No. 21-1385

In the
United States Court of Appeals
for the Tenth Circuit

LS3 INC.

Plaintiff-Appellant,

v.

CHEROKEE NATION STRATEGIC PROGRAMS, L.L.C., ET AL.

Defendants-Appellees.

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

JOINT BRIEF FOR APPELLEES

Oral Argument Is Not Requested.

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GLOSSARY OF TERMS

- "Appellant" or "LS3" means Appellant-Plaintiff LS3, Inc.
- "Cherokee Defendants" means any or all of the following Appellee-Defendant entities: Cherokee Federal Solutions, L.L.C., Cherokee Services Group, LLC, and CNSP.
- "Individual Defendant(s)" means any or all of the following Appellee-Defendants: 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" refers collectively to the Cherokee Defendants and Individual Defendants.
- "USDA" or the "Government" means the United States Department of Agriculture.
- "ICAM Support Contract" means the USDA federal contract performed by LS3 prior to June 30, 2020, awarded to Easy Dynamics on June 30, 2020, and thereafter protested by two companies, including LS3's teaming partner.
- "Bridge Contract" means the contract for which the USDA made a directed award to Cherokee Defendants to perform ICAM Support Contract services

subsequent to the protests of the ICAM Support Contract.

- "Employment Agreement" means the Employment Agreement entered into by certain of Individual Defendants and LS3 during those Individual Defendants' employment with LS3.
- "IP-NDA" means the Intellectual Property, Non-Interference/Non-Solicitation and Non-Disclosure Agreement entered into by certain of Individual Defendants and LS3 during those Individual Defendants' employment with LS3.

STATEMENT OF THE ISSUE

Whether the Court should uphold the district court's determination that LS3 failed to state a claim upon which relief could be granted as to each of its causes of action based on the conclusory, deficient allegations in the Amended Complaint, along with a document extensively quoted in and heavily relied upon by LS3 in its pleadings.

STATEMENT OF THE CASE

LS3, a federal government contractor, misdirected its disappointment following its failure to receive award of a USDA government contract into this misguided lawsuit. *See* Am. Compl., Dkt. No. 21, App. Vol. 2 at 13 ¶ 60.[1] In its Amended Complaint, LS3 asserted claims against three of its competitors (*i.e.*, the "Cherokee Defendants"), one of which was awarded the coveted contract, and twenty-two of its former employees (*i.e.*, the "Individual Defendants"). Am. Compl., Dkt. No. 21, App. Vol. 2 at 8-26 ¶¶ 79-112. Specifically, LS3 alleged claims for breach of contract for violations of "non-compete," "non-solicitation," "loyalty," and "confidentiality" terms against the Individual Defendants; intentional interference with contract against the Cherokee Defendants; and civil

[1] Appellees' record citations refer to the [Document Title], [District Court Docket Number ("Dkt. No.")], Appendix Volume ("App. Vol.") [No.] at [Appendix Page]. Consistent with Bluebook Rule 17.1.4, in all citations to the Appendix, Appellees refer to the pagination assigned by Appellant in the lower-right-hand corner of each page, rather than the Electronic Case Filing system header.

conspiracy and misappropriation of trade secrets against all Defendants. Am. Compl., Dkt. No. 21, App. Vol. 2 at 8-26 ¶¶ 79-112.

Defendants moved to dismiss. Certain Defs.' Mot. to Dismiss Pl.'s Am. Compl., Dkt. No. 26, App. Vol. 2 at 32-108; Remaining Defs.' Mot. to Dismiss Pl.'s Am. Compl., Dkt. No. 29, App. Vol. 2 at 112-74 (individually and/or collectively, "Motion to Dismiss"). Upon review of the Motion to Dismiss and the Amended Complaint, the United States District Court for the District of Colorado (Brimmer, J.), in a thorough and well-reasoned Order (the "Order"), properly dismissed LS3's Amended Complaint in its entirety for failure to state a claim. Order, Dkt. No. 54, App. Vol. 3 at 246-63.

Although briefing at the district court level focused significantly on the validity, enforceability, and alleged breach of the Individual Defendants' non-compete agreements, LS3's Resp. to Certain Defs,' Mot. to Dismiss, Dkt. No. 32, App. Vol. 2 at 177-220; LS3's Resp. to Remaining Defs.' Mot. to Dismis, Dkt. No. 33, App. Vol. 3 at 1-15 (individually and/or collectively, "Response to Motion to Dismiss"), LS3 now abandons that claim, as well as its non-solicitation claim, on appeal. *See generally* Appellant's Brief and 8 n.3. In their place, LS3 pivots to several new arguments, never raised in the trial court, including, primarily, that the trial court should not have considered an exhibit attached to the Defendants' Motion to Dismiss. *Compare* Resp. to Mot. to Dismiss, Dkt. No. 32, App. Vol. 2

at 177-220, Dkt. No. 33, App. Vol. 3 at 1-15 *with* Appellant's Brief at 8-27. In dismissing the Amended Complaint, the district court appropriately construed LS3's deficient pleadings and properly considered the newly-challenged exhibit. Order, Dkt. No. 54, App. Vol. 3 at 246-63. This Court should affirm.

STATEMENT OF THE FACTS

A. Individual Defendants' Employment and the Bridge Contract

LS3 and the Cherokee Defendants are federal government contractors. Am. Compl., Dkt. No. 21, App. Vol. 2 at 8-26 ¶¶ 5-12, 57, 78. Prior to June 30, 2020, LS3 was an incumbent performer on the "ICAM Support Contract" with the USDA. Am. Compl., Dkt. No. 21, App. Vol. 2 at 8-26 ¶¶ 57-58. On June 30, 2020, the USDA awarded the next iteration of the ICAM Support Contract to a third party, Easy Dynamics. Am. Compl., Dkt. No. 21, App. Vol. 2 at 8-26 ¶ 58. Two companies, including LS3's teaming partner, protested the award. Am. Compl., Dkt. No. 21, App. Vol. 2 at 8-26 ¶ 58. Following the June 30, 2020 award, pending resolution of these protests, the USDA made a direct award of a bridge contract to Cherokee Defendants to perform the services called for in the ICAM Support Contract (the "Bridge Contract"). Am. Compl., Dkt. No. 21, App. Vol. 2 at 8-26 ¶¶ 58-60.

Each Individual Defendant is a former employee of LS3 who performed on LS3's incumbent ICAM Support Contract. Am. Compl., Dkt. No. 21, App. Vol. 2

at 8-26 ¶¶ 35-56. While working for LS3, each of the Individual Defendants signed either an "Employment Agreement" ("Employment Agreement") or an "Intellectual Property, Non-Interference/Non-Solicitation and Non-Disclosure Agreement" ("IP-NDA") (collectively, "Agreements"). Am. Compl., Dkt. No. 21, App. Vol. 2 at 8-26 ¶¶ 35-56. Through these Agreements, the Individual Defendants agreed, in relevant part, that they would not "participate or otherwise be involved in competition with LS3 *for the award of* any contract . . . that [the] [e]mployee knows or should have known LS3 was *competing or preparing to compete*"; participate in the "*award* of any contract" that "*would* replace, supersede, succeed, reduce, or diminish the work of LS3"; or "directly or indirectly induce or attempt to induce any . . . client . . . *to cease* doing business with" LS3. Mot. to Dismiss, Exs. A-H, Dkt. No. 26, App. Vol. 2 at 58-103; Exs. 1-8, Dkt. No. 29, App. Vol. 2 at 125-74 (emphasis added). The Individual Defendants further agreed they would not share LS3's confidential information with third parties, including "information of LS3 relating to clients, products, know-how, negotiation strategy, business, finances, or other business operations or activities." Mot. to Dismiss, Exs. A-H, Dkt. No. 26, App. Vol. 2 at 58-103; Exs. 1-8, Dkt. No. 29, App. Vol. 2 at 125-74.

On August 13, 2020, CNSP's manager, Laura Evans ("Evans"), sent an email (the "Evans Email") to the Individual Defendants, informing them that

"Cherokee Nation Strategic Programs (CNSP) has been notified we are being awarded a bridge (interim) contract for four to nine months while the long-term contract award is completed" and assuring them that "CNSP and its partners will give employment preference to current team members who apply for employment on the bridge contract." Am. Compl., Dkt. No. 21, App. Vol. 2 at 8-26 ¶ 61; Mot. to Dismiss Ex. I, App. Vol. 2 at 105-08. The Evans Email continued: "We understand how difficult this uncertainty is for incumbent personnel on a contract, and our desire is to make this a simple and uneventful transition, both transitioning into the CNSP contract, and transitioning out to the eventual winner of the long-term contract."[2] Mot. to Dismiss Ex. I, App. Vol. 2 at 105-08. In order to ensure employees received their same salaries and could transition their positions efficiently, Evans attached an "Incumbent Questionnaire," requesting that the Individual Defendants provide their job title, work duties, a pay stub, and other background information. Am. Compl., Dkt. No. 21, App. Vol. 2 at 8-26 ¶ 65; Mot.

[2] Public policy favors efficient transition of government contracts to successive contractors. If Federal Acquisition Regulation 52.237-3 is incorporated into a federal contract, the prime contractor "recognizes that the services under [the relevant] contract are vital to the Government and must be continued without interruption and that, upon contract expiration, a successor, either the Government or another Contractor, may continue them." 48 C.F.R. § 52.237-3(a). "The [prime contractor therefore] agrees to . . . exercise its best efforts and cooperation to effect an orderly and efficient transition to a successor." *Id.* The prime contractor is also required to "allow as many personnel as practicable to remain on the job to help the successor maintain the continuity and consistency of the services" provided to the Government. *Id.* § 52.237-3(c).

to Dismiss Ex. I, Dkt. No. 26, App. Vol. 2 at 108. Evans specifically instructed the Individual Defendants not to provide any of LS3's proprietary information in response to the Incumbent Questionnaire. Mot. to Dismiss Ex. I, Dkt. No. 26, App. Vol. 2 at 105-08. Each Individual Defendant complied, eventually resigned from or was terminated by LS3, and continued to perform their ICAM Support Contract services under the Bridge Contract with CNSP or its teammates. Am. Compl., Dkt No. 21, App. Vol. 2 at 8-26 ¶ 66, 77-78.

