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 REPLY BRIEF

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SUMMARY OF ARGUMENT

LS3 preserved its causes of action against its former employees (the "Individual Defendants") for breaching the duty of loyalty and duty of confidentiality provisions in their respective contracts by raising these issues in its Responses to Defendants' Motions to Dismiss (the "Motion to Dismiss"). In fact, the parties all addressed these claims and the question of whether the USDA awarded the Individual Defendants' current employee ("Cherokee") the bridge contract prior to Laura Evans' August 13, 2020, email to the Individual Defendants (the "Evans Email") in the Motion to Dismiss briefing. Following this extensive briefing, the trial court decided the issue in its Order, which is the basis for this appeal. In the Order, the trial court improperly and unforeseeably determined that the USDA awarded Cherokee the bridge contract before the Evans Email based solely on Evans's uncorroborated—and clearly disputed—statement saying the same.

Appellees erroneously assert that LS3 failed to allege facts supporting its claims for breach of confidentiality, intentional interference with contract, and civil conspiracy. LS3's Amended Complaint includes various allegations supporting these claims, some of which Appellees gloss over or fail to acknowledge altogether. A closer review of the Amended Complaint reveals that these allegations rise well beyond the types of "naked assertion[s]" the Supreme Court has deemed insufficient.

Consequently, the Court should reverse the trial court on all claims and remand for further proceeding.

ARGUMENT

I. The Trial Court Erred in Dismissing the Contract Claims

The Issue Was Preserved for Appeal

LS3 asserted a cause of action against the Individual Defendants for breach of the duty of loyalty and duty of confidentiality provisions in their contracts. *See* Aplt. App. Vol. II at 17-18, ¶¶ 85-89. LS3 contends that the trial court erred in dismissing these claims, and in particular in relying on hearsay statements within a document outside of the complaint to make a factual finding. In their Joint Brief, the Individual Defendants argue that LS3 did not preserve this issue for appeal.

For an issue to be preserved for appeal, it must be "'presented to, considered [and] decided by the trial court.'" *Lyons v. Jefferson Bank & Trust*, 994 F.2d 716, 721 (10th Cir. 1993) (citing *Cavic v. Pioneer Astro Indus.*, 825 F.2d 1421, 1425 (10th Cir. 1987)).

Here, this issue was addressed in the briefing on the Motion to Dismiss. In its Motion to Dismiss, the defendant parties argued that LS3 no longer had a protectable business interest in retaining its employees because the USDA had *already awarded* the bridge contract to Cherokee prior to the Evans Email. Aplt. App. Vol. I at 234-235. Cherokee cited only to the content of the Evans Email to support this assertion. *Id*.

LS3 directly addressed this issue in its Response to the Motion to Dismiss, arguing that the Individual Defendants were "working with the Cherokee Defendants while [they] were still employed by LS3." Aplt. App. Vol. I at 6; App. Vol. II at 182. In addition, LS3 "alleged facts that support the notion that it had a very strong interest in the awarding of [the] *bridge contract*, not just the final USDA ICAM contract." Aplt. App. Vol. II at 188-189 (emphasis in original). LS3 also argued that Cherokee's conduct—undertaken while both parties sought the bridge contract—directly harmed LS3: LS3 lost its workforce and, consequently, its ability to compete for the bridge contract and future government contracts. *Id.*

The trial court's factual finding in the context of a Motion to Dismiss—whether the ICAM and bridge contracts had been awarded *before* the Evans Email was sent—has been the heart of this dispute since its outset.

The question of whether LS3 had a legitimate interest in retaining its employees when the Evans Email was sent hinges on whether the USDA had *already awarded* the bridge contract to Cherokee when the email was sent, which is a factual question. In its Order, the trial court made this factual determination by interpreting and misconstruing the language in the Evans Email stating "we are *being awarded*" the bridge contract as fact that the "Cherokee defendants *had already been awarded* the bridge contract" and that "[LS3] had already lost the contracts." Aplt. App. Vol.

III at 280-91 (emphasis added). "Being awarded" is a present continuous tense, not a past tense like the trial court concluded.

The trial court's conclusion and reasoning demonstrate one inescapable conclusion: the trial court made an improper factual determination on a motion to dismiss about when the USDA awarded Cherokee the bridge contract. Therefore, because the parties briefed the issue of whether Cherokee won the bridge contract before or after the Evans Email and the trial court decided that issue in its Order, LS3 successfully preserved that issue for appeal.

II. The Trial Court Committed Reversible Error by Considering the Evans Email to Prove the Truth of Its Contents

Cherokee's assertion that the trial court did not misinterpret the Evans Email misses the point and bolsters LS3's position that the trial court should not have been construing the meaning of the Evans Email in the first place. When considering documents incorporated by reference into a complaint, the Court "may look to the contents of a referenced document itself rather than solely to what the complaint alleges the contents to be." *Employees' Retirement System of Rhode Island v. Williams Companies, Inc.*, 889 F.3d 1153, 1158 (10th Cir. 2018) (citing *Roth v. Jennings*, 489 F.3d 499, 511 (2d Cir. 2007)). "'[S]uch documents may properly be considered only for what they contain, *not to prove the truth of their contents*.'" *Id*. (emphasis added). Thus, by considering the Evans Email to prove the truth of its

contents—rather than to determine what it contains—the trial court committed reversible error.

