each Individual Defendant's respective breach of the loyalty provision of their employment contracts.

B. The Court Improperly Dismissed the Claim for Breach of the Confidentiality Provision.

LS3 made a plausible claim that the Individual Defendants breached their contracts by disclosing confidential information. As when it dismissed the breach of loyalty claim, the trial court improperly made a finding on disputed facts. Aplt. App. Vol. III at 255-256. Here, the trial court invaded the province of the jury when it decided the factual questions: (1) What sort of information did the Individual Defendants disclose during their recruitment by Cherokee? and (2) Was any of that information confidential? The trial court erroneously refused to accept the allegations in the Amended Complaint and the reasonable inferences therefrom in the light most favorable to the nonmoving party, Appellant, and improperly invaded the province of the jury to make findings of fact. *Wasatch Equality*, 820 F.3d at 386.

The trial court cited *Mulei v. Jet Courier Serv., Inc.* for the (dated, shaky, and weakly supported in caselaw) proposition that as a matter of law only certain types of information may be protected as confidential by a contract in Colorado. *Mulei v. Jet Courier Serv., Inc.*, 739 P.2d 889, 892-93 (Colo. App. 1987) (overruled on other grounds). Regardless, *Mulei* is distinguishable and not applicable to the legal issue presented here. *Mulei* was a case decided on a

completely different procedural posture: it was post bench-trial, on appeal from findings of fact and conclusions of law. *Id.* at 891. In *Mulei*, after a bench trial, the trial court found, as a matter of fact, that the employee had disclosed certain information, but that none of it qualified as confidential. *Id.* at 892-93. Consistent with its respect for the factual determinations of the court in a bench trial, the Colorado Court of Appeals explained that the judgment would not be overturned where, as a matter of law, "general knowledge", "general ability and know-how" and public information cannot be considered confidential but, crucially, within those bounds, the "[t]he determination of what constitutes 'confidential information' is a question for the trier of fact." *Id.*

Here, instead of allowing discovery and trial on the question of what information the employees disclosed during the process of their recruitment by Cherokee, and what exactly was the nature of that information, the trial court bypassed the entire factfinding process and held that Appellant had failed to plausibly allege the disclosure of confidential information in violation of the Individual Defendants' respective contracts. The trial court invaded the province of the factfinder and failed to view the allegations in the light most favorable to Appellant by prematurely deeming the alleged confidential information non-confidential.

The Court also erred by refusing to allow discovery into what other confidential information may have been disclosed, in contravention of the well-pleaded allegations in the Amended Complaint, and inferences reasonably drawn therefrom. The trial court single-mindedly focused only on the allegation concerning the confidential information covered by the "questionnaire," holding that the questionnaire only sought non-confidential information and therefore there was no claim. *See* Aplt. App. Vol. III at 256 ("The information requested through the questionnaire . . . is information a job applicant would list on a resume."). Appellant does not concede that the information requested by the questionnaire was not confidential and/or did not seek or sweep up confidential information. Aplt. App. Vol. II at 17, 20, ¶¶ 86, 107. Appellant also does not concede that it would be normal or appropriate to disclose such confidential information on a resume or in an interview. But even if the point is accepted for the sake of argument, and it is assumed the questionnaire sought only non-confidential information, the trial court completely ignored Appellant's allegation that the Individual Defendants disclosed other confidential information beyond the questionnaire. *See* Aplt. App. Vol. II at 17, ¶ 86 ("Such confidential and proprietary information included, <u>but on information and belief was not limited to</u>, details which included . . . ."); *see also id.* at 20, ¶ 107 ("Trade secrets that were misappropriated by Defendants included but were not limited to plans, approaches,

and proprietary methods for supporting the USDA on the ICAM contract."). Because Cherokee was emailing Appellant's employees to start a recruitment conversation, it is a reasonable inference from the allegations in the Amended Complaint that the Individual Defendants disclosed confidential information during that process. *See* Aplt. App. Vol. II at 17, 20, ¶¶ 86, 107; *see also id.* at 15, ¶ 72 ("As Cherokee Defendants were actively pursuing the government contract for the work that LS3 was, at that time, performing, it is clear that securing LS3's capabilities and manpower enabled and motivated the government to consider switching from LS3 to Cherokee Defendants"); *id.* at 15-16, ¶ 73 ("[H]ad Cherokee Defendants been unable to secure LS3's workforce it is likely that the government would have . . . simply extended LS3's contract . . . ."). The trial court erred when it foreclosed Appellant's ability to conduct discovery on the confidential information that Appellant believes discovery would show the Individual Defendants disclosed. It also erred when it decided that the confidential information alleged was not in fact confidential—this was a question that Colorado law states is to be decided by the trier of fact. *Mulei*, 739 P.2d at 893.

In sum, the trial court misapplied Fed. R. Civ. P. 12(b)(6) on the question of breach of the contracts' confidentiality obligations where the court did not accept the facts and inferences therefrom in the light most favorable to Appellant, and

where it decided a question that should have been left to the trier of fact. Accordingly, this Court should reverse.