B. LS3's Allegations

In its disappointment following the loss of what it perceived to be a contract to which it was entitled, LS3 concocted a conspiracy theory involving its own previous employees, the Cherokee Defendants, and the USDA: that Cherokee Defendants misled the Individual Defendants into accepting new employment in order to convince the USDA to award Cherokee Defendants the Bridge Contract. *See generally* Am. Compl., Dkt. No. 21, App. Vol. 2 at 8-26.

Against its former employees, LS3 claimed that the Individual Defendants breached the Agreements: (a) by "competing with LS3 both during and following the Individual Defendants' employment" through working on the Bridge Contract and, subsequently, on the new ICAM Support Contract for the new USDA contractor, Am. Compl., Dkt. No. 21, App. Vol. 2 at 8-26 ¶¶ 88-89; (b) by "interfering with and/or causing the curtailment, cancellation, discontinuation,

[and/or] reduction of LS3's customers' business relations with LS3[,]" Am. Compl., Dkt. No. 21, App. Vol. 2 at 8-26 ¶ 89; and (c) by "disclosing confidential and proprietary information to the Cherokee Defendants" in response to the Incumbent Questionnaire attached to the Evans Email, Am. Compl., Dkt. No. 21, App. Vol. 2 at 8-26 ¶¶ 85-86. LS3 also alleged that four of the Individual Defendants solicited their fellow employees to leave LS3 and begin employment with the Cherokee Defendants. Am. Compl., Dkt. No. 21, App. Vol. 2 at 8-26 ¶ 83.

Against its competitors, LS3 claimed that the Cherokee Defendants intentionally interfered with the Individual Defendants' Agreements with LS3. Am. Compl., Dkt. No. 21, App. Vol. 2 at 8-26 ¶ 95. Referring to the Evans Email, LS3 alleged that Cherokee Defendants, "provid[ed] the Individual Defendants misleading information, including misleading legal advice." Am. Compl., Dkt. No. 21, App. Vol. 2 at 8-26 ¶¶ 64 (claiming that the Evans Email provided the Individual Defendants with information "pertaining to employment law"), 95 (stating the purported basis for an intentional interference claim).

And, against all Defendants, LS3 vaguely claimed that Defendants misappropriated LS3's trade secrets when the Individual Defendants allegedly shared certain unidentified "proprietary information about LS3's business operations and equipment" and "plans, approaches, and proprietary methods for

supporting the USDA on the ICAM contract" with Cherokee Defendants. Am. Compl., Dkt. No. 21, App. Vol. 2 at 8-26 ¶¶ 105, 107. LS3 lastly advanced a catch-all civil conspiracy claim against all Defendants, alleging that they reached an agreement to disclose LS3's confidential information; misappropriate LS3's trade secrets; breach the Individual Defendants' contracts, fiduciary duties, and duties of loyalty; and interfere with LS3's contracts. Am. Compl., Dkt. No. 21, App. Vol. 2 at 8-26 ¶ 98-103.

Although LS3 did not attach the Evans Email to its Amended Complaint, it quoted from and paraphrased the Evans Email extensively. Am. Compl., Dkt. No. 21, App. Vol. 2 at 8-26 ¶¶ 61-65, 86, 95. LS3 further relied on the Evans Email and the Incumbent Questionnaire attached thereto in support each of its claims. Am. Compl., Dkt. No. 21, App. Vol. 2 at 8-26 ¶¶ 79-112. In fact, LS3 based its intentional interference claim entirely on the Evans Email, claiming that it provided the Individual Defendants with "misleading legal advice." Am. Compl., Dkt. No. 21, App. Vol. 2 at 8-26 ¶¶ 64, 95.

C. Defendants' Motions to Dismiss and the Trial Court Order

Defendants filed two motions to dismiss: one by a group of seventeen defendants, including the Cherokee Defendants and fourteen Individual Defendants (identified as "Certain Defendants" in their motion), and one by the other eight Individual Defendants (identified as "Remaining Defendants" in their motion).

Certain Defs.' Mot. to Dismiss Pl.'s Am. Compl., Dkt. No. 26, App. Vol. 2 at 32-108; Remaining Defs.' Mot. to Dismiss Pl.'s Am. Compl., Dkt. No. 29, App. Vol. 2 at 112-74. Given LS3's heavy reliance on the Evans Email in the Amended Complaint, Defendants attached the Evans Email to Certain Defendants' Motion to Dismiss, so that the trial court could evaluate it in full and in context. Mot. to Dismiss Ex. I, Dkt. No. 26, App. Vol. 2 at 105-08. In its opposition, LS3 did not object to Defendants' reliance on, or the trial court's consideration of, the Evans Email. *See generally* Resp. to Mot. to Dismiss, Dkt, No. 32, App. Vol. 2 at 177-220; Dkt. No. 33, App. Vol. 3 at 1-15. In fact, LS3, itself, cited to the Evans Email. Resp. to Mot. to Dismiss, Dkt. No. 32, App. Vol. 2 at 193; Dkt. No. 33, App. Vol. 3 at 13.

On September 29, 2021, the district court entered its Order granting Defendants' motions to dismiss in their entirety. Order, Dkt. No. 54, App. Vol. 3 at 246-65. The trial court properly concluded that LS3 could not establish a breach of contract by the Individual Defendants because: (a) the non-compete clauses are unenforceable under Colorado public policy, Order, Dkt. No. 54, App. Vol. 3 at 252-54; (b) LS3 failed to establish that the Individual Defendants disclosed any of LS3's confidential information, Order, Dkt. No. 54, App. Vol. 3 at 255-56; (c) LS3's allegations that some of the Individual Defendants solicited other employees were conclusory and insufficient to state a claim, Order, Dkt. No. 54, App. Vol. 3

at 257 n.4; and (d) LS3 did not allege sufficiently a breach of the duty of loyalty provisions in the Agreements because, by the time the Cherokee Defendants contacted the Individual Defendants for the first time, it was already clear that CNSP, not LS3, would perform the Bridge Contract, and the duty of loyalty provisions only apply to "current or active business opportunit[ies][,]" Order, Dkt. No. 54, App. Vol. 3 at 256-57. The trial court further concluded that, because the underlying breach of contract claims fail, the intentional interference with contract and civil conspiracy claims must also fail. Order, Dkt. No. 54, App. Vol. 3 at 258-59, 262. And, with regard to the misappropriation of trade secrets claim, the trial court found LS3 failed to identify any actual confidential information or trade secret that had been misappropriated. Order, Dkt. No. 54, App. Vol. 3 at 260-62. LS3 now challenges most of the trial court's findings, relying substantially on arguments asserted for the first time on appeal.

SUMMARY OF THE ARGUMENT

The district court properly dismissed LS3's Amended Complaint. Despite two opportunities to allege viable claims, LS3 could not plead sufficient facts to state a claim upon which relief could be granted as to any of its causes of action. FED. R. CIV. P. 12(b)(6).

First, the trial court's dismissal of LS3's breach of contract claims was proper. LS3 has not alleged—nor can it—that any of the Individual Defendants

interfered with LS3's efforts to obtain work from the USDA. The Individual Defendants responded to job opportunity inquiries and provided their basic job information only after receiving an email stating that CNSP—not LS3—was being awarded the Bridge Contract, and no facts have been alleged that show that Individual Defendants provided or offered any assistance to the Cherokee Defendants at any stage in the procurement process, let alone at any time prior to the Evans Email. Moreover, contrary to LS3's brand new arguments on appeal, the trial court properly considered the Evans Email, attached to the Motion to Dismiss, because it was quoted and relied upon in LS3's Amended Complaint, was central to LS3's claims, and was never challenged by LS3 in the trial court. LS3 also failed to plausibly allege that the Individual Defendants disclosed any of LS3's confidential information. The information on which LS3 based its claims is decidedly not confidential; it is basic information that is not entitled to protection. And, even though LS3 has used hindsight to change its position on appeal, it is *still* unable to identify any confidential information shared beyond naked, conclusory assertions without factual support.

Second, LS3 has no claim for intentional interference. As a threshold matter, an intentional interference with contract claim cannot exist where there is no breach of a third-party contract. Because LS3's breach of contract claims lack any merit, so too does its intentional interference claim. What is more, LS3 utterly

failed to plead any facts to suggest that the Cherokee Defendants "improperly" interfered with the Agreements, a mandatory element of the claim under the circumstances of this case.

Third, LS3's civil conspiracy claim was properly dismissed. Civil conspiracy is a derivative claim, meaning that it exists only when there is a viable and independent underlying cause of action. Because all of LS3's causes of action fail, to so too must its civil conspiracy claim. Moreover, LS3 wholly failed to plead that Defendants had a meeting of the minds to pursue some unlawful goal, as required to sustain a civil conspiracy claim.

And, finally, LS3 did not plead facts sufficient to sustain a misappropriation of trade secrets claim under federal or state law. Just like its claim for breach of the confidentiality provisions of the Agreements, LS3 is unable to identify a single trade secret shared outside the company.

For all of these reasons, LS3's Amended Complaint failed to state a claim upon which relief could be granted. The trial court thoroughly considered the Amended Complaint, the documents central to it (indeed, without objection), and the legal principles applicable to LS3's causes of action. And, it properly dismissed LS3's Amended Complaint. This Court should affirm.