LS3 alleged in its Amended Complaint that:

> On or about August 13, 2020, Cherokee Defendants manager Laura Evans sent an email to all of Defendant's employees who were previously employed by LS3 and whom had been working in support of the ICAM contract. In the email, Ms. Evans stated that Cherokee Nation Strategic Programs *was to be awarded* a "bridge" contract . . . and had "teamed with two other strategic partners to deliver this work during the bridge period."

Aplt. App. Vol. II at 14 (emphasis added). LS3 thus employed the existence, date, and plain language of the Evans Email to show that Cherokee made overtures to LS3's employees *before* the USDA awarded the bridge and ICAM contracts. *See* Aplt. App. Vol. II at 14-15. This use of the Evans Email comports with the Court's holding in *Employees' Retirement* that a document incorporated by reference in the complaint may only be considered for what it contains, not the truth of its contents.

By contrast, the trial court here found that the Evans "[E]mail states that Cherokee defendants had already been awarded the bridge contract during the pendency of the protest period." Aplt. App. Vol. III at 280-91. The trial court then concluded that "because 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." *Id*.

As stated in the Appellant's Opening Brief ("Opening Brief"), the unverified statements in the Evans Email are inadmissible hearsay and the trial court cannot make a factual finding about the intent or meaning of the email on a Motion to Dismiss. Importantly, the trial court does not provide any basis for its factual conclusion that Cherokee had already won the contract besides its interpretation of the unverified statement in the Evans Email.

In the absence of any other basis to conclude that the USDA awarded Cherokee the bridge contract prior to August 13, 2020, the inescapable conclusion is that the trial court interpreted Evans's statement in favor of the Appellees to prove the truth of the matter asserted by Appellees.

III. The Trial Court Erred When It Dismissed LS3's Claim for Breach of the Confidentiality Provision.

Appellees argue that Appellant failed to adequately allege facts in support of its claim that the Individual Defendants breached their respective duties of confidentiality because (1) the questionnaire Evans sent to LS3's employees did not, in Appellees' view, ask for confidential information and (2) Appellant's allegation that its former employees disclosed confidential "plans, approaches, and proprietary methods" is not specific.

First, Appellees rely on *Mulei v. Jet Courier Serv., Inc.*, 739 P.2d 889 (Colo. App. 1987), to support its contention that the information Appellees sought and provided through the questionnaire was not confidential. As the *Mulei* Court

concludes, and as Appellant points out in its Opening Brief, whether information is confidential is a question of fact for the trier of fact. *Id*. at 892-93; Opening Brief at 21. This Court should also leave the determination of confidentiality to the jury. Aplt. App. Vol. II at 21 ("Plaintiff hereby demands a trial by jury on all issues so triable.").

Second, LS3's Amended Complaint alleged that "[t]rade 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, ¶ 107. Appellees argue that this allegation amounts to the type of "naked assertion" the *Ashcroft v. Iqbal* Court deemed insufficient. *Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009). Contrary to Appellees' assertions, the "doors of discovery" are open precisely so parties such as LS3 may paint a more detailed picture of precisely the types of "plans, approaches, and propriety methods" it alleges the Individual Defendants misappropriated. *Estate of Walter by & through Klodnicki v. Corr. Healthcare Companies, Inc.*, 232 F. Supp. 3d 1157, 1164 (D. Colo. 2017) (explaining that "the purposes of *Twombly* and *Iqbal* would not be advanced by an order dismissing" causes of action).

Appellees' reliance on *FCA US LLC v. Bullock*, 446 F. Supp. 3d 201, 209 (E.D. Mich. 2020), as an example of a court "dismissing claims that defendant breached confidentiality agreement where plaintiff failed to identify alleged

confidential information shared with defendant" is misplaced. Appellees' Brief at 34-35. The *Bullock* decision is readily distinguishable from the instant matter. Specifically, the *Bullock* Court dismissed the plaintiff's claim that the defendant breached a confidentiality agreement upon a motion for summary judgment under Federal Rule of Civil Procedure 56. *Id.* at 207; 212. The *Bullock* Court reached this decision after the parties had a chance to engage in extensive discovery. *Id*. at 211-12 (". . . to demonstrate that Bullock used its confidential information . . . FCA could have subpoenaed correspondence between Bullock and FCA. . . ."). Here, Appellant should be permitted the same opportunity to conduct discovery related to its claim that the Individual Defendants breached their respective confidentiality agreements.

IV. The Trial Court Erred When It Dismissed Appellant's Claims for Intentional Interference and Civil Conspiracy.

A. Intentional Interference

Appellant's claim for intentional interference with contract survives because (1) its claims for breach of contract based on both the loyalty and confidentiality provisions survive, as discussed in Opening Brief at § II and in §§I-III, *supra*; and (2) its Amended Complaint plead that Cherokee *wrongly interfered* with Individual Defendants' respective contracts with LS3 through false and misleading information and legal advice.

