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GENENTECH, INC.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

GENENTECH, INC.,

Plaintiff,

v.

JHL BIOTECH, INC., XANTHE LAM, an individual, ALLEN LAM, an individual, JAMES QUACH, an individual, RACHO JORDANOV, an individual, ROSE LIN, an individual, JOHN CHAN, an individual, and DOES 1-50,

Defendants.

Case No. 3:18-cv-06582-WHA

PLAINTIFF GENENTECH INC.'S MOTION FOR LEAVE TO AMENDED COMPLAINT

Date: May 2, 2019
Time: 8:00 a.m.
Dept: Courtroom 12 - 19th Floor
Judge: Hon. William Alsup

Date Filed: October 29, 2018

Trial Date: January 25, 2021

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I. INTRODUCTION

Plaintiff Genentech, Inc. ("Genentech") has alleged that defendants JHL Biotech, Inc. ("JHL"), Xanthe Lam, Allen Lam, John Chan, and James Quach (collectively, "defendants") engaged in a multi-year and multifaceted scheme to steal Genentech's trade secrets, compromise a senior scientist's loyalty to her current employer, and breach Genentech's computer networks—all to aid JHL in its race to develop and commercialize biosimilar versions of Genentech's proprietary medicines. In October 2018—just after the United States government indicted Xanthe, Allen, Chan, and Quach for criminal trade secret theft and computer hacking—Genentech filed a civil complaint asserting ten causes of action under both federal and state law. *See* Dkt. 1. Various defendants moved to dismiss certain of those claims under Rule 12(b)(6), and on March 1, 2019, the Court granted and denied those motions in part. *See* Dkt. 128 ("MTD Order").[1] Pursuant to the Court's MTD Order, Genentech now respectfully seeks leave to amend its complaint. A copy of Genentech's proposed First Amended Complaint ("FAC") is attached hereto as **Exhibit A**, and a redline copy showing changes from the initial complaint is attached as **Exhibit B**.

The proposed FAC addresses the issues raised in the Court's MTD Order, as well as issues defendants raised in their motions to dismiss but the Court declined to reach. *See* MTD Order at 44. Specifically, the FAC pleads additional facts clarifying (a) John Chan's and James Quach's roles in the conspiracy; (b) the timeliness of Genentech's state-law claims; and (c) why California's Uniform Trade Secrets Act ("CUTSA") does not supersede Genentech's state-law claims. Because the proposed FAC adequately states claims for relief and would survive any renewed Rule 12(b)(6) motion, Genentech respectfully requests that the Court grant Genentech leave to file the proposed FAC and order JHL to answer it.

II. PROCEDURAL HISTORY

Genentech filed its complaint against all defendants on October 29, 2018. Dkt. 1 ("Compl."). Shortly thereafter, on November 5, 2018, Genentech moved for provisional relief. Dkt. 20. Because the criminal case against the Lams, Quach, and Chan had been assigned to this

[1] In all quotations contained in this brief, internal citations, punctuation, and footnotes have been omitted, and any emphasis was added unless otherwise noted.

Court, the Court ordered the two cases related on November 6, 2019. *See* Dkt. 23; *United States v. Lam, et al.*, No. 3:18-cr-00527-WHA (N.D. Cal.).

On January 4, 2019, defendants filed motions to dismiss various claims under Rule 12(b)(6) and/or joinders in each other's arguments.[2] *See* Dkt. Nos. 57 (JHL), 59 (Lin) 62 (Jordanov), 66 (Chan), 67 (the Lams), 69 (Quach). On January 18, 2019, Genentech filed an omnibus opposition to defendants' motions. Dkt. 93. All defendants but Quach filed replies on January 25, 2019. *See* Dkt. Nos. 96 (Jordanov), 98 (Lin), 99 (the Lams), 104 (JHL).