STANDARD OF REVIEW

An appellate court reviews a trial court's grant of a motion to dismiss filed

under Rule 12(b)(6) of the Federal Rules of Civil Procedure *de novo*. *Gee v. Pacheco*, 627 F.3d 1178, 1183 (10th Cir. 2010) (citing *Howard v. Waide*, 534 F.3d 1227, 1242-43 (10th Cir. 2008)). Although Rule 8 requires a "short and plain statement of the claim showing that the pleader is entitled to relief[,]" FED. R. CIV. P. 8(a)(2), "it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation[,]" *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (citing *Papasan v. Allain*, 478 U.S. 265, 286 (1986)). Rather, "[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotation marks omitted).

To determine whether a complaint states a claim, the court "'accept[s] as true all well-pleaded factual allegations . . . and view[s] these allegations in the light most favorable to the plaintiff.'" *Casanova v. Ulibarri*, 595 F.3d 1120, 1124 (10th Cir. 2010) (citations omitted). This standard is not applicable to legal conclusions couched as factual allegations. *Iqbal*, 556 U.S. at 678.

Although the appellate court applies *de novo* review to a trial court's decision granting a motion to dismiss, the appellate court is not restricted by the trial court's conclusions or grounds for decision. Indeed, an appellate court may "affirm a lower court's ruling[,]" including a dismissal order, "on any grounds adequately supported by the record, even grounds not relied upon by the district

court." *Safe Streets All. v. Hickenlooper*, 859 F.3d 865, 879 (10th Cir. 2017) (quoting *Elwell v. Byers*, 699 F.3d 1208, 1214 n.4 (10th Cir. 2012)).

ARGUMENT

For the reasons discussed herein, the trial court's dismissal was correct in all respects. Accordingly, this Court should affirm.

I. The Trial Court Properly Dismissed LS3's Claim for Breach of Contract

LS3 primarily argues that this Court should reverse the district court's dismissal of LS3's claim for breach of contract against the Individual Defendants. Appellant's Brief at 8-24. On appeal, LS3 wisely abandons its claims that the Individual Defendants breached the non-compete and non-solicitation provisions of their respective agreements. *See generally* Appellant's Brief and 8 n.3 ("Appellant does not challenge the part of the order dismissing the claim that the defendants breached the noncompete provisions of the contracts.").[3] Now, LS3 focuses only on its claims that the Individual Defendants breached the "loyalty"

[3] Under Colorado law, "[a]ny covenant not to compete which restricts the right of any person to receive compensation for performance of skilled or unskilled labor for any employer shall be void." COLO. REV. STAT. ANN. § 8-2-113(2) (West 2022). The Individual Defendants had every legal right to seek employment with the new contractor, and that contractor was completely within its rights to offer them work. *Id.*; *see also supra* note 2. Therefore, LS3's attempts to lock up its government contracts through non-compete clauses with its employees are void as a matter of law, and the trial court properly concluded the same. Order, Dkt. No. 54, App. Vol. 3 at 250-54.

and confidentiality provisions of their respective agreements. Appellant's Brief at 8-24. But, these claims fare no better and were properly dismissed below.

A. LS3's Claim That the Individual Defendants Breached the Loyalty Provision Fails

LS3's claim that the Individual Defendants breached the "duty of loyalty" provisions of their Agreements turns on whether LS3 alleged any facts to show that the Individual Defendants took some action to affect the USDA's Bridge Contract decision. Am. Compl., Dkt. No. 21, App. Vol. 2 at 8-26 ¶ 89. LS3 explained its claim below as follows:

> As stated in the Employment Agreement, during their employment, [Individual Defendants] were not allowed to "directly or indirectly *induce or attempt to induce* any customer . . . to cease doing business with the Company," or "to not engage in doing business with the Company." [ ] The IP-NDA's language is similar and states that employees may not, during the term of their employment, "*interfere with*, or *cause to* curtail, cancel, discontinue, terminate or reduce the extent of, any Customer's . . . business relations with LS3; or . . . in any manner encourage, request, induce, influence, solicit or recruit . . . any of the . . . customers of LS3 . . . to take any action that would disrupt, interfere with, or otherwise be disadvantageous to LS3's relationship with such person or entity."

Resp. to Mot. to Dismiss, Dkt. No. 32, App. Vol. 2 at 181-82 (emphasis added). As the trial court observed: "[T]he plain language of these duty of loyalty provisions only prevent[s] a current employee from generally interfering with a current or active business opportunity." Order, Dkt. No. 54, App. Vol. 3 at 257.

The trial court properly dismissed all claims based on these provisions. Order, Dkt. No. 54, App. Vol. 3 at 256-57.

The Individual Defendants' only loyalty-based obligation was to refrain from "directly or indirectly induc[ing] or attempt[ing] to induce" or "encourag[ing], request[ing] . . . or influenc[ing]" any "customer . . . to cease doing business with the Company." Mot. to Dismiss Exs. A-H, Dkt. No. 26, App. Vol. 2 at 58-103; Exs. 1-8, Dkt. No. 29, App. Vol. 2 at 125-74. The record establishes that the Individual Defendants did not discuss a job offer with CNSP (or its teaming partners) until after they learned that it "[was] being awarded" the Bridge Contract. Mot. to Dismiss Ex. I, Dkt. No. 26, App. Vol. 2 at 105-06; Am. Compl., Dkt. No. 21, App. Vol. 2 at 8-26 ¶ 61. Indeed, there is no allegation in the Amended Complaint of any facts showing cooperation, inducement, encouragement, influence, *or even contact* between Individual Defendants and CNSP prior to that date. *See generally* Am. Compl., Dkt. No. 21, App. Vol. 2 at 8-26. Although, based on its allegations, it is evident LS3 wished to lock down its former employees so that they could not work for a future ICAM Support Contract recipient, the duty of loyalty does not extend that far and cannot extend that far under Colorado law. COLO. REV. STAT. ANN. § 8-2-113(2) (West 2022). Public policy principles—and, often, a contractor's express contractual obligation to the Government—also abhor LS3's attempt to prevent an efficient transfer of

performance on the ICAM Support Contract. 48 C.F.R. § 52.237-3; *see also supra* note 2 and accompanying text. And, notably, once the USDA made the decision to proceed with a new contractor for the Bridge Contract, LS3 no longer had any current or active business opportunity with which the Individual Defendants could have interfered in any event. Am. Compl., Dkt. No. 21, App. Vol. 2 at 8-26 ¶¶ 60-61; Mot. to Dismiss Ex. I, Dkt. No. 26, App. Vol. 2 at 105-06.

LS3 now challenges the trial court's decision, arguing *for the first time on appeal* that the Evans Email: (a) should not have been considered by the trial court at all, as it was a document outside the Amended Complaint; (b) was hearsay; (c) was factually disputed; and (d) was misinterpreted by the trial court. Appellant's Brief at 8-20. Each of these arguments lacks merit.

First, LS3 failed to preserve and therefore forfeited all arguments that the district court should not have considered the Evans Email, that the Evans Email was hearsay, and that the content of the Evans Email was factually disputed, because it did not raise those issues in the trial court, *see generally* Resp. to Mot. to Dismiss, Dkt. No. 32, App. Vol. 2 at 177-220; now, LS3 waives any related arguments because it fails to argue plain error in its brief, Appellant's Brief at 8-20. ***Second***, the district court did not err by exercising its discretion to consider the Evans Email, because it is central to LS3's claims and indisputably authentic. *See generally* Am. Compl., Dkt. No. 21, App. Vol. 2 at 8-26. ***Third***, the trial court

properly interpreted the Evans Email and concluded that LS3 could not state a claim for breach of contract. And, ***fourth***, even if the trial court had excluded the Evans Email, the Amended Complaint fails to state a claim for breach of the "loyalty" provisions of the Agreements. *See generally* Am. Compl., Dkt. No. 21, App. Vol. 2 at 8-26. For each of these reasons, this Court should affirm the district court's order dismissing LS3's breach of contract claim.

1. LS3 Failed to Preserve and Otherwise Waived Any Objection to the Court Considering the Evans Email, Any Claim That the Evans Email is Hearsay, and Any Argument That the Evans Email Raised a Factual Dispute

As a general rule, a federal appellate court will not consider an issue that was not "presented to, considered [and] decided by the trial court." *Lyons v. Jefferson Bank & Tr.*, 994 F.2d 716, 721 (10th Cir. 1993) (quoting *Cavic v. Pioneer Astro Indus., Inc.*, 825 F.2d 1421, 1425 (10th Cir. 1987)). Thus, if an appellant fails to raise an argument before the district court, it forfeits that argument on appeal. *Richison v. Ernest Grp., Inc.*, 634 F.3d 1123, 1130 (10th Cir. 2011); *Tele-Commc'ns, Inc. v. Comm'r*, 104 F.3d 1229, 1233 (10th Cir. 1997) ("In order to preserve the integrity of the appellate structure, [the appellate court] should not be considered a 'second-shot' forum, [where] . . . back-up theories may be mounted for the first time.") (internal quotations and citations omitted). Accordingly, this Court should not consider LS3's newly raised arguments, which were not raised, briefed, or decided below. *Compare* Resp. to Mot. to Dismiss,

Dkt. 32, App. Vol. 2 at 177-220 *with* Appellant's Brief at 8-20.

This Court has characterized its willingness to exercise its discretion to hear forfeited issues "only in the most unusual circumstances." *Lyons*, 994 F.2d at 721. In fact, "an appellant must argue plain error" in order "[t]o urge reversal of an issue that was forfeited in district court."[4] *In re Rumsey Land Co., LLC*, 944 F.3d 1259, 1271 (10th Cir. 2019). And, "[i]f an appellant does not explain [in its opening brief] how its forfeited arguments survive the plain error standard, it effectively waives those arguments on appeal." *Id*.; *see also McKissick v. Yuen*, 618 F.3d 1177, 1189 (10th Cir. 2010) ("[E]ven if [a party's] arguments were merely forfeited before the *district court*, [the] failure to explain in [its] opening appellate brief why this is so and how they survive the plain error standard waives the arguments in *this* court[.]") (italicized emphasis in original; underline emphasis added).