Appellees argue that Appellant failed to allege the type of "wrongful means" required to state a claim for intentional interference with contract. Appellees' Brief

at 38. In doing so, Appellees deploy an overly narrow rule formulation. Appellees' Brief at 38 (citing *Amoco Oil Co. v. Ervin*, 908 P.2d 493, 502 (Colo. 1995)). Deceit and misrepresentation, which LS3 alleged, are both "wrongful means" for purposes of intentional interference with contract claims. *Amoco Oil Co.,* 908 P.2d at n. 6 ("[L]isting conduct constituting wrongful means . . . deceit or misrepresentation[.]") (citing *Downey Chiropractic Clinic v. Nampa Restaurant Corp.*, 900 P.2d 191, 194 (Idaho 1995)).

Appellant's Amended Complaint alleges that: (1) Cherokee's representative, Laura Evans, emailed LS3's employees prior to the USDA awarding Cherokee the bridge contract, Aplt. App. Vol. II at 14-15, ¶¶ 61-65; 67-71; (2) Cherokee's representative, Arthur Molina, emailed LS3's employees while they were still under contract with LS3 urging them to act quickly, Aplt. App. Vol. II at 16, ¶¶ 74-76; and (3) Cherokee's overtures to LS3's employees contained information and legal advice that Cherokee and its representatives knew to be misleading, Aplt. App. Vol. II at 18-19, ¶¶ 92-97. In doing so, Appellant plead its claim for intentional interference with contract on the basis of deceit and misrepresentation. *See Amoco Oil Co.,* 908 P.2d at n. 6.

B. Civil Conspiracy

To state a claim for civil conspiracy under Colorado law, a plaintiff must allege: "(1) two or more persons, and for this purpose a corporation is a person; (2)

an object to be accomplished; (3) a meeting of the minds on the object or course of action; (4) one or more unlawful overt acts; and (5) damages as the proximate result thereof." *In re Qwest Commc'ns Int'l, Inc. Sec. Litig.*, 387 F. Supp. 2d 1130, 1153 (D. Colo. 2005) (citing *Jet Courier Serv., Inc. v. Mulei*, 771 P.2d 486, 502 (Colo. 1989)).

As set forth in the Opening Brief, LS3's conspiracy claim is derivative of its breach of contract, tortious interference, and misappropriation of trade secrets claims. Opening Brief at 24. LS3 alleged that the defendants "agreed, by words or conduct, to commit theft of trade secrets, intentional interference with contract, breach of contract, breach of fiduciary duty, breach of the duty of loyalty, and other unlawful goals against Plaintiff." Aplt. App. Vol. II at 19. The unlawful acts that defendants performed to accomplish these unlawful goals "included but were not limited to disclosure of confidential information, misappropriation of trade secrets under both federal and state law, breach of contract, breach of fiduciary duty, breach of the duty of loyalty, and intentional interference with contract." *Id.* Because LS3 alleged a plausible claim for conspiracy, the trial court's decision to dismiss the claim should be reversed. Opening Brief at 32.

V. The Trial Court Erred When It Dismissed Appellant's Claim For Misappropriation of Trade Secrets.

Appellant's Amended Complaint alleged multiple bases for its claim that Appellees misappropriated its trade secrets. Appellees argue that neither the

Incumbent Questionnaire Cherokee sent to LS3's employees nor Appellant's allegations that Appellees misappropriated its "plans, approaches, and proprietary methods for supporting the USDA on the ICAM contract" qualify as legally protected trade secrets sufficient to form a basis for a misappropriation of trade secrets claim. Appellees' Brief at 43-51. Appellant largely addresses these concerns in § III, *supra*, and in Opening Brief at 25-27.

Appellant's allegation that its "plans, approaches, and proprietary methods for supporting the USDA on the ICAM contract" constitute a protectable trade secret is sufficient to survive a motion to dismiss. In *SGS Acquisition Co. Ltd. v. Linsley*, 352 F. Supp. 3d 1109, 1122 (D. Colo. 2018), the Court, in ruling on a motion for summary judgment, determined that SGS's speculative and nonspecific "plan or concept for operation" of a mine presented a triable issue of fact as to whether this concept was a trade secret for purposes of C.R.S. § 7-74-101 *et seq*. Accordingly, Appellant need not set forth the specifics of its plans, approaches, and proprietary methods for supporting the USDA's ICAM contract; it only needs to plead that it had such designs for purposes of stating a claim for misappropriation of trade secrets.

CONCLUSION

For the reasons set forth in the Opening Brief and herein, LS3 respectfully requests that the Court reverse the trial court on all claims and remand for further proceeding.

Respectfully submitted this 14th day of March, 2022.

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CERTIFICATE OF SERVICE

I hereby certify that on the 14th day of March, 2022, a true and correct copy of the foregoing Appellant's Reply 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 2022, and, according to the program, is virus-free.

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