

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF VIRGINIA  
Charlottesville Division

BONUMOSE BIOCHEM, LLC,	)	
Plaintiff,	)	Civil Action No. 3:17-cv-00033
	)	
v.	)	<u>REPORT &amp; RECOMMENDATION</u>
	)	
YI-HENG PERCIVAL ZHANG et al.,	)	By: Joel C. Hoppe
Defendants.	)	United States Magistrate Judge

Bonumose Biochem, LLC (“Bonumose”) filed this civil action against Yi-Heng Percival Zhang and Cell-Free Bioinnovations, Inc. (“CFB”) alleging that Zhang and CFB (together, “Defendants”) misappropriated Bonumose’s trade secrets about Tagatose, a naturally occurring sugar; breached multiple restrictive covenants in two contracts; and committed various other torts to impede Bonumose’s efforts to develop Tagatose for the commercial market. Am. Compl., ECF No. 19. Defendants filed a Motion to Dismiss the Amended Complaint under Rule 12(b)(6) of the Federal Rules of Civil Procedure, ECF No. 23, which has been fully briefed and argued, ECF Nos. 24, 27, 28, 44. The motion is before me by referral under 28 U.S.C. § 636(b)(1)(B). ECF No. 35. For the reasons that follow, I respectfully recommend that the presiding District Judge grant the motion on Counts Five and Six and deny the motion on the other counts.

I. Standard of Review

A Rule 12(b)(6) motion to dismiss challenges whether a complaint sets out a “short and plain statement of the claim showing that the pleader is entitled to relief.” *Ashcroft v. Iqbal*, 556 U.S. 662, 677–78 (2009) (quoting Fed. R. Civ. P. 8(a)(2)). To survive under Rule 12(b)(6), “a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.” *Id.* at 678 (quotation marks omitted). A claim is facially plausible when

the well-pled factual allegations, accepted as true and viewed in the plaintiff's favor, "allow[] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* at 678–79; *see also Bryant v. Wash. Mut. Bank*, 524 F. Supp. 2d 753, 756 (W.D. Va. 2007) ("[A] plaintiff 'must sufficiently allege facts to allow the Court to infer that all elements of each of his causes of action exist.'" (quoting *Jordan v. Alternative Res. Corp.*, 458 F.3d 332, 344–45 (4th Cir. 2006))). Legal conclusions drawn from factual allegations, unwarranted inferences, and "bare assertions devoid of further factual enhancement" are not entitled to deference, however, because they are not well-pled facts for Rule 12(b)(6)'s purposes. *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 255 (4th Cir. 2009) (citing *Iqbal*, 556 U.S. at 678). Finally, although "[t]he plausibility standard is not akin to a probability requirement" and "does not require detailed factual allegations," it does demand "more than a sheer possibility that the defendant has acted unlawfully." *Iqbal*, 556 U.S. at 678 (quotation marks omitted). "Where a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief." *Id.* (quotation marks omitted).

## II. Background

When resolving Defendants' motion to dismiss, I must consider the Amended Complaint as a whole, accepting as true all well-pled factual allegations and drawing all reasonable inferences in Bonumose's favor. *See Belmora LLC v. Bayer Consumer Care AG*, 819 F.3d 697, 705 (4th Cir. 2016). I also will consider the contents of two contracts attached to Defendants' Rule 12(b)(6) motion, Defs.' Ex. A, Agreement for Asset Sale & Assignment (Apr. 1, 2016) ("April 2016 Agreement"), ECF No. 24-2; Defs.' Ex. D, Business Protection Agreement (May 8, 2013) ("BPA"), ECF No. 24-5, because the documents are "integral to and explicitly relied on" in the Amended Complaint, *see* Am. Compl. ¶¶ 20, 46–70 (April 2016 Agreement), 107–08

(BPA), and Bonumose does not challenge their authenticity, *see generally* Pl.’s Br. in Opp’n 7–29, ECF No. 27.<sup>1</sup> *Zak v. Chelsea Therapeutics Int’l, Ltd.*, 780 F.3d 597, 607 (4th Cir. 2015).

I will not consider the two “technical articles” that Defendants attached to their motion<sup>2</sup> because, contrary to Defendants’ assertion, it would be improper for the Court “to take judicial notice of the fact that certain disclosures were made” in these articles, Defs.’ Reply Br. 8, ECF No. 28, at this early stage of the proceedings. *See Goldfarb v. Mayor & City Council of Balt.*, 791 F.3d 500, 510–11 (4th Cir. 2015); *Zak*, 780 F.3d at 607–08. For example, although the Amended Complaint mentions “two obscure academic papers” containing “hard-to-follow clues” about some of the purported trade secrets at issue in this case, Am. Compl. ¶ 16(D), the pleading neither identifies those papers by title nor explicitly references the articles attached to Defendants’ motion. Moreover, it seems Defendants offered these articles as evidence to rebut Bonumose’s factual allegations that some of the purported trade secrets—particularly the identities of two “key enzymes” and a novel enzymatic pathway—were not publicly known before April 2017, *see, e.g.*, Am. Compl. ¶¶ 15–17, 21, 31, 38, 40, 78, 87–88, and to support their contrary assertion that “the enzyme identities . . . were publicly known” before Bonumose acquired the rights to that information in April 2016. Defs.’ Reply Br. 8; *see also* Defs.’ Br. in Supp. 6–7, 12–14, ECF No. 24. “A Rule 12(b)(6) motion to dismiss merely tests the legal sufficiency of a complaint to determine whether the plaintiff has properly stated a claim; ‘it does not resolve contests surrounding the facts, the merits of a claim, or the applicability of

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<sup>1</sup> Pinpoint citations to documents filed electronically in this Court use the footer page numbers generated by CM/ECF and the exhibit labels assigned by the filing party.

<sup>2</sup> Defs.’ Ex. B, Daniel J. Wichelecki et al., *ABC Transport System Solute Binding Protein-Guided Identification of Novel D-Altritol & Galactitol Catabolic Pathways in Agrobacterium tumefaciens C58* (Oct. 2015), ECF No. 24-3; Defs.’ Ex. C, Hua Huang et al., *Panoramic View of a Superfamily of Phosphatases Through Substrate Profiling* (Apr. 2015), ECF No. 24-4.

defenses.”<sup>3</sup> *Marcantonio v. Dudzinski*, 155 F. Supp. 3d 619, 622 (W.D. Va. 2015) (quoting *Republican Party of N.C. v. Martin*, 980 F.2d 943, 952 (4th Cir. 1992)). Accordingly, I “have intentionally bypassed [Defendants’] arguments” that rely on the articles’ content “and refrained from mining the [articles] to determine what, if anything, [this Court] could take judicial notice of” when resolving their motion.<sup>4</sup> *Goldfarb*, 791 F.3d at 511.

A. *Factual Allegations*

Defendant CFB is a Virginia corporation based in Blacksburg, Virginia. Am. Compl. ¶ 4. Defendant Zhang, CFB’s co-founder and majority shareholder, is a United States citizen residing in Virginia. *Id.* ¶ 3. Zhang also held appointments at the Virginia Polytechnic Institute and State University in Blacksburg and the Tianjin Institute of Industrial Biotechnology (“Tianjin Institute”) in Tianjin, China, at all times relevant to this lawsuit. *See id.* ¶¶ 3, 25–26.

In July 2015, CFB hired Dr. Daniel Wichelecki as part of its research into developing Tagatose<sup>5</sup> and other naturally occurring sugars for the commercial market. *See id.* ¶¶ 9–13. Dr. Wichelecki soon “invented certain processes relating to the enzymatic production of Tagatose that were materially different than the processes CFB previously had considered.” *Id.* ¶ 13. Specifically, Dr. Wichelecki “discovered a new way to convert fructose 6-phosphate to tagatose 6-phosphate, and tagatose 6-phosphate to tagatose. Using two unique enzymes, Dr. Wichelecki

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<sup>3</sup> Given this standard, I also will not discuss in depth those portions of Defendants’ briefs describing the parties’ dispute from Defendants’ perspective, *see* Defs.’ Br. in Supp. 3–4, 23; Defs.’ Reply Br. 4–5, ¶ 9, or alleging additional facts that do not appear in either the Amended Complaint or the underlying contracts, *see* Defs.’ Br. in Supp. 4–9, 13–14; Defs.’ Reply Br. 8–9.

<sup>4</sup> In their Reply Brief, Defendants suggested that the Court convert their Rule 12(b)(6) motion to one for summary judgment under Rule 56 of the Federal Rules of Civil Procedure before considering the technical articles. Defs.’ Reply Br. 9 (citing Fed. R. Civ. P. 12(d)). The Court declines this invitation because the Rule 12(b) motion is ripe for decision and discovery has not yet started. Fed. R. Civ. P. 56(b).

<sup>5</sup> “Tagatose is a naturally occurring sugar found in low concentrations in some grains, fruits, dairy, and the cacao tree.” Am. Compl. ¶ 9. It offers “nearly the same sweetness” as table sugar (sucrose), but with fewer calories and associated health risks like diabetes and tooth decay. *Id.*

created a complete enzymatic pathway for the production of high-yields of tagatose from low-cost feedstocks such as starch.” *Id.* This novel process, which Plaintiff calls the “Tagatose Invention[,] is a central component of the Tagatose Trade Secrets.” *Id.*

On October 2, 2015, CFB filed a United States Provisional Patent Application for “Enzymatic Synthesis of D-Tagatose” (the “provisional patent application”) which listed Dr. Wichelecki as the lead inventor of this process and Zhang as the co-inventor. *Id.* ¶ 14. “Dr. Wichelecki’s and Zhang’s respective shares of the invention were owned by CFB under their respective employment contracts with CFB.” *Id.* The provisional patent application “was not published” and “contained the information . . . that constituted Tagatose Trade Secrets.” *Id.* ¶ 15. “The Tagatose Trade Secrets included, but were not limited to,” four types or categories of information:

- A. the identity of the two key enzymes making the enzymatic pathway viable;
- B. the novel enzymatic pathway for producing Tagatose from starch and the method of using the key enzymes in the pathway;
- C. the methods Dr. Wichelecki used to verify and optimize the novel enzymatic pathway; and
- D. the information about two obscure academic papers which contained hard-to-follow clues about the identity of the key enzymes.

*Id.* ¶ 16(A)–(D). CFB protected the Tagatose Trade Secrets by restricting employee access to sensitive information, requiring non-disclosure agreements with employees and third parties, and using passwords and other security measures to prevent third-party access. *Id.* ¶ 17. CFB and Zhang also had a written agreement that prohibited Zhang from competing against CFB and from disclosing “CFB confidential information,” *id.* ¶ 18, “except as such disclosure or use may be required in connection with [Zhang’s] work for [CFB] or unless [CFB] expressly authorize[d] such disclosure or use in writing,” BPA ¶ 1.1 (non-disclosure clause). *See* BPA ¶¶ 4.0–4.5 (covenant not to compete).

\* \* \*

Plaintiff Bonumose is a Virginia limited liability company based in Charlottesville. Am. Compl. ¶ 2. On April 1, 2016, Zhang, CFB, and Bonumose entered into the April 2016 Agreement, which transferred to Bonumose “all right, title[,] and interest to a broad category of identified assets [that] included the Tagatose Trade Secrets and confidential information related to the Tagatose Invention.” *Id.* ¶ 46. These “Assigned Assets” were defined in relevant part as:

(1) All IP Rights related to the production of Tagatose from starch, sucrose, cellulose, or degradation products thereof, including all intermediate steps, and including without limitation the U.S. Provisional Patent Application entitled “Enzymatic Synthesis of D-Tagatose,” as well as any subsequent non-provisional patent application, international filings, continuations, divisionals, etc. . . .

(2) All IP Rights held by CFB, if any, related to the production of fructose 1,6-bisphosphate (FBP) from starch, sucrose, cellulose, or degradation products thereof, as well as other Sugar Phosphates derived from FBP, including all intermediate steps.

April 2016 Agreement 2–3; *see* Am. Compl. ¶¶ 15–16, 19–20, 35–36, 46. The intellectual property (“IP”) rights referenced in these two clauses included “patent applications, . . . trade secrets, know how, data, [and] lab notes.” April 2016 Agreement 2.