The Court heard oral argument on defendants' motions to dismiss on February 14, 2019. On March 1, 2019, the Court issued an order granting defendants' 12(b)(6) motions in part and denying them in part. Dkt. 128. For the Court's convenience, the asserted claims, challenges, and the Court's rulings can be summarized as follows:

Claim 1: Misappropriation of trade secrets in violation of the Defend Trade Secrets Act ("DTSA"), 18 U.S.C. §§ 1836, *et. seq.* Genentech alleged that all defendants violated DTSA. Jordanov, Lin, and Chan moved to dismiss that cause of action for lack of adequate pleading. The Court denied that motion. MTD Order at 20. Allen Lam, Jordanov, Lin, and Chan also moved to dismiss the DTSA claim on the grounds that Genentech failed to allege conduct postdating DTSA's May 11, 2016 enactment. The Court denied that motion with respect to Allen Lam, Jordanov, and Lin, and granted it solely with respect to Chan. *Id.* at 16. The Court found that because Genentech had "failed to adequately allege an agreement between JHL and Chan," JHL's continued use of Genentech's trade secrets could not be imputed to Chan absent further "allegations regarding his participation in the conspiracy with JHL." *Id.*

Claim 2: Misappropriation of trade secrets in violation of CUTSA, Cal. Civ. Code §§ 3426, *et seq.* Genentech alleged that all defendants violated CUTSA. Jordanov, Lin, and Chan moved to dismiss for lack of adequate pleading. The Court denied that motion. MTD Order at 20.

Claim 3: Conspiracy to misappropriate trade secrets. Genentech alleged that all defendants conspired to misappropriate Genentech's trade secrets. Having already credited

[2] JHL also moved to dismiss the complaint for lack of personal jurisdiction under Rule 12(b)(2). This Court denied that motion on March 1, 2019. *See* Dkt. 128 at 14, 39.

Genentech's conspiracy allegations regarding DTSA, the Court dismissed Claim 3 with prejudice on the grounds that no standalone conspiracy claim exists under California law. *Id.* at 20–21.

Claim 4: Breach of contract against Xanthe and Quach. Genentech alleged that Xanthe breached her contract with Genentech by consulting for competitors while still employed by Genentech and by wrongfully disclosing Genentech confidential information. Genentech further alleged that Quach breached his contract with Genentech by wrongfully disclosing Genentech confidential information. Neither Xanthe nor Quach challenged this claim.

Claim 5: Intentional interference with contractual relations. Genentech alleged that all defendants except Xanthe intentionally interfered with Genentech's contract with her. Those defendants moved to dismiss, arguing that (a) the two-year statute of limitations barred the claim, and (b) CUTSA superseded it. Considering only the timeliness argument, the Court dismissed this claim without prejudice. The Court noted Genentech's explanation that it discovered evidence of Xanthe's activities for a *different* Taiwanese company—AP Biosciences Inc. ("APBio")—in mid-October 2016, but had no notice of JHL's involvement until mid-November 2016. *See* MTD Order at 22. Because those allegations appeared only in briefing rather than the complaint itself, the Court granted Genentech leave to cure the deficiency. *Id.* Although the Court declined to reach the CUTSA supersession argument, it later made clear that Genentech's motion for leave to file an amended complaint must address that issue. *Id.* at 22 n.14, 44.

Claim 6: Breach of duty of loyalty against Xanthe Lam. Genentech alleged that Xanthe breached her duty of loyalty to Genentech by consulting for competitors while still employed by Genentech. The Court dismissed this claim with prejudice as untimely. The Court reasoned that because the claim "covers *all* of Xanthe's consulting activities, including those done for AP Biosciences," Genentech had notice of the claim in October 2016. *Id.* at 22.[3]

Claim 7: Aiding and abetting Xanthe's breach of the duty of loyalty. Genentech asserted that all defendants except Xanthe aided and abetted Xanthe's breach of her duty of

[3] It appears that the Court believed that Genentech was relying on the discovery rule to toll the limitations period for Claim 6. But the discovery rule has no bearing on Claim 6. As alleged in the original complaint, Xanthe breached her duty of loyalty to Genentech well into 2017, making the claim timely without recourse to tolling. *See* Compl. ¶¶ 202–214; 216.

loyalty to Genentech. As was true for Claim 5, those defendants moved to dismiss on statute of limitations and CUTSA supersession grounds. The Court resolved defendants' motions on Claim 7 the same way it did for Claim 5. *See* MTD Order at 22.