The Tenth Circuit has applied this well-settled principle to arguments raised for the first time on appeal from an order granting a motion to dismiss for failure to state a claim. *McDonald v. Kinder-Morgan, Inc.*, 287 F.3d 992, 999 (10th Cir. 2002). In *McDonald*, the district court granted the appellee corporation's 12(b)(6)

[4] Even if LS3 had argued plain error in its opening brief, that standard is an "extraordinary, nearly insurmountable burden" and requires that "a party must establish the presence of (1) error, (2) that is plain, which (3) affects substantial rights, and which (4) seriously affects the fairness, integrity, or public reputation of judicial proceedings." *Richison*, 634 F.3d at 1128, 1130.

motion to dismiss appellants' securities fraud suit. *Id.* at 994. "For the first time on appeal," appellants attempted to raise an argument related to the nature of disclosures made by the appellee corporation on its annual public filings. *Id.* at 999. The Court "closely reviewed the record and conclude[d] that this particular issue or theory was never presented below." *Id.* The Court further held that the appellants failed to identify "any extraordinary circumstances that would justify taking up this issue for the first time on appeal." *Id*. Consequently, the Court refused to address the issue. *Id.* This Court should reach the same conclusion.

Similar to the appellant in *McDonald*, LS3 raises a number of issues for the first time on appeal. *Compare* Resp. to Mot. to Dismiss, Dkt. No. 32, App. Vol. 2 at 177-220 *with* Appellant's Brief at 8-20. Specifically, LS3 now asserts that the district court erred when it considered the Evans Email in its ruling: (1) because the document was hearsay; (2) because the document was outside the complaint; and (3) because the document contained allegedly disputed factual material. Appellant's Brief at 8-20. But, in its opposition to Defendants' motions to dismiss, LS3 failed to make a single challenge to Defendants' inclusion of the Evans Email as an exhibit or its admissibility or reliability. Resp. to Mot. to Dismiss, Dkt. No. 32, App. Vol. 2 at 177-220. Like the appellant in *McDonald*, "there is simply no hint" of LS3's theory for error in its trial briefing. 287 F.3d at 999. This is particularly evident from LS3's failure to provide appendix cites to its trial court

opposition throughout the argument in Appellant's Brief. *See generally* Appellant's Brief at 8-20; *see also* 10th Cir. R. 28.2(C)(2) ("For each issue raised on appeal, all briefs must cite the precise reference in the record where the issue was raised and ruled on.").

Now, before this Court, LS3 also fails to make the mandatory plain error argument to justify its reliance on new arguments not originally presented to the trial court. Appellant's Brief at 8-20. As a result, LS3 has waived the arguments, and this Court should decline to decide them. *See, e.g., Truman v. Orem City*, 1 F.4th 1227, 1243-44 (10th Cir. 2021) (affirming entry of summary judgment where appellant forfeited arguments by failing to assert them in summary judgment briefings, then waived any argument regarding plain error review by failing to assert plain error on appeal); *In re Motor Fuel Temperature Sales Pracs. Litig.*, 872 F.3d 1094, 1107 (10th Cir. 2017) ("Because the [appellees] are correct that [appellant] (1) didn't raise this specific argument below and (2) doesn't attempt to establish plain error on appeal, we decline to consider this argument.") (citations omitted). Because, in the trial court, LS3 did not object to the Evans Email as an exhibit to the motions to dismiss, did not assert that the Evans Email was hearsay, and did not claim that the Evans Email contained disputed factual material, and because, in this Court, LS3 failed to argue plain error, LS3 is absolutely foreclosed from raising those arguments on appeal.

2. The Trial Court Properly Considered the Evans Email

Even if LS3 had raised an objection at the proper time, the district court acted correctly in considering the Evans Email. "When presented with a Rule 12(b)(6) motion, the district court has broad discretion in determining whether to accept materials beyond the pleadings." *Brokers' Choice of Am., Inc. v. NBC Universal, Inc.*, 861 F.3d 1081, 1103 (10th Cir. 2017) (citing *Lowe v. Town of Fairland, Okla.*, 143 F.3d 1378, 1381 (10th Cir. 1998)). Thus, this Court reviews for an abuse of discretion a court's decision to consider documents outside the complaint on a 12(b)(6) motion to dismiss. *Id.* The trial court did not abuse its discretion.

LS3 acknowledges in its brief that a district court may consider documents outside of the complaint that are "referred to in the complaint if the documents are central to the claim and their authenticity is not disputed." Appellant's Brief at 15 (citing *Gee*, 627 F.3d at 1261). Still, without citing any case law, LS3 declares the district court should not have considered the Evans Email because it is not "central" to the breach of contract issue or authentic. Appellant's Brief at 15. LS3's unsubstantiated contention lacks support in the record and ignores precedent.

The Tenth Circuit has held a document is "central" to a plaintiff's claims where it is "frequently referred to and quoted from . . . in [the] amended

complaint." *GFF Corp. v. Assoc. Wholesale Grocers, Inc.*, 130 F.3d 1381, 1385 (10th Cir. 1997). In its Amended Complaint, LS3 referred to or quoted the Evans Email repeatedly – in at least seven paragraphs. Am. Compl., Dkt. No. 21, App. Vol. 2 at 8-26 ¶¶ 61-65, 86, 95. Indeed, the Individual Defendants' purported responses to the email are the gravamen of Appellant's breach of contract claim against them, Am. Compl., Dkt. No. 21, App. Vol. 2 at 8-26 ¶¶ 86, 89, and the Evans Email represents the *entire factual basis* for LS3's intentional interference claim, Am. Compl., Dkt. No. 21, App. Vol. 2 at 8-26 ¶¶ 64, 95 (alleging that the Evans Email included a "link to legal information pertaining to employment law" and claiming that "[t]he Cherokee Defendants intentionally and improperly interfered with the contract by providing the Individual Defendants misleading information, including misleading legal advice"). In its own opposition to the motion to dismiss, LS3 cited to the Evans Email and its attachment as specific evidence of Defendants' purported misappropriation of trade secrets. Resp. to Mot. to Dismiss, Dkt. No. 32, App. Vol. 2 at 193; Dkt. 33, App. Vol. 3 at 13 ("The [Incumbent] Questionnaire . . . alone is enough to make out a plausible claim here, as it is an obvious inference that the [Individual Defendants] in fact filled it out since they are now Cherokee [Defendants'] employees."). Therefore, LS3's suggestion that the Evans Email should not be considered "central" to its claims or authentic belies both logic and the record. *See GFF Corp.*, 130 F.3d at 1385

(document outside complaint was "indisputably authentic and central to [plaintiff's] breach of contract claim" because plaintiff referred to the document in its brief); *see also Jacobsen v. Deseret Book Co.*, 287 F.3d 936, 935 (10th Cir. 2002) ("Because [Plaintiff's] complaint referred to [outside documents], and all the parties invited the district court to consider these works, the district court properly considered the work in ruling on the 12(b)(6) motion.") (internal citation omitted). Based on LS3's own Amended Complaint and arguments in opposition to dismissal, the district court did not err in considering the Evans Email when ruling on Defendants' motions to dismiss.

3. The Trial Court Did Not Misinterpret the Evans Email

Next, LS3 argues that the trial court committed reversible error by misinterpreting the Evans Email in a manner that allegedly contradicted LS3's theory of the case. However, the district court accurately understood the Evans Email and was under no obligation to credit LS3's misleading paraphrasing and characterizations from the Amended Complaint.[5] Critically, the legal effect of an exhibit considered on a motion to dismiss "'is to be determined by [the document's] terms rather than by the allegations of the pleader.'" *Droppleman v.*

[5] Notably, "because [this Court's] review is *de novo*, [it] need not concern [itself] with" LS3's contentions that "the district court resolved several issues of fact against [LS3] and ignored issues of disputed material fact." *TMJ Implants, Inc. v. Aetna, Inc.*, 498 F.3d 1175, 1181 (10th Cir. 2007).

Horsley, 372 F.2d 249, 250 (10th Cir. 1967) (quoting *Zeligson v. Hartman-Blair, Inc.*, 126 F.2d 595, 597 (10th Cir. 1942)). Accordingly, contrary to LS3's contention, the trial court was required to take the document at face value, even if that did not comport with LS3's framing of the issues. LS3's claims fail as a result.

In *Brokers' Choice of America, Inc.*, 861 F.3d 1081, this Court explained that if there is a conflict between the allegations in the complaint and the content of the exhibit, *it is the exhibit that controls*. *Id.* at 1105 (citations omitted). "If the rule were otherwise, a plaintiff with a deficient claim could survive a motion to dismiss simply by not attaching a dispositive document upon which the plaintiff relied." *GFF Corp.*, 130 F.3d at 1384-85. This is exactly the result LS3 seeks. LS3 faults the district court for relying on the terms of the Evans Email rather than LS3's mischaracterizations, misleading descriptions, selective paraphrases, and inconsistent conclusions regarding the email. This Circuit has expressly rejected previous attempts to do the same. *Brokers' Choice*, 861 F.3d at 1113, 1123, 1126-27, 1132, 1133 (reviewing seminar recording central to plaintiff's amended complaint and determining recording's character based on the actual content of the recording rather than appellant's description of it in the amended complaint, ultimately holding the recording "undercut[]," "belie[d]," and "contradict[ed]" plaintiff's allegations). It should hold similarly here.

The terms of the Evans Email are certain: "[CNSP] *has been notified* that we are being awarded a bridge (interim) contract for four to nine months while the long-term contract is completed."[6] Mot. to Dismiss Ex. I, Dkt. No. 26, App. Vol. 2 at 105-08 (emphasis added). In other words, the USDA already had made the decision that LS3 would not receive the Bridge Contract. Mot. to Dismiss Ex. I, Dkt. No. 26, App. Vol. 2 at 105-08.