The April 2016 Agreement contained three restrictive covenants governing Zhang’s and CFB’s disclosure or use of the Assigned Assets after April 1, 2016. First, “CFB and Zhang agree[d] not to compete against Bonumose . . . with respect to the Assigned Assets,” including “in the production of Tagatose or Sugar Phosphates (including FBP) from starch, sucrose, cellulose, or degradation products thereof, or to assist or cooperate with competition against Bonumose by third parties.” April 2016 Agreement 5; *accord* Am. Compl. ¶ 20(A). Zhang retained the right “to pursue purely academic research and freedom to publish papers on Sugar Phosphates,” and “[h]is Chinese collaborators ha[d] a right to retain their rights for sugar phosphate commercialization.” April 2016 Agreement 5. Second, CFB and Zhang agreed “[n]ot to disclose to anyone any confidential information, trade secrets, or other IP Rights about the

Assigned Assets, including any disclosures in an academic setting or any disclosures in scientific or other journals or other publications.” Am. Compl. ¶ 20(B) (quoting April 2016 Agreement 6). Zhang retained the right to “publish Sugar Phosphate-related papers with Chinese collaborators.” April 2016 Agreement 6. Third, CFB and Zhang agreed “[t]o ‘immediately cease communications with third parties about the Assigned Assets.’” Am. Compl. ¶ 20(C) (quoting April 2016 Agreement 6). The April 2016 Agreement also “expressly gave Bonumose the right to enforce CFB’s rights under the [BPA]” that CFB had with Zhang, *id.* ¶ 108 (citing April 2016 Agreement 2), which contained more detailed non-disclosure and non-compete clauses. *See* BPA ¶¶ 1.1–1.3 (non-disclosure clauses allowing the use or disclosure of confidential information in certain circumstances), 4.0–4.4 (non-compete clauses limited in scope, duration, and territory).

For its part, Bonumose immediately issued to CFB common membership units in Bonumose and agreed to make future “Minimum Distributions” beginning on specific dates (April 1, 2017, through April 1, 2020), or the date on which Bonumose met each of four “Milestones” with respect to developing Tagatose for the commercial market. *See* Am. Compl. ¶¶ 51, 59, 67–68; April 2016 Agreement 7, 8–9. Finally, the April 2016 Agreement gave CFB a non-exclusive right of reversion if Bonumose did not live up to its end of the deal:

If (a) Bonumose fails to meet one or more of the Milestones or if Bonumose is more than thirty (30) days late in paying any Minimum Distribution, and (b) CFB and Zhang are not in breach of any terms in this Agreement, CFB shall have, after giving Bonumose thirty (30) days written notice, a non-exclusive right to use the Tagatose IP Rights and develop competing [T]agatose technology for marketing . . . but Bonumose shall retain non-exclusive rights thereto.

April 2016 Agreement 9; *see* Am. Compl. ¶¶ 52, 60, 67. Bonumose “has met all of the milestones and satisfied all of its obligations under the April 2016 Agreement, including the payment of distributions,” through at least the date on which it filed the Amended Complaint. Am. Compl. ¶¶ 68, 71.

After April 1, 2016, Bonumose took “appropriate steps to protect the Tagatose Trade Secrets and confidential information it acquired from CFB,” *id.* ¶ 21, including some of the same steps that CFB took to protect this information, *see id.* ¶ 17. Bonumose also “invested considerable time and resources in commercializing the production methods and other findings” related to Tagatose, *id.* ¶ 23, which, given the “tremendous demand” for natural sweeteners, could unlock “a multi-billion dollar annual global market for the product,” *id.* ¶ 11. In September 2016, Bonumose filed a Patent Cooperation Treaty application (the “PCT application”) for the Tagatose Trade Secrets “list[ing] China as one of the covered countries.” *Id.* ¶¶ 30–31. Information concerning “the Tagatose Trade Secrets remained confidential,” *id.* ¶ 31, until Bonumose’s PCT application was officially published on April 6, 2017, *id.* ¶ 38. This “marked the first time the Tagatose Trade Secrets were publicly disclosed with Bonumose’s knowledge and authorization.” *Id.* ¶ 38. About a week later, however, Bonumose learned from one of its potential business partners that the Tianjin Institute had filed a patent application (the “Tianjin Institute application”) on November 1, 2016, for Tagatose production that was “nearly identical to” Bonumose’s PCT application. *Id.* ¶¶ 32, 39. The Tianjin Institute application listed two inventors by name, one of whom, Dr. Yen-he Ma, was the Institute’s president and a known “research collaborator of Zhang’s.” *Id.* ¶ 33. It also “contain[ed] an unusual statement that ‘other inventors request an unlisted name.’” *Id.* Bonumose believes that Zhang and Dr. Chun You, who joined the Tianjin Institute in March 2016 and was “a current or former CFB employee,” *id.* ¶ 27, are the unnamed “other co-inventors”—indicating that both men played “a substantive role” in producing the Tianjin Institute application and ostensibly “made creative contributions to the substantive features to the invention” described therein, *id.* ¶¶ 33–34.

Bonumose alleges that the Tianjin Institute application “could not have been written” unless someone (or some entity) involved in that project either used a copy of “the confidential, unpublished provisional patent application” that Bonumose acquired from CFB in April 2016 or otherwise disclosed the “Tagatose Trade Secrets, the confidential or trade secret information underlying the Tagatose Invention.” *Id.* ¶ 35; *see also id.* ¶ 97. Bonumose bases this allegation on similarities between the Tianjin Institute application and the unpublished provisional application. For example, the Tianjin Institute application “included the same enzymatic pathway for Tagatose production invented by Dr. Wichelecki” and described in the unpublished provisional application. *Id.* ¶ 36. It also named “the exact same” “two key enzymes” and featured drawings that were “nearly identical” to those in the unpublished provisional application. *Id.* The unpublished provisional application had also “contained an error, which Bonumose later corrected,” that was “replicate[d]” without correction in the Tianjin Institute application— “clearly marking [the latter] as a copycat effort based on the confidential information disclosed by Defendants.” *Id.* According to Bonumose, “[t]he circumstances indicate Zhang and CFB received compensation or benefits from the Tianjin Institute in exchange for” disclosing the Tagatose Trade Secrets. *Id.* ¶ 29.

Although the information contained in Bonumose’s unpublished provisional patent application, including the Tagatose Trade Secrets, has been public since April 2017 because of the “publication of the PCT application,” Bonumose alleges that it “was damaged by the prior disclosure and use of the Tagatose Trade Secrets while that information was confidential.” *Id.* ¶ 40. In particular, the “wrongful disclosure of the[ir] Tagatose Trade Secrets gave the Tianjin Institute several months of advanced knowledge of confidential information, including . . . the enzymatic pathway discovered by Dr. Wichelecki,” *id.*, which allowed the foreign entity to file

its patent application for the same process or product that “Bonumose has invested considerable time and resources in commercializing,” *id.* ¶ 23. *See also id.* ¶ 52 (alleging that Defendants “disclos[ed] the Tagatose Trade Secrets to . . . assist the Tianjin Institute’s efforts to compete with Bonumose regarding the commercialization of Tagatose”). Bonumose also alleges that its “ongoing efforts to commercialize its technology and its business prospects have diminished,” *id.* ¶ 61, and that it incurred damages, *id.* ¶¶ 62, 80, 90, 98, 104, 110.

*B. Counts and Relief Sought*

Bonumose’s Amended Complaint sets out six claims for relief against Zhang and CFB (Counts One through Six) and an additional claim against Zhang (Count Seven):

- Count One: Breach of Contract. Bonumose alleges that Zhang and CFB breached the April 2016 Agreement’s non-disclosure clause, non-communication clause, and covenant not to compete. *See Am. Compl.* ¶¶ 45–63.
- Count Two: Declaratory Judgment, 28 U.S.C. § 2201. Bonumose seeks a declaration clarifying the parties’ rights under the April 2016 Agreement, specifically that Zhang and CFB breached the contract, and as a result: (1) that CFB does not have reversionary rights under the Agreement, and (2) that Bonumose does not owe any further duties to CFB, including duties for payment. *Am. Compl.* ¶ 71.
- Count Three: Misappropriation of Bonumose’s trade secrets in violation of the Virginia Uniform Trade Secrets Act (“VUTSA”), Va. Code §§ 59.1-336 to 59.1-343. *See Am. Compl.* ¶¶ 72–82.
- Count Four: Misappropriation of Bonumose’s trade secrets in violation of the Defend Trade Secrets Act (“DTSA”), 18 U.S.C. §§ 1831–1839. *See Am. Compl.* ¶¶ 83–93.
- Count Five: Civil Conspiracy. Bonumose alleges that “Zhang and CFB intentionally, purposefully, and without justification obtained Bonumose’s proprietary information in the production of Tagatose and used that information to file” the Tianjin Institute application. *Id.* ¶ 97.
- Count Six: Conversion. Bonumose alleges that Zhang and CFB unlawfully converted “information required for the production of Tagatose” that Bonumose owned. *Id.* ¶¶ 101–02.
- Count Seven: Breach of Contract. Bonumose alleges Zhang breached the BPA that prohibited him from disclosing confidential CFB information and competing against CFB. *See id.* ¶¶ 106–10.

Bonumose seeks compensatory and punitive damages, declaratory judgment clarifying Bonumose's and CFB's continuing obligations to each other under the April 2016 Agreement, and an order "enjoining Zhang and CFB from further use of the Tagatose Trade Secrets or other confidential information related to the Tagatose Invention." *Id.* at 16–17.

### III. Analysis

Defendants moved to dismiss all seven counts under Rule 12(b)(6) of the Federal Rules of Civil Procedure. Because Defendants' motion to dismiss Bonumose's DTSA claim, if granted, could eliminate the need to address any other issues or arguments, I will address that substantive federal claim first. *See Streno v. Shenandoah Univ.*, 278 F. Supp. 3d 924, 926, 932–33 (W.D. Va. 2017) (granting defendant's Rule 12(b)(6) motion to dismiss plaintiff's federal-law claims and declining to exercise supplemental jurisdiction over the remaining state-law claims under 28 U.S.C. § 1367); *Va. Farm Bureau Mut. Ins. Co. v. Sutherland*, No. 7:03cv122, 2004 WL 356538, at \*1 (W.D. Va. Feb. 25, 2004) ("[F]ederal courts have discretion to decline to exercise jurisdiction over [a] declaratory judgment action, even when the action otherwise satisfies the subject matter jurisdiction requirements.").

#### A. *Defend Trade Secrets Act*

"An owner of a trade secret that is misappropriated may bring a civil action" in federal district court "if the trade secret is related to a product or service used in, or intended for use in, interstate or foreign commerce." 18 U.S.C. § 1836(b)(1) (2016). To state a claim under the DTSA, the Amended Complaint "must allege (1) that [Bonumose] own[s] a trade secret, (2) that the trade secret was misappropriated, and (3) that the trade secret implicates interstate or foreign commerce." *Hawkins v. Fishbeck*, --- F. Supp. 3d ---, 2017 WL 4613664, at \*5 (W.D. Va. Oct. 16, 2017); *see* 18 U.S.C. § 1836(b)(1) (elements). Defendants argue that the Amended Complaint

falls short on the first and second elements.<sup>6</sup> Defs.’ Br. in Supp. 11–14, 15–17. Their arguments are not persuasive.

*I. Trade Secrets*

Defendants argue that the Amended Complaint does not “describe the subject matter of [Bonumose’s] alleged trade secrets in sufficient detail to establish” that the information at issue is actually a trade secret. *Id.* at 11 (quoting *Trandes Corp. v. Guy F. Atkinson Co.*, 996 F.2d 655, 661 (4th Cir. 1993)). The DTSA defines “trade secret” as “all forms and types of . . . scientific, technical, . . . or engineering information . . . whether tangible or intangible, and whether or how stored, compiled, or memorialized” that “the owner thereof has taken reasonable measures to keep . . . secret.” 18 U.S.C. § 1839(3), (3)(A). This information must also derive “actual or potential” independent economic value “from not being generally known to, and not being readily ascertainable through proper means by, another person who can obtain economic value from the disclosure or use of the information.” *Id.* § 1839(3)(B); *see Hawkins*, 2017 WL 4613664, at \*5. The Amended Complaint sufficiently alleges a trade secret.

First, Bonumose “sufficiently pleads that the purported trade secrets fall within th[e] broad definition of scientific and technical information by describing various facets,” *Hawkins*, 2017 WL 4613664, at \*5, of Dr. Wichelecki’s novel process for converting fructose 6-phosphate into Tagatose, such as the fact that “two key enzymes mak[e] the enzymatic pathway viable” and that Dr. Wichelecki used certain “methods . . . to verify and optimize the novel enzymatic

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<sup>6</sup> The Amended Complaint alleges an interstate or foreign commerce nexus, *see* Am. Compl. ¶¶ 2–5, 10–11, 23, 85, satisfying the third element, which is necessary to establish this Court’s subject-matter jurisdiction over the action. 18 U.S.C. § 1836(b)(1), (c); 28 U.S.C. §§ 1331, 1367(a); *see Gov’t Emps. Ins. Co. v. Nealey*, 262 F. Supp. 3d 153, 172–73 & n.20 (E.D. Pa. 2017) (noting that the DTSA’s “‘interstate commence’ requirement is jurisdictional,” and sua sponte dismissing the action for lack of subject-matter jurisdiction where the complaint did “not allege any nexus between interstate or foreign commerce and the alleged trade secrets”).

pathway” that he invented, Am. Compl. ¶ 16(A)–(C).<sup>7</sup> Bonumose also alleges that certain information described in both the unpublished provisional patent application and the April 2016 Agreement—specifically the “identit[ies] of the two key enzymes” and the “novel enzymatic pathway for producing Tagatose from starch”—qualifies as trade-secret information. Am. Compl. ¶¶ 15, 16(A)–(B); *see also id.* ¶¶ 19–20 (citing April 2016 Agreement 2–3, 6).