Claim 8: Violation of the Computer Fraud and Abuse Act ("CFAA"), 18 U.S.C. §§ 1030 *et seq.* Genentech alleged that JHL and Quach violated the CFAA. JHL moved to dismiss, arguing that Quach was not acting as JHL's agent when he used Xanthe's log-in information to improperly access Genentech's computer system and download hundreds of confidential documents before heading to JHL's manufacturing plan in China. The Court granted JHL's motion without prejudice, concluding that Genentech had "failed to adequately plead that Quach was acting as an agent of JHL in the summer of 2017 when he allegedly used Xanthe's log-in credential to access the confidential [Genentech] documents." MTD Order at 23.

Claim 9: Conspiracy to violate the CFAA. Genentech alleged that JHL, Xanthe, and Quach conspired to violate the CFAA. JHL moved to dismiss this claim, again arguing that Quach was not JHL's agent. Finding that the complaint lacked sufficient facts regarding Quach's agency, the Court granted JHL's motion with leave to amend. The Court also assumed, without deciding, that the CFAA provides for a conspiracy claim. *Id.* at 21.

Claim 10: Violation of California's Computer Data Access and Fraud Act ("CDAFA"), Cal. Penal Code § 502. Genentech alleged that Xanthe, Quach, and JHL violated the CDAFA. As with Claims 8 and 9, the Court dismissed this claim as to JHL, having found that the complaint lacked sufficient facts regarding Quach's role as JHL's agent. MTD Order at 23.

Of the aforementioned claims, six remain at issue (Claims 1, 5, 7, 8, 9, and 10).[4] The proposed FAC re-pleads these live claims as Claims 1 (DTSA), 4 (intentional interference with contractual relations), 5 (aiding and abetting breach of duty of loyalty), 6 (CFAA), 7 (conspiracy to violate CFAA), and 8 (CDAFA).

The Court's MTD Order identified three deficiencies in the original complaint: (1) insufficient allegations "allowing a reasonable inference as to Chan's agreement with JHL to

[4] The Court denied the motion to dismiss Claim 2; Claim 3 was dismissed with prejudice (although Genentech has repleaded its conspiracy claims as part of the underlying torts); no defendant challenged Claim 4; and Claim 6 was dismissed with prejudice.

misappropriate trade secrets on its behalf" (MTD Order at 16); (2) insufficient allegations that Quach acted as JHL's agent in the summer of 2017 when he used Xanthe's credentials to download confidential Genentech documents (*id.* at 21, 23); and (3) allegations relating to the timeliness of Genentech's state law claims (*id.* at 22). The Court granted Genentech 21 calendar days to seek leave to amend its complaint, submit a proposed amended pleading and redlined copy, and to explain why the new pleading overcomes all deficiencies, including those the MTD Order did not reach. *Id.* at 44.

III. LEGAL STANDARD

Leave to amend a complaint is generally freely given, as long as amendment would not be futile. *In re Vantive Corp. Sec. Litig.*, 283 F.3d 1079, 1097 (9th Cir. 2002). "At this stage of the litigation, prior to any discovery, an amendment is not futile so long as the proposed amended complaint states a claim that would survive a motion to dismiss." *Banks.com, Inc. v. Keery*, 2010 WL 1688612, at *2 (N.D. Cal. Apr. 26, 2010) (J. Alsup). Accordingly, Genentech must only plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A claim is facially plausible when it contains facts allowing the Court to draw the reasonable inference that the defendant is liable for the misconduct alleged. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). The Court must accept factual allegations appearing in the complaint as true, and construe the pleading in the light most favorable to the plaintiff. *Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1030–31 (9th Cir. 2008).