Furthermore, contrary to LS3's brand new position on appeal, reliance on the Evans Email did not violate the hearsay rules because the document was offered and relied upon—by both parties—for reasons other than to prove the truth of the matter asserted. *See* FED. R. EVID. 801(c) (hearsay is "a statement that . . . a party offers in evidence to prove the truth of the matter asserted in the statement."); *United States v. Ledford*, 443 F.3d 702, 707 (10th Cir. 2005) ("A statement offered to prove something other than the truth of the matter asserted is not hearsay."). LS3 originally offered the newly-challenged content of the Evans Email to show the Cherokee Defendants' alleged motivation for contacting the Individual Defendants. Am. Compl., Dkt. No. 21, App. Vol. 2 at 8-26 ¶¶ 61-71. The Tenth

[6] In arguing that the district court "misinterpreted and mischaracterized" the terms of the email, LS3 selectively quotes from the Evans Email and mistakes the tense used by Evans. Appellant's Brief at 13. Indeed, LS3 entirely fails to include the indisputably past-tense phrase, "[CNSP] has been notified." *Id.* LS3 also identifies the phrase, "we are being" as future-tense; in fact, this is a present progressive tense, referring to a continuing action or state that was happening at some point in the past. *Id.*

Circuit has ruled that this type of communication is not hearsay. *Denison v. Swaco Geolograph Co.*, 941 F.2d 1416, 1423 (10th Cir. 1991) (exhibit not hearsay because it was not offered for truth but rather to establish defendant's motivation during reduction in force). Defendants then offered the Evans Email to show: that LS3 no longer had a current or active business opportunity with the USDA; that Individual Defendants had notice of the same before leaving their employment with LS3; and the basis for requesting that the Individual Defendants complete the Incumbent Questionnaire. Mot. to Dismiss, Dkt No. 26, App. Vol. 2 at 34 n.4, 34-35, 42, 44, 53. Again, these types of communications are not hearsay. *Denison*, 941 F.2d at 1423 (documents establishing party's motivations are excluded from hearsay rules); *see also Franchina v. City of Providence*, 881 F.3d 32, 50 (1st Cir. 2018) ("hearsay rule does not bar out-of-court statement offered to prove notice"); *Fenstermacher v. Telelect, Inc.*, 21 F.3d 112, *8 n.5 (10th Cir. 1994) (unpublished disposition) ("To the extent the evidence may have been offered to prove notice, it was not hearsay, as it was not offered to prove the truth of the matter asserted."). The Evans Email demonstrates what the Individual Defendants were told about the status of the Bridge Contract, which is the question that is relevant to whether they were in violation of their Agreements.

And, because LS3 had already lost the ICAM Support Contract, Am. Compl., Dkt. No. 21, App. Vol. 2 at 8-26 ¶ 58, and the Individual Defendants had

notice that LS3 was not being selected for the Bridge Contract, Am. Compl., Dkt. No. 21, App. Vol. 2 at 8-26 ¶ 61; Mot. to Dismiss Ex. I, Dkt. No. 26, App. Vol. 2 at 105-06, the Individual Defendants *could not have violated their duty of loyalty provisions*. Mot. to Dismiss Exs. A-H, Dkt. No. 26, App. Vol. 2 at 32-108; Exs. 1-8, Dkt. No. 29, App. Vol. 2 at 112-74 ("duty of loyalty" provisions in Agreements address only pre-award conduct). For these reasons, neither the district court's review of the Evans Email nor its related findings in the order was erroneous.

4. With or Without the Evans Email, LS3's Amended Complaint Failed to State a Claim for Breach of Contract

This Court may affirm the trial court's decision to dismiss LS3's breach of contract claim on an additional compelling ground. Even where a district court improperly considers documents outside the complaint, "[t]he failure to convert a 12(b)(6) motion to one for summary judgment where a court does not exclude outside materials is [not] reversible error [if] the dismissal can be justified without considering the outside materials." *GFF Corp.*, 130 F.3d at 1384. Because the well-pled allegations in the Amended Complaint fail to establish any breach of contract by the Individual Defendants, the district court's dismissal should be affirmed.

Notably, on a motion to dismiss, the district court is required to accept as true only the "well-pleaded factual allegations" in a complaint. *Casanova*, 595 F.3d at 1124. Conclusory statements, which "are not entitled to the assumption of

truth[,]" are disregarded. *Khalik v. United Air Lines*, 671 F.3d 1188, 1193 (10th Cir. 2012). "An allegation is conclusory where it states an inference without stating underlying facts or is devoid of any factual enhancement." *Brooks v. Mentor Worldwide LLC*, 985 F.3d 1272, 1281 (10th Cir. 2021), *cert. denied,* 142 S. Ct. 477 (2021) (internal citation omitted). Thus, although factual allegations may be made on information and belief, to survive dismissal, the complaint must still set forth the factual basis of that belief. *Jackson-Cobb v. Sprint United Mgmt.*, 173 F. Supp. 3d 1139, 1149 (D. Colo. 2016); *see also Titan Mfg. Sols., Inc. v. Nat'l Cost, Inc.*, No. 19-cv-1749-WJM-SKC, 2020 WL 996880, at *3 (D. Colo. Mar. 2, 2020) ("Without supporting allegations . . . [an assertion made solely upon information and belief] is a purely conclusory allegation entitled to no consideration."). Disregarding all conclusory allegations, the remaining factual allegations "must be enough that, if assumed to be true, the plaintiff plausibly (not just speculatively) has a claim for relief." *Robbins v. Okla.*, 519 F.3d 1242, 1248 (10th Cir. 2008).

LS3's well-pled facts set forth the following timeline: the USDA awarded the follow-on ICAM Support Contract to Easy Dynamics on June 30, 2020, Am. Compl., Dkt. No. 21, App. Vol. 2 at 8-26 ¶ 58; following the award to Easy Dynamics, two contractors protested the award, Am. Compl., Dkt. No. 21, App. Vol. 2 at 8-26 ¶ 58; "subsequent to these protests, the [USDA] made a directed

award to Cherokee Defendants," Am. Compl., Dkt. No. 21, App. Vol. 2 at 8-26 ¶ 60; then, on or about August 13, 2020, Evans sent the Evans Email to Individual Defendants stating that CNSP "was to be awarded . . . the 'Bridge Contract' . . . *during the bridge period* [*i.e.*, while the protests were resolved]," Am. Compl., Dkt. No. 21, App. Vol. 2 at 8-26 ¶ 61 (emphasis added). Conversely, LS3's allegation that the government "wanted assurances regarding which of the existing LS3 workers [CNSP] could get . . . as a precursor to making the award to the Cherokee Defendants" is made only upon "information or belief"; LS3 sets forth no factual basis for this conclusion—likely because it is entirely speculative, drawn out of whole cloth, and inconsistent with the record. Am. Compl., Dkt. No. 21, App. Vol. 2 at 8-26 ¶ 73. The Court is required only to consider the well-pled timeline established in LS3's Amended Complaint and the documents central to it.

Comparing this timeline to the Individual Defendants' obligations under the "duty of loyalty" provisions in the IP-NDAs and EAs, which prohibit only *pre-award* conduct, LS3 showed no breach, even by reasonable inference. *Compare* Am. Compl., Dkt. No. 21, App. Vol. 2 at 8-26 ¶¶ 58-61 (explaining the USDA awarded the Bridge Contract for the ICAM Contract work after LS3 lost the award for the recompete and protests were filed on June 30, 2020), 61-78 (describing Cherokee Defendants' alleged hiring process beginning August 13, 2020) *with* Mot. to Dismiss Exs. A-H, Dkt. No. 26, App. Vol. 2 at 58-103; Exs. 1-8, Dkt. No.

29, App. Vol. 2 at 125-74 (setting scope of "duty of loyalty" provisions). Because the Government had already decided which company would receive the Bridge Contract, *and it was not LS3*, the Individual Defendants could not have violated the duty of loyalty provisions.

LS3 should not be permitted to rest on its speculation regarding the USDA's motives in making the Bridge Contract award to continue this expensive and time-consuming inquisition against Individual Defendants. The well-pled facts reveal no breach of contract by the Individual Defendants. The district court's order dismissing LS3's claim should be affirmed.

B. LS3's Claim That the Individual Defendants Breached the Confidentiality Provision Fails

LS3 also failed to allege any facts that would support a claim for breach of the confidentiality provisions of the Agreements, because none of the information requested by the Cherokee Defendants was confidential information. Am. Compl., Dkt. No. 21, App. Vol. 2, at 8-26 ¶¶ 85-86; Mot. to Dismiss Ex. I, Dkt. No. 26, App. Vol. 2 at 108. Employees have every legal right to tell their prospective employer their job title, salary, credentials, skills, experience, and ability to perform a given position: "[T]he general ability and know-how an employee brings into employment, and the skill and experience acquired during it, are not the employer's property; the right to use and expand these powers remains the employee's." *Mulei v. Jet Courier Serv., Inc.*, 739 P.2d 889, 892-93 (Colo. App.

1987), *rev'd in part on other grounds*, 771 P.2d 486 (Colo. 1989).[7] And, Colorado law prohibits employers from "requir[ing] as a condition of employment nondisclosure by an employee of his or her wages . . . or to require an employee to sign a waiver or other document that purports to deny an employee the right to disclose his or her wage information." COLO. REV. STAT. ANN. § 24-34-402(1)(i) (West 2021).