Defendants first protest that Bonumose must name the specific enzymes and enzymatic pathway at issue, or at least describe the purported trade secrets in greater detail, to state a plausible misappropriation claim.<sup>8</sup> Defs.’ Br. in Supp. 11–14; Defs.’ Reply Br. 3–7. In support of

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<sup>7</sup> As to the fourth category of information allegedly constituting the Tagatose Trade Secrets, i.e., “information about two obscure academic papers [that] contained hard-to-follow clues about the identity of the key enzymes,” Am. Compl. ¶ 16(D), the Court has some doubts about whether this information can meet the statutory definition of a trade secret because it apparently refers to published works that were already available to “other members of the relevant industry,” *MicroStrategy, Inc. v. Bus. Objects, S.A.*, 331 F. Supp. 2d 396, 416, 417–19 (E.D. Va. 2004) (indicating, in the context of ruling on a trade secret misappropriation claim after a bench trial, that publicity is an affirmative defense under the VUTSA). *See* Defs.’ Br. in Supp. 14 (“This public ‘information’ cannot be protectable as trade secret, no matter how ‘obscure.’” (quoting Am. Compl. ¶ 16(D))). But “Rule 12(b)(6) is a vehicle to dismiss a ‘claim’ in its entirety,” *Bocock v. Specialized Youth Servs. of Va., Inc.*, No. 5:14cv50, 2015 WL 1611387, at \*2 (W.D. Va. Apr. 10, 2015), and “generally cannot reach the merits of an affirmative defense,” *Goodman v. Praxair, Inc.*, 494 F.3d 458, 464 (4th Cir. 2007). Accordingly, determination of whether Bonumose may proceed on the fourth category of its alleged trade secrets must be deferred to at least summary judgment.

<sup>8</sup> Defendants rely mostly on cases decided on summary judgment or after trial to support their argument that Bonumose’s Amended Complaint does not “describe the subject matter of its alleged trade secrets in sufficient detail to establish” at the pleading stage that the information meets the statutory definition of a trade secret. Defs.’ Br. in Supp. 11 (quoting *Trandes Corp.*, 996 F.2d at 661–62 (discussing plaintiff’s burden of proof at trial and concluding that plaintiff’s conclusory allegation “that it possessed secret ‘formulas,’” without providing any supporting evidence, “did not sustain even a prima facie case of misappropriation”)); *see also id.* at 11–12 (citing *Contracts Materials Processing v. Kataleuna GmbH Catalysts*, 164 F. Supp. 2d 520, 534 (D. Md. 2001) (finding plaintiff’s assertion “that the Technology involved trade secrets,” unsupported by any evidence, was not enough to defeat defendant’s motion for summary judgment)); Defs.’ Reply Br. 6–7 (citing *Thee Dollhouse Prods. N.C., Inc. v. Fairchild*, No. 5:08cv282, 2009 U.S. Dist. LEXIS 132727, at \*30, \*32 n.14 (E.D.N.C. Mar. 30, 2009) (finding on summary judgment that the “scope of the purported trade secrets identified by plaintiffs [was] not entirely clear” and that their “claims for misappropriation of any additional purported trade secrets must fail [as a matter of state law] because they have failed to identify them with sufficient particularity”); *sit-up Ltd. v. IAC/Interactive Corp.*, No. 05 Civ. 9292, 2008 U.S. Dist. LEXIS 12017, at \*33–35 (S.D.N.Y. Feb. 20, 2008) (noting on summary judgment that defendants “challenge[d] plaintiff’s alleged trade secrets on the basis of vagueness and ambiguity” and finding that plaintiff failed to properly rebut defendants’ argument)); *Kuryakyn Holdings, LLC v. Ciro, LLC*, 242 F. Supp. 3d 789, 798–99 (W.D. Wisc. 2017) (granting summary judgment to defendants on misappropriation claims under federal and state law where

this argument, they cite a “growing trend” among federal judges in the Northern District of California to require that trade-secret misappropriation claims be pled with particularity before allowing a case to proceed to discovery. Defs.’ Reply Br. 6–7 (citing *Top Agent Network, Inc. v. Zillow, Inc.*, No. 14-cv-04769, 2015 U.S. Dist. LEXIS 161556, at \*11–16 (N.D. Cal. Apr. 13, 2015) (Seeborg, J.) (explaining that a plaintiff raising a trade-secret misappropriation claim under California law “must itemize the information claimed as a trade secret with reasonable particularity such that prior to engaging in costly discovery, defendants may distinguish them from matters of general knowledge in the trade or of special knowledge of those persons who are skilled in the trade, and ascertain at least the boundaries within which the secret lies,” and granting defendant’s Rule 12(b)(6) motion to dismiss a complaint that “aver[red] only in broad strokes . . . what pieces of information shared . . . could constitute trade secrets, offering not nearly enough detail to allow the Court to make the required item-by-item determination of what is and is not protectable under” state law (internal citations and quotation marks omitted)); *Synopsys, Inc. v. ATopTech, Inc.*, No. C 13-2965, 2013 U.S. Dist. LEXIS 153089, at \*15–23 (N.D. Cal. Oct. 24, 2013) (Conti, J.) (setting out the same pleading standard for trade-secret

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the plaintiff offered only “vague, generalized descriptions of its purported trade secrets without demonstrating that any specific piece of information meets the statutory definition of trade secret”) (cited by Defendants’ counsel at oral argument). Bonumose likewise cites an opinion dissenting from a Fourth Circuit panel decision affirming summary judgment for a defendant on a state-law misappropriation claim to support its argument that the Tagatose Trade Secrets would be legally protected “even if elements of the trade secret [were] public” before April 2016 because the “particular alchemy behind the item as a whole” was not made public until April 2017. Pl.’s Br. in Opp’n 14 (quoting *Hill Holliday Connors Cosmopulos, Inc. v. Greenfield*, 433 F. App’x 207, 222 (4th Cir. 2011) (Gregory, J., dissenting in part)). These cases delineate the evidence necessary to sustain a verdict or to show a genuine dispute of material fact as to whether a purported trade secret is in fact legally protected, but they do not present a controlling statement of the law regarding the plausibility of Bonumose’s well-pled factual allegations, which is the standard that I must apply in resolving Defendants’ Rule 12(b)(6) motion. *Cf. Nemet Chevrolet*, 591 F.3d at 262 (Jones, D.J., sitting by designation, concurring in part and dissenting in part) (noting that *Iqbal* “did not merge the pleading requirements of Rule 8 with the burden of proof required for summary judgment” because “[o]therwise, the summary judgment process under Rule 56 would have little meaning”).

misappropriation claims arising under California law and granting defendant’s Rule 12(b)(6) motion to dismiss a complaint that described the alleged trade secrets in “impermissibly conclusory” language such as “‘proprietary input and output formats, scripts, and technical product documentation, which generally [were] not publicly known, and derive[d] value from being secret’” (quoting the complaint)), *vacated on other grounds by* 2015 U.S. Dist. LEXIS 29312, at \*1 (N.D. Cal. Feb. 19, 2015) (Chesney J.)); *see also Space Data Corp. v. X*, No. 16-cv-03260, 2017 WL 5013363, at \*2–3 (N.D. Cal. Feb. 16, 2017) (Freeman, J.) (setting out the same pleading standard for trade-secret misappropriation claims arising under both the federal DTSA and California law, granting Defendant Google, Inc.’s Rule 12(b)(6) motion to dismiss a complaint that “merely provide[d] a high-level overview of Space Data’s purported trade secrets, such as ‘data on the environment in the stratosphere’ and ‘data on the propagation of radio signals from stratospheric balloon-based transceivers,’” and giving Plaintiff Space Data leave to file an amended complaint (quoting the complaint)) (cited by Defendants’ counsel at oral argument).<sup>9</sup>

While I understand Defendants’ rationale for more specific or detailed factual allegations describing the purported trade secrets at issue in this case, I am more persuaded by decisions from district judges in the Western District of Virginia concluding that a complaint asserting a claim for misappropriation of trade secrets under either the DTSA or the VUTSA “must plead ‘only enough facts to state a claim to relief that is plausible on its face.’” *Hawkins*, 2017 WL 4613664, at \*1 (Moon, J.) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)); *see*

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<sup>9</sup> Judge Freeman later rejected Google’s “overinflated . . . concerns” that Space Data’s “identification of trade secrets” in its amended complaint was “vague and ambiguous and . . . not adequately distinguished from public information,” and concluded that the amended complaint contained “reasonable detail—enough to permit Google to prepare a defense and for the court to craft limits on discovery.” *Space Data Corp. v. X*, No. 16-cv-03260, 2017 WL 3007078, at \*2–3 (N.D. Cal. July 14, 2017) (cited by Defendants’ counsel at oral argument).

also *All Bus. Sols., Inc. v. NationsLine, Inc.*, 629 F. Supp. 2d 553, 557, 558–59 (W.D. Va. 2009) (Conrad, J.) (citing *Iqbal*, 556 U.S. at 678; *Twombly*, 550 U.S. at 570). In *Hawkins*, for example, Judge Norman K. Moon concluded that the plaintiff’s allegations “describing various facets of the software and related products”—such as that the trade secrets included “software design specifications,” “product engineering and architecture,” “system prototypes,” and “user interface design”—were sufficient to show that the purported trade secrets fell within the DTSA’s “broad definition of scientific and technical information.” 2017 WL 4613664, at \*5 (quotation marks omitted). In reaching this conclusion, Judge Moon explicitly rejected the defendants’ assertion that the complaint did “not sufficiently specify that the information at issue was actually a ‘trade secret.’” *Id.* Conversely, Judge Glen E. Conrad concluded in *All Business Solutions* that a complaint did not contain enough facts to state a claim for relief under the VUTSA where the claim was “premised on the single, conclusory assertion that NationsLine ‘sought to appropriate and disclose the names of ABS customers, along with other ABS trade secrets and confidential information,’” without providing any “additional factual allegations [to] support th[at] assertion.” 629 F. Supp. 2d at 558–59 (alterations omitted) (quoting the complaint). Judge Conrad dismissed the plaintiff’s VUTSA claim in that case “[b]ecause *Twombly* and *Iqbal* make clear that ‘naked assertions devoid of further factual enhancement’ are insufficient to withstand a motion to dismiss.” *Id.* at 559 (quoting *Iqbal*, 556 U.S. at 678) (alterations and other quotation marks omitted). “Viewed in the light most favorable to [Bonumose],” *Woods v. City of Greensboro*, 855 F.3d 639, 649 (4th Cir. 2017), I find that the Amended Complaint’s well-pled facts describing the purported trade secrets at issue here, Am. Compl. ¶¶ 15, 16(A)–(D), are more in line with the factual allegations Judge Moon found sufficient in *Hawkins* than with the single, conclusory assertion Judge Conrad found insufficient in *All Business Solutions*. Accordingly,

Bonumose need not name the specific “key enzymes” or describe the purported trade secrets in any greater detail to survive Defendants’ motion to dismiss. *Cf. Li v. Shuman*, No. 5:14cv30, 2015 WL 3766182, at \*14–15 (W.D. Va. June 16, 2015) (Urbanski, J.) (concluding that plaintiff’s allegations describing his trade secrets as “a number of secret recipes compiled in an excel sheet format” that provided “unique culinary art in taste and display” were sufficiently specific to state a claim under the VUTSA (quoting the complaint)); *Star City Comics & Games, Inc. v. Webbed Sphere, Inc.*, No. 7:10cv417, 2010 WL 5186713, at \*6 (W.D. Va. Dec. 9, 2010) (Conrad, J.) (concluding that plaintiff’s allegations describing its trade secrets as “valuable confidential and proprietary information, such as customer lists, business opportunities, cost and pricing procedures, and marketing strategies,” viewed in their entirety, were sufficient to state a claim under the VUTSA even though some of the “allegations [were] arguably conclusory”).<sup>10</sup>

Defendants argue in the alternative that Bonumose’s general description of its purported trade secrets, particularly the unnamed “enzymatic pathway” and “two key enzymes,” does not give Defendants fair notice of the trade-secret claims against them because they are left “to guess at what Bonumose believes is protectable.” Defs.’ Br. in Supp. 12–13 (citing Fed. R. Civ. P. 8(a)); *see also* Defs.’ Reply Br. 2–3, 5, 8. Yet, Defendants repeatedly assert that the identities of