IV. ARGUMENT

A. The proposed FAC adequately pleads facts allowing the reasonable inference that Chan conspired with JHL to misappropriate Genentech's trade secrets.

1. Genentech has alleged facts supporting the inference that JHL and Chan were part of the same conspiracy.

The proposed FAC reasserts a DTSA claim against John Chan (Claim 1). John Chan was a critical link in the conspiracy to misappropriate Genentech's trade secrets. The supplemental allegations contained in the proposed FAC more than adequately support the "reasonable inference" that Chan "agree[d] with JHL to misappropriate [Genentech's] trade secrets on its behalf." MTD Order at 16.

Conspiracy is "a legal doctrine that imposes liability on persons who, although not actually committing a tort themselves, share with the immediate tortfeasors a common plan or design in its perpetration." *Applied Equip. Corp. v. Litton Saudi Arabia Ltd.*, 7 Cal. 4th 503, 510–11 (1994). To plead a conspiracy, the plaintiff must allege (1) formation of a conspiracy (an agreement to commit wrongful acts); (2) operation of a conspiracy (commission of the wrongful acts); and (3) damage resulting from operation of a conspiracy. *Id.* To satisfy the first element, the plaintiff need only allege facts supporting the reasonable inference that the conspirators "reached a unity of purpose or a common design and understanding, or a meeting of the minds in an unlawful arrangement." *Gilbrook v. City of Westminster*, 177 F.3d 839, 856 (9th Cir. 1999), *as amended on denial of reh'g* (July 15, 1999). "General allegations of agreement have been held sufficient, and the conspiracy averment has even been held unnecessary, providing the unlawful acts or civil wrongs are otherwise sufficiently alleged." *Olenicoff v. UBS AG*, 2010 WL 8530286, at *29 (C.D. Cal. Mar. 16, 2010). The plaintiff need not allege that each participant in the conspiracy "kn[ew]the exact details of the plan," but rather that they "at least share[d] the common objective of the conspiracy." *Gilbrook*, 177 F.3d at 856. Importantly, the Court may infer the "defendant's knowledge of and participation in a conspiracy . . . from circumstantial evidence and from evidence of the defendant's actions." *Id*. at 856–57.

a. Chan's Role in the Conspiracy

As alleged in the proposed FAC, Chan played a significant role in the conspiracy to misappropriate Genentech's trade secrets, simultaneously reporting to Xanthe back in California and to JHL's leadership in Taiwan. Chan's hiring was itself part of the conspiracy; he did not merely stumble into becoming a JHL formulation scientist with responsibility for developing biosimilar versions of Genentech's medicines. Rather, Xanthe handpicked him for the job, and—after consultation with JHL's executives—even created the position for him. FAC ¶ 168. Rose Lin interviewed Chan, during which she told him that his "working arrangement and role" would be formulation under Xanthe's and Allen's guidance, making him Xanthe's "direct report." *Id.* ¶ 169. Neither Xanthe nor Chan were freelancing—Chan emailed Xanthe: "Importantly, Rose [Lin] asked if you could perform a formal interview with me and send her a report." *Id.* Xanthe

apparently did so, because JHL offered Chan the position on March 4, 2014 and formally hired him on May 5, 2014. *Id.* ¶¶ 170, 174. Xanthe knew about the hiring in advance. On April 23, 2014, she emailed Chan to let him know, "You will start your new job at JHL in less than two weeks." *Id.* ¶ 172. She further advised him that Allen wanted to be in Taiwan for "the first few weeks when you are on board," and that Allen would "share the company apartment" with Chan. *Id.* She ended her email with a telling post-script designed to conceal the conspiracy: "Please send future emails to my personal address." *Id.*

Chan served as JHL's "Project Manager + Scientist" from May 2014 to May 2015, and according to his resume, as "Project Lead + Group Leader" from June 2015 to at least July 2016. *Id.* ¶ 173. He worked as the "head of the Pulmozyme® biosimilar project." *Id.*