LS3 contends that the trial court focused too narrowly on the information requested in the Incumbent Questionnaire attached to the Evans Email, ignoring "other confidential information beyond the questionnaire." Appellant's Brief at 22. This is surprising, because the Incumbent Questionnaire was the *only* disclosure of alleged confidential information LS3 identified or briefed to the district court. Resp. to Mot. to Dismiss, Dkt. No. 32, App. Vol. 2 at 180-81 ("LS3 provided factual detail about this claim [for breach of the confidentiality provisions]: it alleged that the employees all received an 'Incumbent Questionnaire' from Defendant CNSP that requested confidential information as

[7] LS3 objects to the trial court's reliance on *Mulei*, claiming that it is "dated, shaky, and weakly supported in caselaw . . . ." Appellant's Brief at 20. However, *Mulei* continues to be cited as good authority. *SRS Acquiom Inc. v. PNC Fin. Servs. Grp., Inc.*, No. 1:19-cv-02005-DDD-SKC, 2020 WL 3256883, at *9 (D. Colo. Mar. 26, 2020). And, this Court cited *Mulei* as good authority as recently as 2009. *Hertz v. Luzenac Grp.*, 576 F.3d 1103, 1116 (10th Cir. 2009). Notably, LS3 fails to provide a single citation to any legal authority calling *Mulei* into question, and it fails to cite to any legal authority of its own to support its position. Appellant's Brief at 20-24.

defined by both the Employment Agreements and the IP-NDAs.").

Before this Court, LS3 misleadingly identifies the alleged "other confidential information beyond the questionnaire" as

> details which included their job title, the name of the Technical Representative for the work they performed, whether their position "require[d] ongoing training or certifications," the length of time worked "on this project," whether the employee had "clearance" and if so, "at what level," and whether the employee had equipment issued by LS3 that the employee "require[s] to perform" the employee's "work duties [with LS3]."

Appellant's Brief at 22 (citing Am. Compl., Dkt. No. 21, App. Vol. 2 at 8-26 ¶ 86). However, these are the exact pieces of information requested in the Incumbent Questionnaire. *Compare* Am. Compl., Dkt. No. 21, App. Vol. 2 at 8-26 ¶ 86 *with* Mot. to Dismiss Ex. I, Dkt. No. 26, App. Vol. 2 at 108. As Defendants argued in the trial court, "such information could not reasonably be considered confidential. Indeed, an employer cannot use a nondisclosure agreement to protect general knowledge of a business operation . . ." or an "employee's 'general knowledge, skill or facility.'" Mot. to Dismiss, Dkt. No. 26, App. Vol. 2 at 46-47 (quoting *Mulei*, 739 P.2d at 892; *Fournil v. Turberville Ins. Agency, Inc.*, No. 3:07-3836-JFA, 2009 WL 512261, at *5 (D.S.C. Mar. 2, 2009)).

In its brief, LS3 does not attempt to analyze whether the information sought in the Incumbent Questionnaire could ever be considered confidential. *See* Appellant's Brief at 20-24. Rather, all LS3 offers to this Court is that it "does not

concede" that the trial court was correct. Appellant's Brief at 22. Because LS3 does not actually challenge the trial court's findings about the information contained in the Incumbent Questionnaire, the trial court's ruling should be affirmed in this regard. *See, e.g., Clark v. Colbert*, 895 F.3d 1258, 1265 (10th Cir. 2018) ("We will not question the reasoning of a district court unless an appellant actually argues against it. . . . By offering an incomplete challenge to the district court's analysis, [appellant] has effectively abandoned his appeal of its ruling.") (internal quotation and citations omitted).

The only "other confidential information beyond the questionnaire" identified anywhere in the Amended Complaint is a vague reference to "plans, approaches, and proprietary methods for supporting the USDA on the ICAM [Support Contract]." Appellant's Brief at 22-23 (citing Am. Compl., Dkt. No. 21, App. Vol. 2 at 8-26 ¶ 107). LS3 does not explain in the Amended Complaint, Am. Compl., Dkt. No. 21, App. Vol. 2 at 8-26; in its opposition to the motions to dismiss, Resp. to Mot. to Dismiss, Dkt. No. 32, App. Vol. 2 at 177-194, Dkt. No. 33, App. Vol. 3 at 1-15; or in its brief, *see generally* Appellant's Brief, what these alleged "plans, approaches, and proprietary methods" may be. This is exactly the kind of "naked assertion devoid of factual enhancement" that federal courts find insufficient to survive a motion to dismiss. *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 557); *see also, e.g., FCA US LLC v. Bullock*, 446 F. Supp. 3d

201, 209 (E.D. Mich. 2020) (dismissing claims that defendant breached confidentiality agreement where plaintiff failed to identify alleged confidential information shared with defendant).

Lacking any ability to argue that confidential information was disclosed at all, LS3 now pleads for this Court to allow it to go on a fishing expedition "on the question of what information the employees disclosed during the process of their recruitment by [the Cherokee Defendants], and what exactly was the nature of that information . . . ." Appellant's Brief at 21. But, the "doors of discovery" are not to be unlocked for "a plaintiff armed with nothing more than conclusions." *Iqbal*, 556 U.S. at 678-79. LS3's Amended Complaint gave the trial court no factual basis to infer that any of the Individual Defendants breached their agreements with LS3 or disclosed any type of confidential information. Thus, the Amended Complaint was properly dismissed.

II. The Trial Court Properly Dismissed Appellant's Claims for Intentional Interference and Civil Conspiracy

LS3's civil conspiracy and intentional interference claims fail because they are dependent on the initial breach of contract claim. *See Double Oak Constr., L.L.C. v. Cornerstone Dev. Int'l, L.L.C.*, 97 P.3d 140, 146 (Colo. App. 2003) ("If the acts alleged to constitute the underlying wrong provide no cause of action, then there is no cause of action for the conspiracy itself.") (citation omitted), *overruled on other grounds*, *L.H.M. Corp., TCD v. Martinez*, 499 P.3d 1050 (Colo. 2021).

For the reasons discussed herein, *see supra* Section I, LS3's breach of contract claims were properly dismissed. Because LS3 hinges the survival of its intentional interference and civil conspiracy claims on its ill-fated and properly dismissed breach of contract claims, Appellant's Brief at 24-25, this Court should affirm the trial court's dismissal of the intentional interference and civil conspiracy claims, as well. Order, Dkt. No. 52, App. Vol. 3 at 258-59, 262-63.

Even assuming this Court finds that LS3 stated a plausible claim for breach of contract—and it should not—LS3's intentional interference and civil conspiracy claims still must be dismissed. LS3's Amended Complaint fails to plausibly allege the elements of intentional interference and civil conspiracy, and dismissal is appropriate.[8]

A. LS3 Failed to Plausibly Plead Essential Elements of an Intentional Interference Claim

The principles underlying a claim of intentional interference in Colorado are well-settled: "One who intentionally and improperly interferes with the performance of a contract . . . between another and a third person by inducing the

[8] The Cherokee Defendants raised these arguments in the trial court, Mot. to Dismiss, Dkt. No. 32, Vol. 2 at 47-51, 54-56, 122-23, but the district court did not reach or address them, opting to dismiss on other grounds, Order, Dkt. No. 54, Vol. 3 at 246-63. Nevertheless, this Court may "affirm the district court's dismissal on any ground sufficiently supported by the record." *GF Gaming Corp. v. City of Black Hawk*, Colo., 405 F.3d 876, 882 (10th Cir. 2005) (citing *Issa v. Comp USA*, 354 F.3d 1174, 1178 (10th Cir. 2003)).

third person not to perform the contract, is subject to liability to the other for the pecuniary loss resulting to the other" from such nonperformance. *Q.E.R., Inc. v. Hickerson*, 880 F.2d 1178, 1183 (10th Cir. 1989) (citations and internal quotation marks omitted). Liability for intentional interference "does not attach unless the court concludes that the actor's conduct [was] improper." *Westfield Dev. Co. v. Rifle Inv. Assocs*., 786 P.2d 1112, 1118 (Colo. 1990); *see also Ecco Plains, LLC v. United States*, 728 F.3d 1190, 1198 (10th Cir. 2013) (listing elements for intentional interference). LS3's claim fails because LS3 cannot establish improper interference. *See Warne v. Hall*, 373 P.3d 588, 596 (Colo. 2016) (plaintiff failed to plausibly plead "improper interference" element where amended complaint alleged defendant "induced a breach of [a] purchase agreement or effectively made the purchase impossible by improperly imposing conditions on the plan that were not agreeable" to third party).

In weighing whether a defendant's conduct was improper, Colorado courts provide "less protection for contracts terminable at will because an interference with a contract terminable at will is an interference with a future expectancy, not a legal right." *Mem'l Gardens, Inc. v. Olympian Sales & Mgmt. Consultants, Inc.*, 690 P.2d 207, 211 (Colo. 1984) (internal citations omitted); *see also Harris Grp., Inc. v. Robinson*, 209 P.3d 1188, 1196 (Colo. App. 2009) ("[W]hen the parties are business competitors, and the conduct in question involves intentional interference

with . . . contracts terminable at will," the defendant's "privilege to engage in business and to compete with others implies a privilege to induce third persons to do their business with him rather than with his competitors.") (citations omitted). Thus, when a plaintiff complains of a defendant's alleged intentional interference with a contract terminable at will, Colorado courts require that a plaintiff show the defendant engaged in not merely "improper" but rather "wrongful means" of interference. *Amoco Oil Co. v. Ervin*, 908 P.2d 493, 502 (Colo. 1995) (en banc). The term "wrongful means" is "limited to actions such as physical violence, fraud, or civil or criminal prosecution as means of harming a competitor." *Id.* The Agreements indicate that the Individual Defendants were engaged in an at-will employment relationship. *See, e.g.,* Mot. to Dismiss Exs. A, B, Dkt. No. 26, App. Vol. 2 at 59 § 1, 68 § 11.2. Accordingly, to state a claim for intentional interference, LS3 was required to allege that the Cherokee Defendants engaged in wrongful means of interference with the Agreements. *Amoco Oil*, 908 P.2d at 502. LS3 failed to do so.