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<sup>10</sup> Defendants object that Judge Conrad’s decision in *Star City Comics & Games* is inapposite because “it would have been difficult for [Star City] to describe the non-technical trade secrets in more detail,” whereas Bonumose “has sufficient information and ability to describe its trade secrets in detail.” Defs.’ Reply Br. 6 n.4. Rule 8 “do[es] not require heightened fact pleading of specifics,” *Twombly*, 550 U.S. at 570, just because a defendant thinks the plaintiff “could . . . have” provided detailed allegations to support its claims, Defs.’ Reply Br. 5; *see also id.* at 4 (“It should have been a simple matter to identify the enzymes. So why did Plaintiff fail to do so?”). *Iqbal*, 556 U.S. at 678 (“[T]he pleading standard Rule 8 announces does not require detailed factual allegations, but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation.”); *see, e.g., Blue Ocean Labs., Inc. v. Tempur Sealy Int’l, Inc.*, No. 1:15cv331, 2015 WL 9592523, at \*7 (M.D.N.C. Dec. 31, 2015) (denying a motion to dismiss a state-law misappropriation claim, despite finding that Blue Ocean would “likely need to produce more specific evidence of misconduct in order to proceed on its claims, particularly with regard to identifying the specific trade secret information that [Tempur Sealy] has allegedly misappropriated,” because the complaint’s factual allegations “were sufficiently specific to put Tempur Sealy on notice of the trade secrets Blue Ocean accuse[d] it of misappropriating”).

the enzymatic pathway and two enzymes are not trade secrets at all because that exact information “already had been publicly disclosed” in the two technical articles attached to their Rule 12(b)(6) motion. Defs.’ Reply Br. 4; *see also id.* at 8–9; Defs.’ Br. in Supp. 6–7, 12–13, 14. Defendants’ latter assertion belies their argument that the Amended Complaint falls short of Rule 8(a)’s pleading standard, as well as their suggestion that Bonumose is impermissibly trying to “unlock the doors of discovery” while “armed with nothing more than conclusions,” *Iqbal*, 556 U.S. at 678–79. *See generally* Defs.’ Br. in Supp. 3–4, 10–13; Defs.’ Reply Br. 1–8. Defendants’ alternative argument notwithstanding, I am satisfied that the facts alleged in Bonumose’s Amended Complaint meet “the requirement of providing not only ‘fair notice’ of the nature of the [trade-secret misappropriation] claim, but also ‘grounds’ on which the claim rests.” *Twombly*, 550 U.S. at 555 n.3 (quoting 5 Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1202 (3d ed. 2004)); *see Blue Ocean Labs.*, 2015 WL 9592523, at \*7.

Second, Bonumose sufficiently pleads that it took reasonable measures to keep the information secret before its PCT application was published in April 2017 by including confidentiality and non-compete clauses in the April 2016 Agreement, using passwords or other security measures to prevent third-party access to sensitive information, and keeping confidential the information in the unpublished provisional patent application. Am. Compl. ¶¶ 15–17, 21, 31, 38, 40, 78, 87–88; *see Hawkins*, 2017 WL 4613664, at \*5 (corporate plaintiff’s allegations that it included confidentiality and non-compete clauses in employment agreements sufficiently pled that plaintiff “took reasonable measures to keep th[e] information secret”). Viewed in the light most favorable to Bonumose, these allegations support a reasonable inference that the identities

of “the two key enzymes” and the enzymatic pathway were not publicly known until April 2017.<sup>11</sup>

Third, “[a]lthough never pled directly,” *Hawkins*, 2017 WL 4613664, at \*5, the Amended Complaint provides enough factual context for the Court to infer that the scientific and technical information at issue “derive[d] independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable through proper means by, another person who [could] obtain economic value from the disclosure or use of the information,” 18 U.S.C. § 1839(3)(B). *See, e.g.*, Am. Compl. ¶¶ 10–11 (alleging that there is “tremendous demand for the commercialization of natural alternatives to sucrose” and that “there is a multi-billion-dollar annual global market” for Tagatose if someone could reduce the “high costs of commercial production”), 29 (alleging that “Zhang and CFB received compensation or benefits from the Tianjin Institute in exchange for their wrongful disclosure of the Tagatose Trade Secrets”), 53 (alleging that Defendants “disclos[ed] the Tagatose Trade Secrets . . . to assist the Tianjin Institute’s efforts to compete with Bonumose regarding the commercialization of Tagatose”).

Defendants do not argue otherwise. Instead, they argue that the Amended Complaint does “not state[] a claim for misappropriation on which relief can be granted” because Bonumose does not allege “harm” and “cannot claim damages.” Defs.’ Br. in Supp. 17; *see also id.* at 11, 16–17; Defs.’ Reply Br. 11. But Defendants do not cite any authority suggesting that a plaintiff must articulate facts showing “realized harm” or “non-speculative damages,” Defs.’ Br. in Supp. 16, to state a claim for relief under the DTSA.<sup>12</sup> *See Sterling Computs. Corp. v. Haskell*, No. 4:17-cv-

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<sup>11</sup> As explained earlier, the Court will not take judicial notice of “the fact that certain disclosures were made” in the two technical articles attached to Defendants’ motion to dismiss, Defs.’ Reply Br. 8, in order to resolve a factual dispute over whether this scientific information was publicly known before April 2016. *See* Defs.’ Br. in Supp. 4–5, 10–12; Pl.’s Br. in Opp’n 6–8.

<sup>12</sup> At the hearing, Defendants’ counsel clarified that this argument primarily challenges whether Bonumose can persuade a jury that any misappropriation of its trade secrets resulted in compensable

04073, 2018 WL 671210, at \*5 (D.S.D. Feb. 1, 2018) (concluding that a plaintiff “does not need to establish specific proof of harm, actual or threatened, to survive a motion to dismiss” a DTSA claim). Finally, to the extent Defendants urge the Court to dismiss portions of this claim because the Amended Complaint supposedly fails to show that Bonumose is entitled to certain kinds of relief—such as punitive damages, attorneys’ fees, or an injunction, Defs.’ Br. in Supp. 17; Defs.’ Reply Br. 11—I find the argument misplaced because “a Rule 12(b)(6) motion is a premature means to attack a request” for a specific remedy where, as here, such relief is “theoretically recoverable under the applicable law,” *Hamilton v. Boddie-Noell Enters., Inc.*, 88 F. Supp. 3d 588, 592 (W.D. Va. 2015); *see* 18 U.S.C. § 1836(b)(3) (available remedies).

## 2. *Misappropriation*

Defendants next argue that the Amended Complaint fails to show that Zhang and CFB misappropriated any of Bonumose’s alleged trade secrets. Defs.’ Br. in Supp. 15–16. As relevant here, the DTSA defines “misappropriation” as the

disclosure or use of a trade secret of another without express or implied consent by a person who-- at the time of disclosure or use, knew or had reason to know that the knowledge of the trade secret was-- acquired under circumstances giving rise to a duty to maintain the secrecy of the trade secret or limit the use of the trade secret.

18 U.S.C. § 1839(5)(B)(ii)(II). Defendants argue that the facts alleged in the Amended Complaint do not establish that Zhang and CFB shared any trade-secret information with the Tianjin Institute *after* they signed the Agreement for Asset Sale & Assignment on April 1, 2016. *See* Defs.’ Br. in Supp. 15–16. Put differently, Zhang and CFB assert that they had every right to disclose this information *before* April 2016 and that Bonumose “does not—and cannot—plead that such communication occurred at a time when Defendants owed any duty to Bonumose not to

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damages. This “is a question more appropriately resolved at a later date.” *Costello Constr. Co. of Md. v. City of Charlottesville*, 97 F. Supp. 3d 819, 826 (W.D. Va. 2015).

do so.” *Id.* at 15. Absent facts describing precisely “when this communication occurred,” Defendants contend, the Amended Complaint “falls short of the line between possibility and plausibility of entitlement to relief” because it describes conduct that is “merely consistent with” a conclusion that Defendants misappropriated Bonumose’s trade secrets. *Id.* at 15–16.

I disagree. First, although an “allegation of time . . . is material when testing the sufficiency” of a complaint, Fed. R. Civ. P. 9(f), ordinary pleading rules do “not require specificity in pleading time,” and a complaint typically need only “set[] out the timing of the defendants’ actions with enough specificity to allow the defendants to respond to the allegations,” *C.L. Ritter Lumber Co. v. Consolidation Coal Co.*, No. 1:11cv19, 2011 WL 3793320, at \*6 (W.D. Va. Aug. 25, 2011), *adopted by* 2011 WL 4963195 (W.D. Va. Oct. 19, 2011). Bonumose’s allegation that “Zhang and CFB . . . provided the Tagatose Trade Secrets to the Tianjin Institute” “[i]n violation of the[ir] obligations under the April 2016 Agreement . . . and during a time” when the provisional patent application “remained unpublished,” Am. Compl. ¶ 28, provides enough context for the Court to infer that Defendants allegedly disclosed or used Bonumose’s trade secrets sometime between April 1, 2016, and April 6, 2017. *See id.* ¶¶ 15–17, 21, 31, 38, 40, 78, 87–88; *cf.* Defs.’ Br. in Supp. 15 n.6 (acknowledging that Bonumose’s allegation “that this communication happened ‘during a time in which’ the [provisional patent application] ‘remained unpublished’” narrows the relevant period to “any time between October 2, 2015 and April 6, 2017” (quoting Am. Compl. ¶ 28)). This level of specificity is sufficient to satisfy the ordinary pleading standard. *See C.L. Ritter Lumber Co.*, 2011 WL 3793320, at \*6 (“[A] complaint that omits any allegation as to time is insufficient and subject to dismissal, but a complaint that contains an indefinite allegation of time does not justify dismissal.”).

Second, contrary to Defendants’ suggestion, the Court cannot “undert[ake] to determine whether a lawful alternative explanation appear[s] more likely,” *Houck v. Substitute Tr. Servs., Inc.*, 791 F.3d 473, 484 (4th Cir. 2015), than the plausible version of events that Bonumose described in its pleading. *See, e.g.*, Defs.’ Br. in Supp. 15 (asserting that “the alleged communication *could have* occurred . . . when Defendants held all rights in the alleged trade secrets” and Bonumose therefore “*cannot* . . . plead that such communication occurred at a time when Defendants owed any duty to Bonumose not to do so” (emphasis added)). The Amended Complaint “need not demonstrate that [Bonumose’s] right to relief is probable or that alternative explanations are less likely; rather, [it] must merely advance [the] claim ‘across the line from conceivable to plausible.’” *Houck*, 791 F.3d at 484 (quoting *Twombly*, 550 U.S. at 570). “This plausibility standard requires only that the complaint’s factual allegations ‘be enough to raise a right to relief above the speculative level.’” *Id.* (quoting *Twombly*, 550 U.S. at 555). “The question before [me] is ‘not whether [Bonumose] will ultimately prevail’” on its trade-secret misappropriation claim, “but whether the complaint [is] sufficient to cross the federal court’s threshold.” *Woods*, 855 F.3d at 652–53 (quoting *Skinner v. Switzer*, 562 U.S. 521, 529–30 (2011) (cleaned up)).<sup>13</sup>

The facts describing Defendants’ alleged conduct (and Zhang’s in particular) support a reasonable inference that Zhang and/or CFB “disclos[ed] or use[d]” the Tagatose Trade Secrets “without express or implied consent” at a time when they “knew or had reason to know that the knowledge of the trade secret was . . . acquired under circumstances giving rise to a duty to maintain” its secrecy or to limit its use. 18 U.S.C. § 1839(5)(B)(ii)(II). For example, Bonumose

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<sup>13</sup> This Report & Recommendation “uses ‘(cleaned up)’ to indicate that internal quotation marks, alterations, and citations have been omitted from quotations.” *Davis v. Bryson*, No. 5:17cv60, 2017 WL 5179237, at \*2 n.3 (W.D. Va. Nov. 8, 2017) (Urbanski, C.J.) (citing *United States v. Reyes*, 866 F.3d 316, 321 (5th Cir. 2017)).

alleges that Zhang’s share of the Tagatose Invention, which was detailed in the unpublished provisional patent application, “was owned by CFB under” the terms of Zhang’s employment agreement. Am. Compl. ¶¶ 14, 15. CFB and Zhang also had a BPA that “obligated [Zhang] not to disclose CFB confidential information.” *Id.* ¶ 18. CFB kept the unpublished provisional patent application confidential and treated its contents as trade-secret information until Bonumose acquired the rights to that information (and the unpublished provisional patent application itself) on April 1, 2016. *Id.* ¶¶ 15, 19. In executing the April 2016 Agreement, Zhang and CFB expressly agreed “[n]ot to disclose to anyone any confidential information, trade secrets, or other IP Rights about the Assigned Assets, including any disclosures in an academic setting or any disclosures in scientific or other journals or other publications” and to “immediately cease communications with third parties about the Assigned Assets.” *Id.* ¶ 20(B), (C) (quoting April 2016 Agreement 6).