Almost immediately, Chan was integrated into the conspiracy to misappropriate Genentech's trade secrets. On May 17, 2014, Xanthe emailed Allen about Chan, writing that their "job is to make sure he delivers at work." *Id.* ¶ 175. She then reminded Allen that she had already provided him (Allen) with "most of the Pulmozyme assays (GNE Q methods) listed for characterization," except for one that she would send later.[5] *Id.* Sketching out the contours of the conspiracy to misappropriate Genentech's trade secrets, she continued:

> You should let Racho, Rose and the 1921 CMC team know that JHL needs to have 1921 performed with all these characterization methods side by side with Pulmozyme to demonstrate that they are highly similar in terms of the physiochemical properties as well as functionalities. Functional testing with the currently approved nebulizers (4 or 5 of them, I forgot) is also needed, but can be done at Kim's lab at University of Sydney (with funding from JHL).[6]

Id. Making clear that JHL, Chan, and the Lams all needed to be on the same page regarding using Genentech's quality methods, Xanthe told Allen that she had "mentioned this to John" during a recent one-on-one telephone call. *Id.* Later in the conspiracy, Xanthe and Allen funneled a Genentech technical report labeled "CONFIDENTIAL" to Chan in hard copy only, telling him "don't show it to others." *Id.* ¶¶ 179–80. Despite Chan's youth and inexperience, communications

[5] Genentech has alleged—and for purposes of this motion, the Court must accept—that these Genentech quality methods constitute protectable trade secrets.

[6] "Kim" is a reference to Kim Chan, John Chan's father. "1921" refers to JHL's biosimilar version of Genentech's Pulmozyme® medicine. FAC ¶¶ 157, 166, 175.

like these urging surreptitious conduct were red flags giving him ample reason to know that he was part of something improper.

Moreover, despite Xanthe's admonition not to show that particular document to others, Genentech alleges additional facts supporting the inference that JHL "knew or reasonably should have known about some activity under [its] control that could injure plaintiff," yet "failed to take action to avoid the harm." *Keery*, 2010 WL 1688612, at *3 (granting leave to amend complaint to plead a CUTSA claim). During Xanthe's voluntary interviews with Genentech in September 2017, Xanthe confirmed that Rose Lin knew about Xanthe's ongoing work with Chan and—specifically—knew that Xanthe was sending documents to Chan to aid him in his work for JHL. FAC ¶ 184. Xanthe added that she was sure that Chan had told Lin that Xanthe was sending him documents. *Id.* She further stated that, once Xanthe expressed concern about working so closely with Chan via Skype, both Lin and Jordanov personally thanked her for her work with him while acknowledging her concern that she could get into trouble if the Skype video calls continued. *Id.* ¶ 186. These allegations support the reasonable inference that Chan, Xanthe, and JHL were knowingly working together to misappropriate Genentech's trade secret information. *See Banks.com, Inc.*, 2010 WL 1688612, at *3.

b. Post-DTSA-enactment Conduct

In light of the FAC's allegations regarding Chan's "participation in the conspiracy," "JHL's alleged continued use of the misappropriated trade secrets post-DTSA enactment may be imputed" to him. MTD Order at 16. Even if that were not the case, however, the proposed FAC sufficiently alleges that Chan continued to acquire and use Genentech trade secret information after DTSA's May 11, 2016 enactment date, subjecting him to liability under the statute. The proposed FAC alleges how Xanthe and Chan discussed Genentech trade secret information during Skype video chats both before ***and after*** DTSA's enactment, including in July, August, and November of 2016. FAC ¶ 176. Those allegations alone suffice to subject Chan to DTSA liability at the pleading stage. *See Sonoma Pharm., Inc. v. Collidion Inc.*, 2018 WL 3398940, at *5 (N.D. Cal. June 1, 2018) (applying DTSA when "the defendant took *some relevant act*" after May 11, 2016); MTD Order at 15 (discussing post-enactment cases).