LS3's Amended Complaint alleges solely and weakly that Cherokee Defendants acted "improperly" by "providing the Individual Defendants with misleading information, including misleading legal advice" and "purposely lur[ing] and tempt[ing] the Individual Defendants into breaching their contracts with LS3." Am. Compl., Dkt. No. 21, App. Vol. 2 at 8-26 ¶ 95. These bare allegations are

insufficient to survive dismissal. The allegedly "misleading" legal advice Cherokee Defendants are accused of providing to Individual Defendants is that "it is unlawful to use force, threats, or other means of intimidation to prevent any person from engaging in any lawful occupation . . . ." Am. Compl., Dkt. No. 21, App. Vol. 2 at 8-26 ¶ 64. This is not misleading at all; and, in any event, it did not rise to the requisite level of "wrongful means" sufficient to state a claim.

In the Evans Email, Evans accurately quoted a current Colorado statute, which states that employers cannot use threats to prevent its employees from exploring or seeking alternate employment. Mot. to Dismiss Ex. I, Dkt. No. 26, App. Vol. 2 at 106 ("I understand some of you have expressed concerns about non-compete agreements you have signed with your current employer. Please note that under Colorado law, it is unlawful to use force, threats, or other means of intimidation to prevent any person from engaging in any lawful occupation at any place he sees fit."). She also provided a link to a then-current website operated by the state of Colorado. Mot. to Dismiss Ex. I, Dkt. No. 26, App. Vol. 2 at 106. The exact language to which LS3 objects tracks the Colorado statute verbatim. *See* COLO. REV. STAT. ANN. § 8-2-113(1) (West 2019) ("It shall be unlawful to use force, threats, or other means of intimidation to prevent any person from engaging in any lawful occupation at any place he sees fit."). Accordingly, Evans' communication with the Individual Defendants was not even remotely

"misleading"; it simply directed the Individual Defendants to the provisions of existing Colorado law. Mot. to Dismiss Ex. I, Dkt. No. 26, App. Vol. 2 at 106. Thus, Cherokee Defendants cannot plausibly be alleged to have interfered with LS3's employment relationships by wrongful means.

In sum, LS3 fails to establish, even by inference, the type of wrongful means necessary to show the Cherokee Defendants improperly interfered with the Agreements. LS3 does not contend that the Cherokee Defendants used physical violence, fraud, or the threat of a civil suit or criminal prosecution to induce the Individual Defendants to leave their employment with LS3; Cherokee Defendants' alleged conduct falls well short of that. *See* Am. Compl., Dkt. No. 21, App. Vol. 2 at 8-26 ¶¶ 61-76, 92-97. For these reasons, LS3 fails to state a claim for intentional interference under Colorado law.

B. LS3 Failed to Plausibly Plead the Elements of Civil Conspiracy

LS3's Amended Complaint similarly fails to state a claim for civil conspiracy. "'To establish a civil conspiracy in Colorado, a plaintiff must show: (1) two or more persons; (2) an object to be accomplished; (3) a meeting of the minds on the object or course of action; (4) an unlawful overt act; and (5) damages as to the proximate result.'" *Savant Homes, Inc. v. Collins*, 809 F.3d 1133, 1146 (10th Cir. 2016) (quoting *Nelson v. Elway*, 908 P.2d 102, 106 (Colo. 1995)). At a minimum, LS3's Amended Complaint fails to establish any meeting of the minds

between the Cherokee Defendants and the Individual Defendants. Thus, LS3 cannot pursue a civil conspiracy claim.

To successfully advance a claim of civil conspiracy, a plaintiff must "allege, either by direct or circumstantial evidence, a meeting of the minds or agreement among the defendants." *Brever v. Rockwell Int'l Corp.*, 40 F.3d 1119, 1126 (10th Cir. 1994) (quotation omitted). "Conclusory allegations that defendants acted in concert, or conspired without specific factual allegations to support such assertions are insufficient[]" to survive dismissal. *Merritt v. Hawk*, 153 F. Supp. 2d 1216, 1225 (D. Colo. 2001) (citations and internal quotation marks omitted). As the Supreme Court has explained, although a claim may survive dismissal where "the sequence of events alleged were sufficient to allow a jury to infer from the circumstances that the [conspirators] had a meeting of the minds[,]" *Brever*, 40 F.3d at 1127 (internal quotation marks omitted) (quoting *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970)), "[w]ithout more, parallel conduct [that could just as well be independent action] does not suggest conspiracy, and a conclusory allegation of agreement at some unidentified point does not supply facts adequate to show illegality," *Twombly,* 550 U.S. at 556-57.

LS3's Amended Complaint offers nothing more than the barest of conclusory allegations to support its misguided conspiracy claim. Indeed, all LS3 claims is that "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." Am. Compl., Dkt. No. 21, App. Vol. 2 at 8-26 ¶¶ 98-103. The Amended Complaint fails to provide any factual support for the existence of some agreement, such as any "concerted action" between any of the Defendants. *Durre v. Dempsey*, 869 F.2d 543, 545 (10th Cir. 1989). To the contrary, there is no indication that Cherokee Defendants and Individual Defendants interacted whatsoever until after it became clear that Cherokee Defendants would be awarded the Bridge Contract. *See generally* Am. Compl., Dkt. No. 21, App. Vol. 2 at 8-26. Thus, there can be no preceding agreement on which to sustain liability. *Twombly,* 550 U.S. at 557.

Even in its opposition to the motion to dismiss, LS3 offered no justification for its conspiracy claim, instead arguing that it was sufficient to allege that "Defendants agreed to work together to commit their unlawful goals and that they performed unlawful acts in pursuit thereof." Resp. to Mot. to Dismiss, Dkt. No. 32, App. Vol. 2 at 194. LS3 pointed only to the fact that "the individual defendants all resigned 'within hours of one another' and all now work for the Cherokee Defendants or their business partners." Resp. to Mot. to Dismiss, Dkt. No. 32, App. Vol. 2 at 194. But, the Amended Complaint establishes that LS3's ICAM Support Contract performance was winding down, and the Bridge Contract

was beginning. Am. Compl., Dkt. No. 21, Vol. 2 at 8-26 ¶¶ 67-77. It is inherently logical that the incumbent employees on a contract would end their employment around the same time in order to avoid a gap in employment as the contract transitioned. Am. Compl., Dkt. No. 21, Vol. 2 at 8-26 ¶ 74 ("We don't want you to have an employment gap between contracts."). Plainly, LS3 relied on the type of conclusory allegations of parallel conduct, without any specific supporting facts, that the Supreme Court has held are insufficient to sustain a conspiracy claim. *Twombly,* 550 U.S. at 556-57. The trial court's dismissal of LS3's conspiracy claim was appropriate for this additional reason.

III. The Trial Court Properly Dismissed LS3's Misappropriation of Trade Secrets Claim

Finally, LS3 failed to state a claim for misappropriation under the federal Defend Trade Secrets Act ("DTSA"), 18 U.S.C. §§ 1831 – 1839, and the Colorado Uniform Trade Secrets Act ("CUTSA"), COLO. REV. STAT. ANN. §§ 7-74-101 – 7-74-110 (West 2004), because it did not identify any legally protected trade secrets that allegedly were misappropriated. Order, Dkt. No. 54, App. Vol. 3 at 261-62. The term "trade secret" has a specific definition; it does not, as LS3 appears to believe, apply to general operational knowledge that would be convenient to know when the government decides to switch contractors.

"Due to the similarities in the pleading requirements under" the federal DTSA and the CUTSA, courts frequently "address the claims' elements together."

zvelo, Inc. v. Akamai Techs., Inc., No. 19-cv-00097-PAB-SKC, 2019 WL 4751809, at *2 (D. Colo. Sept. 30, 2019). Under both statutes, a plaintiff must generally allege: (1) the existence of a valid trade secret; (2) use or disclosure of the trade secret without consent; and (3) that the defendant knew, or should have known, that the trade secret was acquired, used, or disclosed by improper means. *See id.* (listing elements of a DTSA claim); *see also Oakwood Lab'ys LLC v. Thanoo*, 999 F.3d 892, 905 (3d Cir. 2021) (same); *Gates Rubber Co. v. Bando Chem. Indus., Ltd.*, 9 F.3d 823, 847 (10th Cir. 1993) (listing elements of CUTSA claim). The statutes also provide similar definitions for what constitutes a trade secret. *Compare* 18 U.S.C. § 1839(3) *with* COLO. REV. STAT. ANN. § 7-74-102 (West 1986). When deciding whether business information is a "trade secret," courts consider: (1) the extent to which the information is known outside the business; (2) the extent to which it is known to those inside the business, *i.e.*, by the employees; (3) the precautions taken by the holder of the trade secret to guard the secrecy of the information; (4) the savings effected and the value of the holder in having the information guarded from competitors; (5) the amount of effort or money expended in obtaining and developing the information; and (6) the amount of time and expense it would take for others to acquire and duplicate the information. *Colo. Supply Co. v. Stewart*, 797 P.2d 1303, 1306 (Colo. App. 1990); *zvelo*, 2019 WL 4751809, at *2. LS3 fails to identify, under either statute, a valid

trade secret that allegedly was misappropriated.

Throughout this matter, LS3 stated two different misguided theories about what trade secrets the Defendants may have misappropriated. In its trial court briefing, LS3 focused solely on the "Incumbent Questionnaire" attached to the Evans Email. Resp. to Mot. to Dismiss, Dkt. No. 32, App. Vol. 2 at 192-93. On appeal, LS3 instead relies upon a vague allegation that other "plans, approaches, and proprietary methods for supporting the USDA" may have been misappropriated. Appellant's Brief at 22-23 (citing Am. Compl., Dkt. No. 21, App. Vol. 2 at 8-26 ¶ 107). What LS3 fails to do, in either instance, is list any specific proprietary information that it possessed and that was misappropriated, beyond very basic information about business operations that does not qualify as trade secrets.