Bonumose kept the Assigned Assets confidential until its PCT application was published on April 6, 2017. *See id.* ¶¶ 15, 17, 20, 38. In November 2016, however, one of Zhang’s known “research collaborators” at the Tianjin Institute in China co-published a patent application that was “nearly identical to” the PCT application that Bonumose had recently filed. *Id.* ¶ 32. Bonumose alleges that the Tianjin Institute application “was prepared using Bonumose’s Tagatose Trade Secrets” and “could not have been written” unless someone involved had access to the unpublished provisional patent application—in part because the two applications featured “nearly identical” drawings and the provisional application contained a specific error that was “replicate[d]” without correction in the Tianjin Institute application. *Id.* ¶¶ 35–36. Bonumose also alleges that the Tianjin Institute compensated Zhang and CFB “in exchange for their . . . disclosure of the Tagatose Trade Secrets,” *id.* ¶ 29, and that Zhang is one of two “anonymous co-

inventors” listed on the Tianjin Institute application, which indicates Zhang played “a substantive role” in the document’s creation and “made creative contributions to the substantive features” of the underlying invention, *id.* ¶ 34.

Defendants’ argument that Bonumose “has not shown” it is entitled to relief under the DTSA because these factual allegations are “merely consistent with” a conclusion that Zhang and CFB misappropriated the Tagatose Trade Secrets misses the mark. Defs.’ Br. in Supp. 15–16 (quoting *Iqbal*, 556 U.S. at 678–79 (citing *Twombly*, 550 U.S. at 557)). The Supreme Court has used the phrase “‘merely consistent with’ a defendant’s liability,” *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 557), to explain why Rule 8(a) requires dismissal of a complaint that does not contain “enough factual matter,” accepted as true, for the Court to reasonably infer that all elements of the plaintiff’s cause of action exist. *Twombly*, 550 U.S. at 556–57; *see also Iqbal*, 556 U.S. 678–79, 682–83, 686–87. The complaint in *Twombly* fell short of this threshold because it alleged “parallel conduct . . . without that further circumstance pointing toward a meeting of the minds”—i.e., it did not plead any facts “plausibly suggesting . . . *the agreement necessary*” to state a claim for conspiracy to violate the Sherman Act. 550 U.S. at 557 (emphasis added); *see Oxbow Carbon & Minerals, LLC v. Union Pac. R.R. Co.*, 81 F. Supp. 3d 1, 13 (D.D.C. 2015) (“Plaintiffs [in *Twombly*] failed to allege *any* facts, circumstantial or otherwise, to render the alleged conspiracy plausible.” (citing 550 U.S. at 566)). Similarly, the complaint in *Iqbal* did “not nudge[] [plaintiff’s] claim of invidious discrimination across the line from conceivable to plausible” because its factual allegations that then-F.B.I. Director Robert Mueller and other high-ranking Executive Branch officials implemented a policy directing agents to “arrest[] and detain[] thousands of Arab Muslim men as part of [the F.B.I.’s] investigation” immediately after September 11, 2001, were merely consistent with a conclusion that the

officials “purposefully designat[ed] detainees of high interest because of their race, religion, or national origin.” 556 U.S. at 680–81 (cleaned up). Without additional facts plausibly suggesting the *discriminatory intent* needed to state a claim for “invidious discrimination in contravention of the First and Fifth Amendments,” *id.* at 676, however, the Supreme Court could not reasonably infer that the officials “adopted [this] policy *because of*, not merely in spite of, its adverse effects upon an identifiable group,” *id.* at 681 (emphasis added) (quotation marks omitted). *See also id.* at 682–83, 686–87. Bonumose’s Amended Complaint, on the other hand, contains enough facts for the Court to reasonably infer that all elements of this cause of action exist, 18 U.S.C. §§ 1836(b)(1), 1839(3)–(5), and that Defendants are “liable for the misconduct alleged,” *Iqbal*, 556 U.S. at 678. *See Hawkins*, 2017 WL 4613664, at \*5.

Finally, Defendants argue that misappropriation is not a plausible conclusion on the facts alleged in the Amended Complaint because it is just as likely that Zhang and CFB did nothing wrong and that Bonumose should have to rule out alternative explanations for the alleged misconduct in order to state a claim for relief. *See* Defs.’ Br. in Supp. 15–16. This argument violates familiar axioms that the Court must view the Amended Complaint’s factual allegations and all reasonable inferences “in the light most favorable to” Bonumose when evaluating whether its misappropriation claims are facially plausible, *Woods*, 855 F.3d at 649, and that, as long as Bonumose’s “explanation is plausible, [its] complaint survives . . . under Rule 12(b)(6), regardless of whether there is a more plausible alternative explanation,” *Houck*, 791 F.3d at 484. *See also Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 595 (8th Cir. 2009) (vacating and remanding where the district court impermissibly “drew inferences in [defendants’] favor” and faulted plaintiff “for failing to plead facts tending to contradict those inferences” in granting defendants’ Rule 12(b)(6) motion); *Bd. of Trs. of City of Birmingham Emps.’ Retirement Sys. v.*

*Comerica Bank*, 767 F. Supp. 2d 793, 804 (E.D. Mich. 2011) (contrasting *Twombly*'s discussion of "an obvious alternative explanation" for the alleged illegal agreement with defendant's assertion "that it [was] just as likely" defendant did nothing wrong, and rejecting the argument that "wrongdoing is not a plausible conclusion" simply because the defendant puts forth "as-likely alternative explanations" for its alleged misconduct). Thus, while it is possible that Zhang's and CFB's alleged conduct occurred completely before Bonumose acquired the rights to the Tagatose Trade Secrets, it is not Bonumose's "responsibility to rebut" that possibility in its Amended Complaint where, as here, the well-pled facts support a reasonable inference that Defendants are liable for the misconduct alleged. *Braden*, 588 F.3d at 596 ("The district court erred by . . . finding the complaint inadequate for failing to rule out potential lawful explanations for [defendants'] conduct."); see *Blue Ocean Labs.*, 2015 WL 9592523, at \*7 (denying motion to dismiss a state-law misappropriation claim, despite finding that the complaint's factual allegations "may be consistent with innocent explanations as well as misconduct," because a plaintiff is not required to set out a "prima facie case" of trade-secret misappropriation at the pleading stage).

Accordingly, Defendants' motion to dismiss Count Four should be denied.

*B. Virginia Uniform Trade Secrets Act*

To state a claim for relief under the VUTSA, "a plaintiff must allege sufficient facts to establish (1) that the information at issue is a trade secret and (2) that the defendant misappropriated it." *All Bus. Sols.*, 629 F. Supp. 2d at 558 (quotation marks omitted); see Va. Code § 59.1-336. By state statute, a trade secret is information that "(1) [has] independent economic value; (2) [is] not known or readily ascertainable by proper means; and (3) [is] subject to reasonable efforts to maintain secrecy." *Trident Prods. & Servs., LLC v. Canadian Soiless*

*Wholesale, Ltd.*, 859 F. Supp. 2d 771, 778 (E.D. Va. 2012). Misappropriation under Virginia law has two elements:

(1) that the defendant acquired, disclosed, or used a trade secret developed by the plaintiff through improper means (namely, without express or implied consent); and (2) that the defendant knew or had reason to know that its knowledge of the trade secret was either acquired under circumstances giving rise to a duty to maintain its secrecy or derived through a person owing such a duty to the plaintiff.

*Id.* at 780. Defendants contend that the Amended Complaint falls short for the same reasons they argued the pleading failed to state a claim under the DTSA. Defs.’ Br. in Supp. 11 n.5 (“In all aspects relevant to Bonumose’s misappropriation claims, the provisions of the VUTSA and DTSA are substantively identical.”); *see generally id.* at 11–17; Defs.’ Reply Br. 2–8, 10–11. “Given the similarity of elements with the DTSA,” I find that the facts alleged in the Amended Complaint also state a plausible claim for relief under the VUTSA. *Space Sys./Loral, LLC v. Orbital ATK, Inc.*, No. 4:17cv25, 2018 WL 701280, at \*6 (E.D. Va. Feb. 2, 2018). *See generally* Va. Code §§ 59.1-336 to 59.1-338.1 (definitions, elements, and remedies). Accordingly, Defendants’ motion to dismiss Count Three should be denied.

### C. *Breach of Contract*

Defendants also move to dismiss Bonumose’s causes of action asserting that Zhang and CFB breached the April 2016 Agreement’s three restrictive covenants, *see* Am. Compl. ¶¶ 45–63 (Count One), and that Zhang violated the BPA that he had with CFB, *see id.* ¶¶ 106–10 (Count Seven). Defs.’ Br. in Supp. 18–19. Both contracts expressly state that they are governed by Virginia law, April 2016 Agreement 10; BPA ¶ 13.1, which I find applies to Bonumose’s claims, *see Colgan Air, Inc. v. Raytheon Aircraft Co.*, 507 F.3d 270, 275 (4th Cir. 2007) (*per curiam*) (“Virginia law looks favorably upon choice of law clauses in a contract, giving them full effect except in unusual circumstances, none of which exist here.”). “The elements of breach of

contract in Virginia are: ‘(1) a legally enforceable obligation of a defendant to a plaintiff; (2) the defendant’s violation or breach of that obligation; and (3) injury or damage to the plaintiff caused by the breach of obligation.’” *Jones v. Fulton Bank, N.A.*, 565 F. App’x 251, 252 (4th Cir. 2014) (per curiam) (quoting *Filak v. George*, 594 S.E.2d 610, 614 (Va. 2004)). Defendants contend that the Amended Complaint falls short on the second and third elements. *See* Defs.’ Br. in Supp. 18–19 (violation or breach); Defs.’ Reply Br. 11 (injury or damage). Their arguments are not persuasive.

*I. Violation or Breach*

Defendants first argue that the Amended Complaint does not state a breach-of-contract claim with respect to either agreement because, as they explained elsewhere in their opening brief, “Bonumose fails to show that any acts allegedly constituting a breach occurred *after* the Agreement [for Asset Sale & Assignment] was signed” on April 1, 2016.<sup>14</sup> Defs.’ Br. in Supp. 18 (emphasis added) (citing Defs.’ Br. in Supp. 15–16). This argument carries even less currency here than it did against Bonumose’s trade-secret misappropriation claims—especially given that the Amended Complaint sets out “the terms of agreement upon which liability is predicated” and Defendants concede they were legally “bound to . . . refrain from” specific conduct with respect to the Assigned Assets for more than a year before Bonumose filed this lawsuit. *Cunningham Bros. Used Auto Parts, Inc. v. Zurich Am. Ins. Co.*, No. 6:17cv51, 2017 WL 4707464, at \*2 (W.D. Va. Oct. 19, 2017) (quotation marks omitted) (explaining the factual allegations necessary to show the existence of an enforceable obligation under Virginia law); *see* Am. Compl. ¶¶ 18–20, 28, 45–62, 106–10; Defs.’ Br. in Supp. 8–9, 18–19. Viewing the Amended Complaint as a

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<sup>14</sup> Defendants concede that the April 2016 Agreement gave Bonumose “the right to enforce the terms of” the BPA between Zhang and CFB, but argue that the former “Agreement—and the law—does not somehow permit Bonumose to state a claim for any breach of contract that might have occurred before Bonumose . . . acquired the right to enforce the terms” of the latter Agreement. Defs.’ Br. in Supp. 18.

whole, Bonumose’s allegation that “Zhang and CFB . . . provided the Tagatose Trade Secrets to the Tianjin Institute” “[i]n violation of the[ir] obligations under the April 2016 Agreement . . . and during a time” when the provisional patent application “remained unpublished,” Am. Compl. ¶ 28, allows the Court to infer that the alleged breaches happened sometime between April 1, 2016, and April 6, 2017. *See also id.* ¶¶ 15–17, 21, 31, 38, 40, 78, 87–88; Defs.’ Br. in Supp. 15 n.6. These allegations are sufficient to satisfy the general pleading standard applicable to ordinary breach-of-contract claims arising under Virginia law.

Next, Defendants argue that the Amended Complaint does not plausibly show that the April 2016 Agreement’s terms were violated because the pleading “merely alleges” Defendants disclosed “the Tagatose Trade Secrets” or “unidentified ‘confidential information,’” whereas “Defendants’ non-compete, non-disclosure, and no communication obligations under the Agreement apply to a much narrower set of information” defined as the “Assigned Assets” and underlying “IP Rights.” Defs.’ Br. in Supp. 18 (quoting Am. Compl. ¶ 54).<sup>15</sup> This argument advances too constricted a reading of both the April 2016 Agreement’s terms and the Amended Complaint’s well-pled factual allegations.

The relevant portion of the April 2016 Agreement defined the “Assigned Assets” as:

- (1) All IP Rights related to the production of Tagatose from starch, sucrose, cellulose, or degradation products thereof, including all intermediate steps, and including without limitation the U.S. Provisional Patent Application entitled “Enzymatic Synthesis of D-Tagatose,” as well as any subsequent non-provisional patent application, international filings, continuations, etc.
- (2) All IP Rights held by CFB, if any, related to the production of fructose 1,6-bisphosphate (FBP) from starch, sucrose, cellulose, or degradation products thereof, as well as other Sugar Phosphates derived from FBP, including all intermediate steps.