II. The Court Improperly Dismissed the Claims for Intentional Interference with Contract and Conspiracy.

The trial court dismissed Appellant's claim for intentional interference with contract on the basis that the contracts were void as to the non-compete provisions and there was no claim for breach of contract on the issues of loyalty or confidentiality. It therefore concluded that there was no possibility that Cherokee tortiously caused a breach of those contracts. Aplt. App. Vol. III at 258-259. Because, as detailed *supra*, Appellant did state a claim for breach of contract on both the loyalty and confidentiality provisions, the claim for intentional interference with contract against Cherokee remains viable and should not have been dismissed for failure to state a claim.

The trial court dismissed the conspiracy claim on the same basis. Here, conspiracy was a derivative claim, hinging on the allegations of breach of contract, tortious interference with contract, and misappropriation of trade secrets. *See* Aplt. App. Vol. III at 262 (noting that, for a conspiracy claim, Plaintiff must allege an "unlawful overt act.") (citation omitted). On the basis of its finding that there was no claim for breach of contract, tortious interference, or misappropriation of trade secrets, the trial court held that there was "no cause of action for the conspiracy itself." *Id*. Because, as explained *supra*, the breach of contract claim and

intentional interference with contract claims should not have been dismissed, so too should the conspiracy claim survive. Accordingly, because Appellant plausibly alleged unlawful overt acts including breach of contract, intentional interference with contract, and misappropriation of trade secrets, the trial court's decision to dismiss this claim should also be reversed.

III. The Court Improperly Dismissed the Claim for Misappropriation of Trade Secrets.

The trial court dismissed this claim on the basis that Appellant failed to plausibly allege the existence of trade secrets. Aplt. App. Vol. III at 261. In so holding, the trial court failed to accept the facts in the light most favorable to Appellant, and likewise failed to draw reasonable inferences from those allegations in the light most favorable to Appellant. *Reznik*, 18 F.4th at 1260. "A claim has facial plausibility when the plaintiff plead[s] factual content [that] allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft*, 556 U.S. at 678 (citation omitted).

The trial court, in its decision, focused narrowly on the questionnaire, and held that "the information requested by the questionnaire, which is the only information plaintiff alleges were trade secrets, are not a trade secrets [sic]." Aplt. App. Vol. III at 261; *see also* Aplt. App. Vol. III at 262 ("It is implausible that the information requested by the questionnaire are trade secrets . . . . Accordingly,

plaintiff has failed to state a claim[.]"). However, this narrow focus was unwarranted and ignored the well pleaded allegations in the Amended Complaint.

Far from alleging only that the answers to the questionnaire constituted trade secrets, Appellant actually alleged far more, and used the questionnaire merely as an example or a related fact leading to a further inference of misappropriation. Appellant explained this in Appellant's brief, below: "It is a reasonable inference to draw from this conduct—an overt questionnaire seeking confidential information—that Cherokee was seeking, and the Employees were sharing, far more about LS3 than what appeared there." Aplt. App. Vol. II at 193.

The Amended Complaint supports this. In paragraph 107, Appellant alleged as follows: "Trade secrets that were misappropriated by Defendants included but were not limited to plans, approaches, and proprietary methods for supporting the USDA on the ICAM contract." Aplt. App. Vol. II at 20. Appellant also alleged that the "Cherokee Defendants were actively pursuing the government contract;" that "securing LS3's capabilities and manpower enabled and motivated the government to consider switching from LS3 to Cherokee Defendants" and that "the government wanted assurances regarding which of the existing LS3 workers they would get and this information was being used as a precursor to making the award to Cherokee Defendants." Aplt. App. Vol. II at 15-16, ¶¶ 72-73.

The clear, reasonable, and plausible inference to be drawn from these allegations, in the light most favorable to Appellant and construing the pleadings liberally, is that the Appellees misappropriated trade secrets through their conduct of recruiting Appellant's workers. Appellant made plausible allegations. Fed. R. Civ. P. 12(b)(6).

Appellant suspected but could not specifically say exactly what trade secrets were stolen—that is the function of the discovery process under a notice pleading standard. Appellant was not required to set out a *prima facie* case in its complaint. Because the trial court did not accept the facts and reasonable allegations therefrom in the light most favorable to Appellant, it committed reversible error and this Court should reverse.

CONCLUSION

For the foregoing reasons, Appellant respectfully asks this Court to reverse on all claims and remand for further proceedings.

Respectfully submitted this 29th day of December, 2021.

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CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of December, 2021, a true and correct copy of the foregoing Appellant's Opening Brief was served by the CM/ECF system on the following:

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CERTIFICATE OF COMPLIANCE

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In addition, I hereby certify that: (1) no privacy redactions were required, (2) this Brief as submitted to the Court in digital form is an exact copy of the written document filed with the Clerk, and (3) the digital form of this Brief was scanned for viruses using VIPRE Endpoint Security 2021, and, according to the program, is virus-free.

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