Genentech has also adequately alleged that, with JHL's knowledge and consent, Chan continued to use the information he had received from Xanthe throughout his tenure at JHL, which ended in roughly June 2017. FAC ¶ 187. "[C]ontinuous use of misappropriated trade secrets that began prior to DTSA's enactment date can give rise to DTSA liability." *Space Data Corp. v. Alphabet Inc.*, 2017 WL 9840133, at *4 (N.D. Cal. Dec. 18, 2017) (J. Freeman); *see also Cave Consulting Grp., Inc. v. Truven Health Analytics Inc.*, 2017 WL 1436044, at *4 (N.D. Cal. Apr. 24, 2017) (J. Illston). Until he left JHL, Chan worked directly on developing formulations and analytical methods for JHL's biosimilar versions of Genentech medicines alongside other JHL personnel. FAC ¶ 187. For example, on September 26, 2016, Chan signed off on a "Development Protocol" for testing the stability of JHL 1922 (JHL's Pulmozyme® biosimilar), in his capacity as "Group Leader, Formulation Department." *Id.* He approved the protocol alongside three other JHL employees, including the company's Vice President for Research and Analytical Operations. *Id.*[7] The trade secrets at issue in this litigation include Genentech's stability protocols for Pulmozyme®, which Genentech has adequately alleged were used by Chan and others within JHL to develop the protocol approved in September 2016 (four months after DTSA's enactment). *See id.* ¶ 127(a); Dkt. 21 (Genentech's Trade Secret Statement), Exs. 1 & 2 (Genentech Stability Protocols for Pulmozyme Drug Product and Drug Substance).

* * *

The proposed FAC thus supports the reasonable inference that Chan, Xanthe, Allen, and JHL (through Lin and Jordanov) knew full well that they were working together to acquire and use Genentech trade secrets, that they conspired to do so, and that Chan's post-DTSA-enactment conduct suffices to subject him to liability at this stage of the litigation. It requires no great leap of logic to infer that (a) Lin expressly approved of Xanthe's recruiting and hiring Chan; (b) Chan worked directly with Xanthe on biosimilar versions of Genentech's medicines at Lin's direction; (c) Xanthe transmitted trade secret information to JHL through Chan; (d) JHL knew that Xanthe was doing so, and appreciated it; and (e) Chan continued using that information throughout his

[7] Although general allegations are sufficient at the pleading stage, evidence supporting this allegation can be found in the supporting documents JHL filed in opposition to Genentech's motion for preliminary injunctive relief. *See* Dkt. 77-39 (under seal).

time at JHL, well past DTSA's May 11, 2016 enactment. As the Court held when denying JHL's motion to dismiss Claim 1, "When properly read in context and taken as true, those facts sufficiently support a reasonable inference of the alleged conspiracy." MTD Order at 8. Claim 1 against Chan should likewise proceed.

2. DTSA provides a private right of action for conspiracy.

Although the Court expressed skepticism about the existence of a private right of action for conspiracy under DTSA (MTD Order at 21, n.13), the federal statute does afford such a right, as Genentech previously argued in its opposition papers. *See* Dkt. No. 93 at 22–23. The traditional common law principle of joint tortfeasor liability based on conspiracy applies in full to DTSA. It is a "well established principle of tort law that where two persons act in concert to commit a wrong each is liable for the entire injury resulting therefrom and that one who abets a wrongful act is equally liable with the perpetrator." *Int'l Longshoremen's & Warehousemen's Union v. Juneau Spruce Corp.*, 189 F.2d 177, 190 (9th Cir. 1951). "In order to abrogate a common-law principle, the statute must 'speak directly' to the question addressed by the common law," and nothing in DTSA displaces this ordinary rule of joint liability. *United States v. Texas*, 507 U.S. 529, 534 (1993) (citation omitted); *see also Fox Ins. Co., Inc. v. Ctrs. for Medicare & Medicaid Servs.*, 715 F.3d 1211, 1224 (9th Cir. 2013) ("Courts read statutes and regulations to preserve common law principles … absent an evident statutory purpose to the contrary.").