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<sup>15</sup> This argument focuses exclusively on the terms of the April 2016 Agreement. Defendants did not make the same argument with respect to Zhang’s non-compete and non-disclosure obligations under the BPA. *See* Defs.’ Br. in Supp. 18–19.

April 2016 Agreement 2–3; *accord* Pl.’s Br. in Opp’n 21–22. The “IP Rights” referenced in these two clauses included “patent applications, . . . trade secrets, know how, data, [and] lab notes.”

April 2016 Agreement 2. Defendants “agree[d] not to disclose to anyone any confidential information, trade secrets, or other IP Rights about the Assigned Assets” and to “immediately cease communications with third parties about the Assigned Assets.” Am. Compl. ¶¶ 23, 51 (citing April 2016 Agreement 6). They also “agree[d] not to compete against Bonumose . . . with respect to the Assigned Assets,” including “in the production of Tagatose or Sugar Phosphates (including FBP) from starch, sucrose, cellulose, or degradation products thereof, or to assist or cooperate with competition against Bonumose by third parties.” *Id.* ¶¶ 23, 50 (citing April 2016 Agreement 5).

Viewed in the light most favorable to Bonumose, the Amended Complaint plausibly alleges that Zhang and/or CFB shared information about the Assigned Assets—including confidential information in the unpublished provisional patent application—with the Tianjin Institute after they promised not to do so. *See id.* ¶¶ 28, 35–36, 45–46, 48, 50, 54, 57–58, 106–08. The factual allegations describing Zhang’s “substantive role” in the Tianjin Institute patent application, *see id.* ¶¶ 32–37, 40–42, also support a reasonable inference that Zhang violated his promise not to assist or cooperate with competition against Bonumose by third parties—including his Chinese collaborators’ efforts to commercialize sugar phosphates. *See id.* ¶¶ 10–11, 40, 42–43, 61; *cf. Schering-Plough Corp. v. Fed. Trade Comm’n*, 402 F.3d 1056, 1066 (11th Cir. 2005) (“Engrafted into patent law is the notion that a patent grant bestows ‘the right to exclude others from profiting by the patented invention.’” (quoting *Dawson Chem. Co. v. Rohm & Hass Co.*, 448 U.S. 176, 215 (1980))); *Best Lock Corp. v. Ilco Unican Corp.*, 94 F.3d 1563, 1564 (Fed.

Cir. 1996) (“By obtaining patent protection, a company hopes to control the [relevant] market . . . during the life of the patent.”).

## 2. *Resulting Injury or Damages*

Defendants asserted for the first time in their Reply Brief that Bonumose failed to state a breach-of-contract claim under either agreement because the Amended Complaint does “not articulate any kind of traditional damages” caused by the alleged breach. Defs.’ Reply Br. 11; *see also* Defs.’ Br. in Supp. 14–15 (arguing that Bonumose did not allege harm or damages as a result of alleged misappropriation of trade secret). But Defendants did not develop an argument on this point, and it not clear what they meant by “traditional damages.” Defs.’ Reply Br. 11 (asserting that Bonumose “attempts to make out a claim of ‘unjust enrichment’” rather than trying to “articulate any kind of traditional damages, whether in trade secret, contract, or any other tort”). Presumably, Defendants intended to argue that Bonumose failed to plead facts showing *any* injury or damage caused by the alleged breach, *see* Defs.’ Br. in Supp. 14–15, and not that Bonumose must plead facts showing that it is entitled to monetary relief (i.e., damages) in order to state a breach-of-contract claim under Virginia law.<sup>16</sup> *See* Damages, *Black’s Law*

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<sup>16</sup> The latter argument would be particularly problematic for Count Seven, which relates to the BPA between Zhang and CFB. Am. Compl. ¶¶ 106–10. That Agreement reflects the contracting parties’ mutual assent that CFB “would not have an adequate remedy at law for the breach or threatened breach of th[e] Agreement” and Zhang’s “express[] consent to the enforcement of th[e] Agreement and any of its provisions by . . . equitable relief.” BPA ¶ 10; *see* Adequate Remedy at Law, *Black’s Law Dictionary* 1320 (8th ed. 2004). Presumably, Bonumose has the same right as CFB to seek equitable relief under the terms of this Agreement if it can show Zhang violated his non-disclosure or non-compete obligations. *See* April 2016 Agreement 2; Am. Compl. ¶¶ 107–08. It is well-settled under Virginia law that parties have a “right to contract in such a way as ‘to eliminate damages as a required element of a breach of contract action,’” *W. Insulation, LP v. Moore*, 316 F. App’x 291, 297 (4th Cir. 2009) (quoting *Ulloa v. QSP, Inc.*, 624 S.E.2d 43, 48 (Va. 2006)), and this Court must give effect to the contracting parties’ intent in determining whether Bonumose’s Amended Complaint states a claim for which relief can be granted, *cf. Wilkins v. Wells Fargo Bank, N.A.*, No. 2:15cv566, 2016 WL 6775692, at \*3 (E.D. Va. Nov. 15, 2016) (noting, in the context of denying a motion to dismiss a breach-of-contract claim, that Virginia law allows contracting parties to “agree to a wide array of rights and responsibilities as between the parties, and courts must ‘enforce the contract as written, unless the contract is repugnant to some rule of law or public

*Dictionary* 416 (8th ed. 2004); *cf. Mayo v. Wells Fargo Bank, N.A.*, 30 F. Supp. 3d 485, 499 (E.D. Va. 2014) (declining to hold, in ruling on a motion to dismiss, that a plaintiff cannot seek an equitable remedy for breach of contract under Virginia law). Although Bonumose’s “allegations regarding damages are arguably conclusory,” the Amended Complaint as a whole “contains sufficient factual content” for the Court “to reasonably infer that all of the required breach of contract elements can be met,” *AvePoint, Inc. v. Power Tools, Inc.*, 981 F. Supp. 2d 496, 511 (W.D. Va. 2013), and Bonumose “is entitled to some form of relief” under governing law, *Charles v. Front Royal Volunteer Fire & Rescue Dep’t*, 21 F. Supp. 3d 620, 630 (W.D. Va. 2014). *See, e.g., W. Insulation*, 316 F. App’x at 298–99 (noting that Virginia “provides for an award of nominal damages in cases where the plaintiff proves that a breach of contract occurred but does not prove compensatory damages” for the actual resulting losses). Bonumose alleged that Zhang and CFB broke their contractual obligations and misappropriated its confidential, commercially valuable trade secrets, allowing Zhang and the Tianjin Institute to compete unfairly and submit its own patent application for producing Tagatose. Am. Compl. ¶¶ 23, 24, 35, 36, 40, 43. It is plausible that Zhang and CFB caused harm and damages to Bonumose through these acts. *Id.* ¶¶ 44, 80. I find that these allegations are sufficient to state a claim upon which relief can be granted.

Accordingly, Defendants’ motion to dismiss Count One and Count Seven should be denied.

*D. Civil Conspiracy*

In Count Five, Bonumose asserts that “Zhang and CFB combined, associated, agreed, or mutually undertook to willfully and maliciously injure Bonumose in its reputation, trade,

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policy” (alterations omitted) (quoting *D.C. McClain, Inc. v. Arlington Cty.*, 452 S.E.2d 659, 662 (Va. 1995))).

business, or profession” when, “through concerted action,” “Zhang and CFB intentionally, purposefully, and without justification obtained Bonumose’s propriety information in the production of Tagatose and used that information to file the Tianjin [Institute] Application.” Am. Compl. ¶¶ 95–97. The parties agree that this claim arises under Virginia law, Pl.’s Br. in Opp’n 23–25; Defs.’ Br. in Supp. 19–21, but Bonumose did not say whether it meant to plead a cause of action under Virginia’s business conspiracy statute, common law, or both. Am. Compl. ¶¶ 94–99; *see Harrell v. Colonial Holdings, Inc.*, 923 F. Supp. 2d 813, 825 (E.D. Va. 2013) (noting that the common law and the business conspiracy statute, Va. Code §§ 18.2-499 to 18.2-500, provide distinct causes of action for civil conspiracy). At the hearing, counsel for Bonumose said that Count Five alleges a cause of action under the common law. Given that the Amended Complaint’s allegations essentially track the statutory text, however, I will also consider this claim under the business conspiracy statute. Am. Compl. ¶¶ 95–97; Va. Code § 18.2-499(A).

Defendants first argue that the VUTSA preempts this claim because the “proprietary information in the production of Tagatose” that Bonumose accuses Zhang and CFB of using to file the Tianjin Institute application is also allegedly a trade secret. Defs.’ Br. in Supp. 19; *see* Va. Code § 59.1-341. The VUTSA expressly displaces “conflicting” Virginia tort law “providing civil remedies for misappropriation of a trade secret” unless the remedy is “not based upon misappropriation of a trade secret.” Va. Code § 59.1-341(A), (B)(2). While the Supreme Court of Virginia has not interpreted this provision’s scope, one Virginia Circuit Court has concluded “that preemption occurs only where the common-law claims ‘are premised entirely on a claim for the misappropriation of a trade secret.’” *Rogers Elec. of Va. v. Sims*, No. CL14–1917, 2015 WL 13589667, at \*3 (Chesapeake City Cir. Ct. Feb. 13, 2015) (quoting *Smithfield Ham & Prods. Co. v. Portion Pac, Inc.*, 905 F. Supp. 2d 346, 348 (E.D. Va. 1995))). Another has explained that

the VUTSA “does not preempt alternative tort recovery unless it is clear” that the “information at issue constitutes a trade secret.” *Int’l Paper Co. v. Gilliam*, No. CL03-496, 2003 WL 23573613, at \*4 (Roanoke City Cir. Ct. Dec. 23, 2003) (citing *Stone Castle Fin., Inc. v. Friedman, Billings, Ramsey & Co.*, 191 F. Supp. 2d 652, 659 (E.D. Va. 2002)).

Count Five arguably is “premised solely on the misappropriation of confidential, proprietary information,” *Combined Ins. Co. of Am. v. Wiest*, 578 F. Supp. 2d 822, 834 (W.D. Va. 2008), required for the production of Tagatose, *see* Am. Compl. ¶ 97; Pl.’s Br. in Opp’n 23. “Nonetheless, because the determination of whether such information qualifies as a trade secret presents a question of fact,” and because Defendants “specifically dispute[] whether” at least some of that information constituted a trade secret, I recommend that the Court defer ruling on the preemption issue at this stage of the litigation. *Wiest*, 578 F. Supp. 2d at 834 (citing *MicroStrategy Inc. v. Li*, 601 S.E.2d 580, 589 (Va. 2004) (“[T]he determination whether a trade secret exists ordinarily presents a question of fact to be determined by the fact finder from the greater weight of the evidence.”)); *see also AWP, Inc. v. Commonwealth Excavating, Inc.*, No. 5:13cv31, 2013 WL 3830500, at \*7 (W.D. Va. July 24, 2013) (denying as premature a motion to dismiss common law and statutory business conspiracy claims on preemption grounds because “although AWP ha[d] sufficiently alleged the existence of a trade secret, it ha[d] not yet proven its entitlement to relief under the VUTSA”); *Stone Castle Fin.*, 191 F. Supp. 2d at 659 (denying a motion to dismiss various tort claims on preemption grounds where it was “clear . . . the parties very much dispute whether the confidential information constitutes trade secrets”).

To state a business conspiracy claim under Virginia Code §§ 18.2-499 and 18.2-500, the Amended Complaint’s factual allegations “must show ‘(1) a combination of two or more persons for the purpose of willfully and maliciously injuring a plaintiff’s business, and (2) resulting

damage to the plaintiff.”” *Rosenthal v. R.W. Smith Co.*, 260 F. Supp. 3d 588, 593 (W.D. Va. 2017) (quoting *Rogers v. Deane*, 992 F. Supp. 2d 621, 633 (E.D. Va. 2014)). Each element must also be pled with particularity, which prevents every garden-variety business dispute from becoming an actionable business conspiracy claim. *Schlegel v. Bank of Am., N.A.*, 505 F. Supp. 2d 321, 329 (W.D. Va. 2007). “[T]he elements of a common law civil conspiracy are (i) an agreement between two or more persons (ii) to accomplish an unlawful purpose or to accomplish a lawful purpose by unlawful means, which (iii) results in damage to plaintiff” through an overt action done pursuant to the agreement.” *Marcantonio*, 155 F. Supp. 3d at 634 (quoting *William v. AES Corp.*, 28 F. Supp. 3d 553, 574 (E.D. Va. 2014)). “There must also be an underlying tort committed.” *Id.* Bonumose’s “statutory and common law business conspiracy claims [can] be addressed together because they share the same fatal flaw—the lack of a conspiracy.” *Rosenthal*, 260 F. Supp. 3d at 593.