A. The Incumbent Questionnaire Did Not Seek Protected Trade Secrets

As part of CNSP's transition to performing the Bridge Contract, Evans provided to the Individual Defendants the Incumbent Questionnaire to obtain basic information. Mot. to Dismiss Ex. I, Dkt. No. 26, App. Vol. 2 at 108. The trial court correctly concluded that the requested information is not the kind of "financial, business, scientific, technical, economic, or engineering information," 18 U.S.C. § 1839(3), "relating to any business or profession which is secret and of value," COLO. REV. STAT. ANN. § 7-74-102 (West 1986), that is protected by the

trade secrets statutes. Order, Dkt. 43, App. Vol. 3 at 259-61. To the contrary, almost every item on the Incumbent Questionnaire requested information personal to the employee rather than information proprietary to LS3 (*e.g.*, whether the employee telecommutes; a description of the employee's compensation and benefit package; and the employee's home city and state). Mot. to Dismiss Ex. I, Dkt. No. 26, App. Vol. 2 at 108.

Nor has LS3 explained, to the trial court or on appeal, how any of the information requested in the Incumbent Questionnaire was secret from the public, secret from other LS3 employees, or protected by LS3 in any way. *See generally* Am. Compl., Dkt. No. 21, App. Vol. 2 at 8-26; Resp. to Mot. to Dismiss, Dkt. No. 32, App. Vol. 2 at 177-220; Appellant's Brief at 25-27. In fact, the majority of the information requested in the Incumbent Questionnaire is information an employee would include on their resume or a LinkedIn social media page (*e.g.*, the employee's job title; the length of the employee's tenure on the project; whether the employee maintained a security clearance). Mot. to Dismiss Ex. I, Dkt. No. 26, App. Vol. 2 at 108.

In its trial court opposition, LS3 attempted to assert that "[i]t is a reasonable inference to draw from [the Incumbent Questionnaire] that the Individual Defendants were sharing [ ] far more about LS3 than what appeared [on the Incumbent Questionnaire]. . . . [Individual Defendants] had been working on that

contract, for that customer, and they knew it inside and out, and knew all of LS3's trade secrets and know-how with respect to performing the work." Resp. to Mot. to Dismiss, Dkt. No. 32, App. Vol. 2 at 192-93. The problem with this argument is that general "know-how" is not a legally protected trade secret, *Mulei*, 739 P.2d at 892, and LS3 alleged no facts to allow an inference that LS3 actually owns any trade secrets whatsoever, much less that those unidentified secrets were misappropriated, Am. Compl., Dkt. No. 21, App. Vol. 2 at 8-26 ¶¶ 104-12. LS3 certainly did not make any allegations that the Incumbent Questionnaire sought proprietary software, formulas, client lists, or other business secrets protected by federal or state statute. *See generally* Am. Compl., Dkt. No. 21, App. Vol. 2 at 8-26. Indeed, Evans expressly cautioned Individual Defendants *not* to provide any proprietary information in their responses. Mot. to Dismiss Ex. I, Dkt. No. 26, App. Vol. 2 at 106 ("Please know that *CNSP and its partners will not ask you to provide, nor do we want you to provide, any proprietary information from your current employer*.") (emphasis in original). For these reasons, any misappropriation claim based on the Incumbent Questionnaire was properly dismissed.

B. LS3 Has Not Identified Any Other Trade Secrets That May Have Been Disclosed

Nor has LS3 successfully identified any other trade secret that may have been disclosed. On appeal, LS3 takes issue with the trial court's analysis because

it "focused narrowly on the [Incumbent Questionnaire,] . . . [which] was unwarranted[,] and [it] ignored the well pleaded allegations in the Amended Complaint." Appellant's Brief at 25-26. To the contrary, the trial court focused on the exact and only information LS3 asked it to consider. *Compare* Resp. to Mot. to Dismiss, Dkt. No. 32, App. Vol. 2 at 192-93 *with* Order, Dkt. No. 54, App. Vol. 3 at 259-62. Even if LS3 had asked the trial court to consider the "plans, approaches, and propriety methods," the trial court nevertheless appropriately dismissed the misappropriation claim because such information does not satisfy LS3's pleading requirement.

When a plaintiff fails to describe the trade secrets allegedly misappropriated with sufficient particularity to put the defendant on notice of the claim, dismissal is appropriate.[9] LS3's vague description of "plans, approaches, and propriety

[9] District courts routinely dismiss trade secrets claims where the plaintiff fails to identify, with sufficient particularity, the trade secrets at issue. *See, e.g., MedioStream, Inc. v. Microsoft Corp.*, 869 F. Supp. 2d 1095, 1113 (N.D. Cal. 2012) (dismissing claim where plaintiff failed to identify with sufficient particularity, which, if any, of the trade secrets described in the complaint were obtained by the defendant); *Julie Rsch. Lab., Inc. v. Select Photographic Eng'g, Inc.*, 810 F. Supp. 513, 519 (S.D.N.Y. 1992) (plaintiffs bears the burden of identifying trade secrets in detail), *aff'd in part, vacated in part on other grounds*, 998 F.2d 65 (2d Cir. 1993); *Next Commc'ns, Inc. v. Viber Media, Inc.*, No. 14-cv-8190 (RJS), 2016 WL 1275659, at *3 (S.D.N.Y. Mar. 30, 2016) ("'the law requires the trade secret claimant to describe the secret with sufficient specificity that its protectability can be assessed and to show that its compilation is unique.'") (emphasis removed) (citations omitted); *also cf. Dodson Int'l Parts, Inc. v. Altendorf*, 347 F. Supp. 2d 997, 1010 (D. Kan. 2004) (on motion for summary judgment "[t]he plaintiff's burden [in a trade secrets case] is not met by general

methods" simply fails to plausibly identify a trade secret.

In its brief, LS3 attempts to explain away its failure to describe the allegedly misappropriated "plans, approaches, and proprietary methods" by claiming: "Appellant suspected but could not specifically say exactly what trade secrets were stolen—that is a function of the discovery process under a notice pleading standard."[10] Appellant's Brief at 27. Not so. Discovery is not a guaranteed, all-access pass that permits any plaintiff who can recite the bare elements of a cause of action to determine *whether* it might have a claim if certain documents exist outside its control; rather, a complaint must include "enough fact to raise a reasonable expectation that discovery will reveal evidence of" the wrongdoing alleged. *Twombly*, 550 U.S. at 556; *cf. Farhang v. Indian Inst. of Tech., Kharagpur*, No. C-08-02658, 2010 WL 2228936, at *13 (N.D. Cal. June 1, 2010) (complaint must "describe the subject matter of the trade secret with sufficient particularity to separate it from matters of general knowledge in the trade . . . to

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allegations: Plaintiffs must describe the subject matter of their alleged trade secrets in sufficient detail to establish each element of a trade secret. [ ] Although plaintiffs are not required to disclose all of their trade secrets, they must do more than merely allege that they had trade secrets.") (citations omitted).

[10] This is the first time in this litigation that LS3 has asserted that it "suspected" but could not specifically identify the trade secrets that it believed had been misappropriated. *See* Resp. to Mot. to Dismiss, Dkt. No. 32, App. Vol. 2 at 192-93. But, LS3's statement affirms that its claims are based on speculation and nothing more. *Cf. Twombly*, 550 U.S. at 555 ("Factual allegations must be enough to raise a right to relief above the speculative level . . . .").

permit the defendant to ascertain at least the boundaries within which the secret lies."). At the very least, if trade secrets existed, LS3 was required to identify those in the Individual Defendants' possession that *could* have been misappropriated. It failed to do so.

LS3 also fails to address who had access to the supposed "plans, approaches, and proprietary methods"; whether they were known to anyone outside the company, including the USDA; or what value or competitive advantage could have been gained from their alleged misappropriation. *See generally* Am. Compl., Dkt. No. 21, App. Vol. 2 at 8-26. *See also Colo. Supply Co.*, 797 P.2d at 1306 (listing factors to identify trade secrets). Although LS3 vaguely stated that it password protects its proprietary information and forces employees to sign non-disclosure agreements, it did not otherwise explain what steps it takes to protect these alleged "plans, approaches, and proprietary methods" or whether they are even capable of protection. Am. Compl., Dkt. No. 21, App. Vol. 2 at 8-26 ¶ 106. Furthermore, contrary to LS3's vague assertions, that LS3 alleges so many people—at least twenty-two employees—possessed and were able to disclose the information calls into question whether these "plans, approaches, and proprietary methods" were protected at all. *Cf. zvelo*, 2019 WL 4751809, at *3 ("Moreover, plaintiff limits access to the database to fewer than five zvelo employees who are allowed to access the entirety of the database or to make changes to it."). Finally, LS3 fails to

mention the amount of time, effort, or money expended in developing the "plans, approaches, and proprietary methods" or the amount of time, effort, and expense it would take for competitors to duplicate the information. *Colo. Supply Co.,* 797 P.2d at 1306. Thus, LS3 fails to state even a single factor to show that the "plans, approaches, and proprietary methods," to the extent they exist, should be protected as trade secrets.

Simply put, a single, vague reference to otherwise unidentified "plans, approaches, and proprietary methods" is insufficient to sustain a cause of action for trade secret misappropriation. *RE/MAX, LLC v. Quicken Loans Inc.*, 295 F. Supp. 3d 1163, 1175 (D. Colo. 2018) ("[W]ithout 'specific factual averments' of disclosure or use, [a court] could not impute the employee's acquisition of trade secrets to his new employer.") (citations omitted); *also cf. L-3 Commc'ns Corp. v. Jaxon Eng'g & Maint., Inc.*, 863 F. Supp. 2d 1066, 1080 (D. Colo. 2012) (denying motion to dismiss because plaintiff provided specific details of types of trade secrets allegedly misappropriated). From the Amended Complaint, the Court is wholly unable to evaluate whether the information allegedly misappropriated was a program that could revolutionize government contracting or simply instructions to work the coffee maker. For these reasons, the misappropriation claim was properly dismissed.

CONCLUSION

For the foregoing reasons, the Appellees respectfully ask this Court to affirm

the district court's determination.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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