The sole out-of-circuit case JHL cited—and which this Court referenced in its MTD Order—is not to the contrary. In *Steves & Sons v. JELD-WEN, Inc.*, 271 F. Supp. 3d 835 (E.D. Va. 2017), the plaintiff sought to bring a civil claim under 18 U.S.C. § 1832(a)(5), which criminalizes the inchoate offense of conspiring to misappropriate trade secrets without requiring an underlying misappropriation offense. By contrast, Genentech has never asserted a claim under DTSA's criminal inchoate offense provision. Instead, Genentech alleges the actual theft of trade secrets, with sufficient concerted action amongst defendants to subject each to joint liability under DTSA's private right of action for trade-secret misappropriation. *See* 18 U.S.C. § 1836(b).

In the end, this legal discussion is, perhaps, academic. Regardless of whether DTSA provides a private cause of action for conspiracy, when "two or more persons agree to perform a

wrongful act, the law places civil liability for the resulting damage[s] on *all* of them, regardless of whether they actually commit the tort themselves." *Wyatt v. Union Mortg. Co.*, 24 Cal. 3d 773, 784 (1979) (emphasis in original). As set forth above, Genentech has adequately pleaded in the proposed FAC that all Defendants, including John Chan, acted in concert to misappropriate Genentech's trade secrets, and therefore Claim 1 should proceed against all Defendants.

B. The proposed FAC pleads facts allowing the reasonable inference that Quach and JHL conspired to violate the CFAA and CDAFA.

1. Genentech has alleged facts supporting the inference that JHL and Quach were part of the same conspiracy.

The proposed FAC re-asserts claims under the CFAA and CDAFA against JHL (Claims 6, 7, and 8). The Court dismissed these claims without prejudice, determining that the original complaint had failed adequately to allege that JHL and Quach conspired to misappropriate Genentech's trade secrets. MTD Order at 21, 23. The proposed FAC cures that deficiency.

As alleged in the proposed FAC, on three separate occasions in July 2017, Quach improperly used Xanthe's Genentech credentials to log into Genentech's computer system and download a trove of confidential documents, just before leaving for a job at JHL. FAC ¶¶ 207–08. Once he arrived at JHL's plant in China, he asked for additional documents, which Xanthe provided. *Id.* ¶ 214. During the February 14 hearing on defendants' motions to dismiss, the Court rightly noted that "it's not just a reasonable inference; it's a strong inference" that Quach downloaded those documents "for his new job" at JHL. Hr'g Tr. at 12:1–10 (Feb. 14, 2019). The proposed FAC raises a similarly strong (or, at a minimum, a reasonable) inference that Quach and JHL were part of the same conspiracy to breach Genentech's computer systems and acquire its trade secrets.[8]

Much like Chan, Quach did not arrive at JHL by happenstance. Acting as JHL's agent, Xanthe recruited Quach after Genentech terminated him for performance issues in April 2017. FAC ¶¶ 203–06, 216. Quach sent Xanthe his resume, and the two discussed JHL job openings in

[8] To reiterate the legal standard, Genentech need only plead that Quach and JHL "reached a unity of purpose" with respect to unlawfully acquiring Genentech's trade secrets, and "share[d] the common objective of the conspiracy." *Gilbrook*, 177 F.3d at 856. Circumstantial evidence and inferences drawn from the defendants' conduct suffice to state the claim. *Id.* at 856–57.