Defendants argue that Bonumose’s factual allegations do not show that Zhang and CFB, the only two alleged conspirators specifically identified in the Amended Complaint, came to “the agreement” or took the “concerted action” necessary to make out any conspiracy claim.<sup>17</sup> *See*

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<sup>17</sup> Bonumose’s allegations that “Zhang is CFB’s majority shareholder, Chairman of the Board, . . . President,” and employee, Am. Compl. ¶¶ 4, 14, 18, may well render this alleged conspiracy “a legal impossibility” under Virginia’s intracorporate immunity doctrine. *Am. Chiropractic Ass’n, Inc. v. Trigon Healthcare, Inc.*, 151 F. Supp. 2d 723, 731 (W.D. Va. 2001) (“The doctrine of intracorporate immunity holds that because at least two persons must be present to form a conspiracy, a corporation cannot conspire with itself. Since a corporation is an artificial entity, it can only act through its authorized agents, officers, and employees. Thus, a conspiracy between a corporation and its agents, acting within the scope of their employment, is a legal impossibility.”); *cf. Rosenthal*, 260 F. Supp. 3d at 593–94 (“Rosenthal alleges that the two or more persons who conspired against him were RWS employees Bates and Jenny. However, there cannot be a conspiracy between agents of a corporation operating within the scope of their duties.” (citations omitted)). When I raised the issue to Defendants’ counsel at the hearing, however, counsel responded that Defendants chose not to challenge the civil conspiracy claim on this ground. *See* Defs.’ Br. in Supp. 19–20; Defs.’ Reply Br. 11–12. Accordingly, this Report & Recommendation addresses only those arguments raised in Defendants’ briefs.

Defs.’ Br. in Supp. 20. In response, Bonumose quotes several paragraphs from the Amended Complaint that expressly allege “Zhang and CFB” or “CFB and Zhang” did something:

- **Zhang and CFB** intentionally, purposefully, and without justification obtained Bonumose’s proprietary information in the production of Tagatose and used that information to file the Tianjin [Institute] Application.
- In violation of the obligations under the April 2016 Agreement and duties under statute and common law, and during a time in which the Provisional Patent Application remained unpublished, **Zhang and CFB** wrongfully provided the Tagatose Trade Secrets to the Tianjin Institute.
- The circumstances indicate **Zhang and CFB** received compensation or benefits from the Tianjin Institute in exchange for their wrongful disclosure of the Tagatose Trade Secrets.
- **Zhang and CFB** wrongly concealed their misappropriation, the wrongful disclosure to the Tianjin Institute, and the Tianjin [Institute] Application from Bonumose.
- **CFB and Zhang** have misappropriated Tagatose Trade Secrets by: **Conspiring with each other** and third parties to engage in the conduct described in subsections (a) and (b) [of paragraph 89]. At the time of such conspiracy, CFB and Zhang intended or knew that its conduct would benefit the Chinese government, an instrumentality of the Chinese government, and/or an agent of the Chinese government.

Pl.’s Br. in Opp’n 24–25 (quoting Am. Compl. ¶¶ 28, 29, 37, 89(c), 97) (emphasis in brief) (other alterations omitted). Similar allegations lumping together the two Defendants, yet describing “parallel conduct that could just as well be independent action,” *Twombly*, 550 U.S. at 557, appear throughout the pleading, Am. Compl. ¶¶ 53–55, 78–80, 89–92, 102–03. *See Jaggars v. Sandy Spring Bank*, No. 6:14cv15, 2014 WL 4251003, at \*3 (W.D. Va. Aug. 28, 2014) (“Conspiracy is not established simpl[y] by lumping the defendants altogether’ because the heart of conspiracy ‘is an agreement and a conscious decision by each defendant to join it.’” (other quotation marks omitted) (quoting *SD3, LLC v. Black & Decker (U.S.), Inc.*, No. 1:14cv191, 2014 WL 3500674, at \*3 (E.D. Va. July 15, 2014), *aff’d in relevant part*, 801 F.3d 412 (4th Cir. 2015))).

Where “allegations of parallel conduct are set out” to support a conspiracy claim, they must be placed in a factual context “plausibly suggesting,” *Twombly*, 550 U.S. at 557, that the Defendants (or another non-party conspirator) had a “preconceived plan” or “actually worked together” towards a common goal, *Schlegel*, 505 F. Supp. 2d at 325–26 (quotation marks omitted). *Cf. Turbomin AB v. Base-X, Inc.*, No. 6:09cv7, 2009 WL 1850614, at \*3 (W.D. Va. June 29, 2009 ) (concluding that plaintiff’s factual allegations describing communications among defendants and a person who was not a party to the action “led to a plausible inference of concerted action”). “After all, this ‘common design is the essence of the conspiracy.’” *Schlegel*, 505 F. Supp. 2d at 326 (quoting *Bay Tobacco, LLC v. Bell Quality Tobacco Prods., LLC*, 261 F. Supp. 2d 483, 499 (E.D. Va. 2003)). “To survive a motion to dismiss, then, a plaintiff ‘must at least plead the requisite concert of action and unity of purpose,’ and must do so ‘in more than mere conclusory language.’” *Id.* (quoting *Bay Tobacco*, 261 F. Supp. 2d at 499).

Even viewing the Amended Complaint in its entirety, “this count is woefully inadequate” because it does not allege concerted action or common purpose between at least two persons “in more than mere conclusory language.” *Bay Tobacco*, 261 F. Supp. 2d at 499. Because “there must be two persons to comprise a conspiracy,” *Bowman v. State Bank of Keysville*, 331 S.E.2d 797, 801 (Va. 1985), this “concerted action” element of the conspiracy claim requires Bonumose to plead with particularity that *someone* agreed, mutually undertook, or concerted together “*with someone else* in the injurious conduct,” *Schlegel*, 505 F. Supp. 2d at 325 (emphasis added). As drafted, the Amended Complaint alleges that Zhang and CFB had a bilateral conspiracy when they “obtained Bonumose’s propriety information in the production of Tagatose and used that information to file the Tianjin [Institute] Application.” Am. Compl. ¶ 97; *see id.* ¶¶ 28, 29, 37, 94–98; Pl.’s Br. in Opp’n 24–25. Because CFB is an artificial entity that cannot express intent or

“act except through [its] living agents,” *Fraizer v. Va. Military Inst.*, 81 Va. 59, 61 (1885), however, “a third party is necessary to create an actionable conspiracy” under Virginia law, *Bowman*, 331 S.E.3d at 801 (“[A] corporation, like an individual, cannot conspire with itself.”).

The Amended Complaint contains well-pled facts supporting a reasonable inference that *Zhang* used Bonumose’s proprietary information “to file the Tianjin [Institute] Application,” Am. Compl. ¶ 97, “by having himself listed as an anonymous co-inventor” on a patent application that “could not have been written” unless someone involved in that project either used a copy of “the confidential, unpublished provisional patent application” that Bonumose acquired from CFB in April 2016 or otherwise disclosed the “Tagatose Trade Secrets, the confidential or trade secret information underlying the Tagatose Invention,” *id.* ¶¶ 33–35. It also plausibly alleges that *Zhang* disclosed the Tagatose Trade Secrets to the Tianjin Institute after he promised not to do so. *See id.* ¶¶ 14–20, 32–25. The problem, however, is that the Amended Complaint does not contain any well-pled facts describing *CFB*’s agreement or involvement with *Zhang*’s alleged misconduct. For example, Bonumose does not allege any facts suggesting that a person, other than *Zhang*, acting on *CFB*’s behalf agreed with *Zhang* to share the Tagatose Trade Secrets with the Tianjin Institute.<sup>18</sup> The mere fact that both “*Zhang* and *CFB* received compensation or benefits from the Tianjin Institute in exchange for their wrongful disclosure of the Tagatose Trade Secrets,” *id.* ¶ 29, does not allow the Court to infer that *Zhang* and any *CFB* agent acted together or agreed beforehand to disclose this information. *Cf. Schlegel*, 505 F. Supp.

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<sup>18</sup> The Amended Complaint mentions two other individuals, Dr. You and Dr. Ma, who were listed as Dr. *Zhang*’s co-inventors on the Tianjin Institute patent application. Am. Compl. ¶¶ 33–34. But the pleading does not allege that either man was acting as *CFB*’s agent in this capacity, or that he and *Zhang* came to the agreement or took the concerted action necessary to state a conspiracy claim. *See id.* ¶¶ 33, 89(c) 94–98; Pl.’s Br. in Opp’n 24–25; *cf. Twombly*, 550 U.S. at 556–57 (“Without more, parallel conduct does not suggest conspiracy, and a conclusory allegation of agreement at some unidentified point does not supply facts adequate to show illegality.”). Indeed, counsel for Bonumose clarified at the hearing that the allegations against Dr. You, who left *CFB* in March 2016 and is not a defendant to this action, should not be construed to suggest that he is liable for the misconduct alleged.

2d at 327 (rejecting plaintiff’s argument that Virginia Code § 18.2-499 could be expansively read to impose civil liability on “two people acting independently . . . regardless of whether the two people actually came to an agreement (whether explicit or implicit) regarding the purpose of their actions”). Bonumose’s conclusory assertions that “Zhang and CFB combined, associated, agreed, or mutually undertook together . . . to accomplish through concerted action[] a criminal or unlawful purpose,” Am. Compl. ¶¶ 95–96, do not supply any well-pled factual allegations, let alone “facts adequate to show illegality,” *Twombly*, 550 U.S. at 556.<sup>19</sup> Bonumose also alleges that Zhang and CFB conspired “with each other and third parties to engage in conduct” such as [c]opying, downloading, uploading, replicating, transmitting, conveying, receiving, buying and/or possessing Bonumose’s trade secrets.” Am. Compl. ¶ 89. This allegation of third party involvement is simply too conclusory to establish concert of action or the existence of an agreement between a third party and Zhang or CFB. As currently drafted, then, the Amended Complaint fails to state a claim under Virginia law because it describes only one person’s role in the alleged conspiracy.

Accordingly, Defendants’ motion to dismiss Count Five should be granted, and the civil conspiracy claim should be dismissed without prejudice. *See* Pl.’s Br. in Opp’n 31.

*E. Conversion*

In Count Six, Bonumose asserts that it “owned (and owns) the information required for the production of Tagatose,” and that “[a]t the time Bonumose owned this information, Zhang

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<sup>19</sup> Additionally, counsel for Bonumose explained at the hearing that the “unlawful act” at the heart of its conspiracy claim was that Defendants’ use of Bonumose’s proprietary information to file the Tianjin Institute application violated Defendants’ contractual obligations under the April 2016 Agreement. “[A] conspiracy merely to breach a contract that does not involve an independent duty arising outside the contract is insufficient to establish a civil claim” for statutory business conspiracy under Virginia Code §§ 18.2-499 and 18.2-500. *Station #2, LLC v. Lynch*, 695 S.E.2d 537, 541 (Va. 2010). Virginia’s common law still recognizes a cause of action against those who conspire to induce a breach of contract, *see Terry v. SunTrust Banks, Inc.*, 493 F. App’x 345, 357 (4th Cir. 2012), but simply alleging the *resulting breach* is not enough for the court to reasonably infer that all elements of the cause of action exist.

and CFB wrongfully exercised dominion or control over the information required for the production of Tagatose, inconsistent with Bonumose’s rights.” Am. Compl. ¶¶ 101–02. The parties agree that this conversion claim arises under Virginia common law.

Defendants first argue that the VUTSA preempts this claim because the information that Bonumose accuses Zhang and CFB of converting is also allegedly a trade secret. As with its civil conspiracy claim, Bonumose’s conversion claim arguably is “premised solely on the misappropriation of confidential, proprietary information,” *Wiest*, 578 F. Supp. 2d at 834, required for the production of Tagatose, *see* Am. Compl. ¶¶ 100–02; Pl.’s Br. in Opp’n 23. Nonetheless, I recommend that the Court defer ruling on the preemption issue because Defendants “specifically dispute[] whether” at least some of that information constituted a trade secret, *Wiest*, 578 F. Supp. 2d at 834, and Bonumose has not yet had an opportunity to prove facts showing that it is entitled to relief under the VUTSA, *AWP, Inc.*, 2013 WL 3830500, at \*7. *See also Int’l Paper Co.*, 2003 WL 23573613, at \*4 (denying motion to dismiss a conversion claim on preemption grounds where the defendant “raised significant questions of fact vigorously opposing the classification of the price list as a trade secret”).

Defendants next argue that the Amended Complaint does not state a conversion claim because Bonumose does not allege that the intangible “information was merged with any document that was allegedly converted.” Defs.’ Br. in Supp. 22 (quotation marks omitted). “Under Virginia law, ‘a person is liable for conversion for the wrongful exercise or assumption of authority over another’s goods, depriving the owner of their possession, or any act of dominion wrongfully exerted over property in denial of, or inconsistent with, the owner’s rights.’” *Wiest*, 578 F. Supp. 2d at 834–35 (quoting *Simmons v. Miller*, 544 S.E.2d 666, 679 (Va. 2001) (alterations omitted)). “While a claim for conversion traditionally has been a means to

recoup tangible property, ‘ courts have recognized the tort of conversion in cases where intangible property rights arise from or are merged with a document.’” *E.I. DuPont de Nemours & Co. v. Kolon Indus., Inc.*, 688 F. Supp. 2d 443, 454–55 (E.D. Va. 2009) (quoting *Wiest*, 578 F. Supp. 2d at 835); *see also Wiest*, 578 F. Supp. 2d at 835 (citing *United Leasing Corp. v. Thrift Ins. Corp.*, 440 S.E.2d 902 (Va. 1994)). So, for example, federal courts applying Virginia law have allowed conversion claims “based exclusively on the transfer of copies of electronic information” to proceed past the pleading stage where the complaint plausibly alleged “that the purloining of copies of documents . . . [was] an act of ‘dominion’ inconsistent with the true owner’s property rights.” *E.I. DuPont*, 688 F. Supp. 2d at 455 (quoting *Simmons*, 544 S.E.2d at 679); *see also Wiest*, 578 F. Supp. 2d at 835 (denying a motion to dismiss a conversion claim where the complaint identified the property at issue as “an electronic version” of plaintiff’s “confidential and proprietary list of persons targeted for recruitment”).

Bonumose responds that its Amended Complaint alleges “the information required for the production of Tagatose . . . was merged into” both the unpublished provisional patent application and the PCT application. Pl.’s Br. in Opp’n 26. But the pleading does not set out any facts suggesting that Defendants surreptitiously kept copies (electronic or otherwise) of the provisional patent application after Bonumose acquired the rights to the document and the underlying intellectual property on April 1, 2016, or that Defendants somehow stole a copy of Bonumose’s PCT application before it was officially published on April 6, 2017.<sup>20</sup> *See generally*

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<sup>20</sup> At the hearing, counsel for Bonumose clarified that nothing in the Amended Complaint should be construed to suggest that Zhang or CFB improperly obtained or used confidential information related to the Tagatose Invention that Bonumose independently developed after April 1, 2016. *See also* Defs.’ Reply Br. 11. Rather, any allegations describing Bonumose’s subsequent efforts to commercialize Tagatose are related to the company’s alleged damages. *See* Am. Compl. ¶¶ 22–23, 97.

Counsel for Defendants argued at the hearing that Bonumose could not state a conversion claim even if it plausibly alleged that Zhang used or shared a copy of the provisional patent application after April 1, 2016, because the physical document had belonged to his company in the first place. That

Am. Compl. ¶¶ 19–21, 30–38, 89, 100–05. Instead, Bonumose asks the Court to infer that Defendants *must* have converted some tangible property belonging to Bonumose because the scientific information at issue “is sufficiently complicated that it can only be adequately transferred by being reduced to a writing, in either electronic or physical form.” Pl.’s Br. in Opp’n 26.

This request seems reasonable enough as a matter of common sense. The problem, however, is that Bonumose’s pleading itself must “allege facts to allow the Court to infer that *all* elements” of this cause of action exist in order to survive Defendants’ motion to dismiss. *Bryant*, 524 F. Supp. 2d at 756 (emphasis added) (quotation marks omitted). To state a claim for conversion under Virginia law, the Amended Complaint must contain enough factual matter to show that Bonumose “ha[d] a property interest in and [was] entitled to the immediate possession of the item alleged to have been wrongfully converted,” *Economopoulos v. Kolaitis*, 528 S.E.2d 714, 719 (Va. 2000), and that Zhang or CFB committed some “act of dominion wrongfully exerted over [the] property in denial of, or inconsistent with, [Bonumose’s] rights,” *Simmons*, 544 S.E.2d at 679. Even if the Court accepts that the “information required for the production of Tagatose,” Am. Compl. ¶ 101, could “only be adequately transferred by being reduced to a writing,” Pl.’s Br. in Opp’n 26, the Amended Complaint does not contain any facts identifying

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argument cannot absolve the Defendants of the alleged conversion given that CFB sold its rights in the provisional patent application to Bonumose. April 2016 Agreement 1–2; 5–6; *see Simmons*, 544 S.E.2d at 679 (“A person is liable for conversion for the wrongful exercise or assumption of authority over another’s goods, depriving the owner of their possession, *or* any act of dominion wrongfully exerted over property in denial of, *or inconsistent with*, the owner’s rights.” (emphasis added)); *cf. Three Rivers Landing of Gulfport, LP v. Three Rivers Landing, LLC*, No. 7:11cv25, 2013 WL 5492936, at \*5 (W.D. Va. Oct. 2, 2013) (denying partial summary judgment as to liability on a conversion claim because “a defendant’s belief that he had a right to the property is no defense to conversion” under Virginia law); *Wiest*, 578 F. Supp. 2d at 825–27, 835 (concluding that an employer stated a conversion claim against a former employee who, despite being contractually required “to return all confidential or proprietary documents and information provided during the course of his employment[] and to refrain from retaining any copies thereof,” forwarded a confidential company-owned document to his personal email account and later used the document to recruit employees for his new employer).

“what tangible property or specific thing” belonging to Bonumose (electronically stored or otherwise) that “Defendants are supposed to have taken.” *James River Mgmt. Co. v. Kehoe*, No. 3:09cv387, 2009 U.S. Dist. LEXIS 107847, at \*22 (E.D. Va. Nov. 17, 2009) (brackets and quotation marks omitted).

Bonumose’s argument that it cannot be expected to “plead the precise format of the information” at the time it was converted because “those details are uniquely within the knowledge and control of Defendants and will be a subject of discovery” also misses the mark. Pl.’s Br. in Opp’n 26–27 (citing *Penn Mut. Life Ins. Co. v. Berck*, Civil Action No. DKC 09-0578, 2010 WL 1233980, at \*5 (D. Md. Mar. 23, 2010)). In *Penn Mutual Life Insurance Co.*, the district court concluded that a complaint stated a fraud claim where the plaintiff “adequately identified four misrepresentations and one omission that [were] specific, . . . adequately stated its basis of knowledge about each transaction,” and “allege[d] specifics regarding” a fraudulent underwriting report. 2010 WL 1233980, at \*5. Having found that the complaint satisfied the applicable pleading requirements, the court explained that it would not require the plaintiff to affirmatively plead facts that were “within the unique knowledge of [the] Defendants” such as additional details about “the time and place of meetings and transactions.” *Id.* Bonumose’s Amended Complaint, on the other hand, does not satisfy the applicable pleading standard because it does not contain any facts that allow the Court to determine whether the intangible property right at issue “arises from or is merged with a document and, if so,” whether Defendants are alleged to have converted that particular document. *James River Mgmt. Co.*, 2009 U.S. Dist. LEXIS 107847, at \*23–24 (“[I]t is a significant fact whether the intangible right arises from or is merged with a document.”).

Accordingly, Defendants' motion to dismiss Count Six should be granted, and the conversion claim should be dismissed without prejudice. *See* Pl.'s Br. in Opp'n 31.

*F. Declaratory Relief*

Bonumose also seeks declaratory judgment, 28 U.S.C. § 2201, clarifying the parties' rights under the April 2016 Agreement and specifically declaring "(1) that Zhang and CFB are in breach of contract and accordingly CFB does not have reversionary rights under the April 2016 Agreement, and (2) Zhang and CFB are in breach of contract and accordingly Bonumose does not owe any further duties to CFB, including duties for payment." Am. Compl. ¶ 71 (Count Two). Defendants assert that Count Two should be dismissed because "there is no such thing as a 'Declaratory Judgment' claim[,] and declaratory judgment is not an appropriate remedy for any other claim" pled in the Amended Complaint. Defs.' Br. in Supp. 22; *see also* Defs.' Reply Br. 12 ("Plaintiff's 'declaratory judgment' claim . . . cannot exist independently of one of the other causes of action.").

The Declaratory Judgment Act allows a federal court, in "a case of actual controversy within its jurisdiction," to "declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." 28 U.S.C.

§ 2201(a). The court may entertain such a request when:

(1) the complaint alleges an actual controversy between the parties of sufficient immediacy and reality to warrant issuance of a declaratory judgment; (2) the court possesses an independent basis for jurisdiction over the parties (e.g., federal question or diversity jurisdiction); and (3) the court does not abuse its discretion in its exercise of jurisdiction.

*Volvo Constr. Equip. N. Am., Inc. v. CLM Equip. Co.*, 386 F.3d 581, 592 (4th Cir. 2004)

(quotation marks omitted); *see Adkins v. EQT Prod. Co.*, No. 1:11cv31, 2011 WL 6178438, at

\*2-4 (W.D. Va. Dec. 13, 2011) (denying a Rule 12(b)(6) motion to dismiss plaintiff's request for

declaratory judgment where the complaint satisfied these requirements). The Amended Complaint satisfies each element.

First, “the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment”—namely a dispute over whether Bonumose owes any continuing obligations to CFB under the April 2016 Agreement. *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 127 (2007); *see* Am. Compl. ¶¶ 66–70. Bonumose’s request for declaratory judgment also seeks “specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.” *MedImmune*, 549 U.S. at 127; *see* Am. Compl. ¶¶ 68–70. Second, this Court has an independent basis for exercising jurisdiction over the subject matter of the parties’ dispute. Am. Compl. ¶ 5 (citing 28 U.S.C. §§ 1331, 1367). Finally, Defendants fail to give a “good reason” why the Court should “declin[e] to exercise its declaratory judgment jurisdiction,” *Volvo Constr. Equip.*, 386 F.3d at 594. *See* Defs.’ Br. in Supp. 22–23.

Defendants argue that declaratory judgment is inappropriate because “Bonumose has an adequate alternative remedy in another form of action—an action at a law for a breach of contract.” Defs.’ Br. in Supp. 22 (citing *Jones v. Jones*, 206 F. Supp. 3d 1098, 1113 (E.D. Va. 2016)). While “declaratory judgment is generally unavailable when claims and rights asserted have fully matured[] and the alleged wrongs have already been suffered,” Bonumose’s request for declaratory judgment does not “seek[] only to adjudicate [its] already-existing breach of contract claim,” *Jones*, 206 F. Supp. 3d at 1113 (quotation marks omitted), for money damages and an order enjoining Zhang and CFB from using the Tagatose Trade Secrets, Am. Compl. ¶¶ 62–63. Rather, by requesting a ruling that “Zhang and CFB are in breach of [the] contract and

[that] accordingly Bonumose does not owe any further duties to CFB, including duties for further payment,” *id.* ¶ 71, Bonumose properly seeks the Court’s “guidance . . . via a declaratory judgment to steer [its own] conduct away from a breach of contract,” *Jones*, 206 F. Supp. 3d at 1113 (quotation marks omitted). *See Wenzel v. Knight*, No. 3:14cv432, 2015 WL 3466864, at \*3 (E.D. Va. June 1, 2015) (“The coexistence of both claims for breach of contract and declaratory judgment does not necessarily moot the need for a declaratory judgment, but when the same party brings both claims to obtain essentially identical relief, the declaratory judgment serves little useful purpose.”). A “district court [does] not abuse its discretion” in exercising jurisdiction, and indeed should “rule on the merits of a declaratory judgment action,” where, as here, the complaint alleges “declaratory relief will serve a useful purpose in clarifying and settling the legal relations [at] issue” and “eliminat[ing] uncertainty” about the parties’ continued “legal obligations under the . . . Agreement[.]” *Volvo Constr. Equip.*, 386 F.3d at 594 (quotation marks omitted). Accordingly, Defendants’ motion to Dismiss Count Two should be denied.

#### IV. Conclusion

For the foregoing reasons, I respectfully recommend that Defendants’ Motion to Dismiss the Amended Complaint, ECF No. 23, be **GRANTED in part** and **DENIED in part**. Specifically, the motion should be **GRANTED** on Counts Five and Six, and those state-law claims should be **DISMISSED without prejudice** under Rule 12(b)(6) of the Federal Rules of Civil Procedure. The motion should be **DENIED** on Counts One through Four and Count Seven.

#### Notice to Parties

Notice is hereby given to the parties of the provisions of 28 U.S.C. § 636(b)(1)(C):

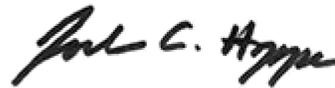
Within fourteen days after being served with a copy [of this Report and Recommendation], any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court. A judge of the court shall make a de novo determination of those portions of the report or

specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge. The judge may also receive further evidence or recommit the matter to the magistrate judge with instructions.

Failure to file timely written objections to these proposed findings and recommendations within 14 days could waive appellate review. At the conclusion of the 14 day period, the Clerk is directed to transmit the record in this matter to the Honorable Norman K. Moon, Senior United States District Judge.

The Clerk shall send certified copies of this Report and Recommendation to all counsel of record.

ENTER: May 21, 2018

A handwritten signature in black ink that reads "Joel C. Hoppe". The signature is written in a cursive, slightly slanted style.

Joel C. Hoppe  
U.S. Magistrate Judge