May 2017. *Id.* ¶¶ 204–05. With Xanthe's advice and support, Quach landed a job at JHL's manufacturing facility in Wuhan, China. *Id.* ¶ 206. JHL entered into a consulting agreement with Quach for a term beginning on August 7, 2017, and provided him an office in China. *Id.*

Quach did not set out for China emptyhanded. As recounted above, he used Xanthe's log-in information to access Genentech's document-control system and to download numerous documents containing Genentech trade secret information. According to email correspondence, Quach performed one of his illicit downloading sessions while Allen Lam was in Wuhan having discussions with JHL's "Wuhan team." *Id.* ¶ 209. And all of Quach's downloads took place in the evening in California, just when the following workday would have been starting in Taiwan. *Id.* ¶ 210. The documents Quach downloaded concern the same subject matter as his role at JHL, which involved managing engineering and validation activities during the start-up phase of JHL's Wuhan manufacturing facility. *Id.* ¶¶ 211–12. Shortly after Quach began working for JHL in Wuhan, he asked Xanthe to send him additional Genentech documents, which she downloaded for him on August 13, 2017. *Id.* ¶ 214.

Taken together, these allegations raise the reasonable inference that Quach had the same unlawful objective as JHL and took steps to achieve it—namely, the theft and use of Genentech's trade secret information. FAC ¶ 217. Genentech need not plead or prove that JHL or Quach knew every detail of the conspiracy, or each participant's role in it. *Gilbrook*, 177 F.3d at 856. But the well-pleaded facts make clear that Quach joined an ongoing conspiracy alongside JHL to harm Genentech. Accordingly, Genentech should be allowed to proceed with its CFAA and CDAFA claims against JHL in Claims 6, 7, and 8 to hold JHL jointly liable for Quach's actions in mid-summer 2017.

2. Genentech has alleged facts supporting the inference that Quach was acting as JHL's agent when he violated the CFAA and CDAFA.

JHL is also liable for Quach's conduct under an agency theory, because Genentech has adequately alleged that both Quach and Xanthe were acting as JHL's agents when they committed the torts at issue. Genentech need not prove—or even "explicitly allege[]"—that Quach or Xanthe were JHL's agents; it need only "include[] allegations from which an agency

relationship may plausibly be inferred." *Sloan v. Gen. Motors LLC*, 287 F. Supp. 3d 840, 876 (N.D. Cal. 2018); *see also Baranco v. Ford Motor Co.*, 294 F. Supp. 3d 950, 975 (N.D. Cal. 2018) (denying motion to dismiss where allegations "support a plausible inference that the dealers acted as Ford's agents").

Genentech has plausibly alleged in the proposed FAC that Quach was acting as JHL's agent when he illicitly gained access through Xanthe to Genentech's password-protected servers and downloaded hundreds of Genentech confidential manufacturing protocols and procedures *after* agreeing with JHL to go work at its manufacturing plant in Wuhan. Email correspondence between Xanthe, Allen, and others reveals that, at least as of July 16, 2017 (the date of Quach's second downloading session), Quach, Xanthe, and Allen all knew that Quach would be "going to Wuhan" to work for JHL. Allen was already in Wuhan at that time and having discussions with JHL's "Wuhan team." FAC ¶¶ 208–09. By that point, JHL had agreed to have Quach work for its benefit, even though his formal consulting agreement was not executed until August 7, 2017. What's more, Genentech has plausibly alleged that Quach was acting as JHL's agent when he requested additional Genentech documents from JHL's plant in Wuhan. By that point, JHL had hired Quach. *Id.* ¶ 214.

Although JHL will likely argue again that Quach was only an "independent contractor" and that nothing in his consulting agreement "should be construed" to provide for agency, Dkt. 57-1, the legal test for agency does not turn on niceties or formalism.[9] Formal employment status and job titles do not define, limit, or invalidate an agency relationship. The Ninth Circuit has held that even unpaid, volunteer "moderators" may be considered a company's agents—it all depends on the context. *See Mavrix Photographs, LLC v. Livejournal, Inc.*, 873 F.3d 1045, 1054–55 (9th Cir. 2017), *as amended* (Aug. 30, 2017). The Ninth Circuit has identified ten, non-exhaustive factors that guide the agency analysis:

> 1) the control exerted by the employer, 2) whether the one employed is engaged in a distinct occupation, 3) whether the work is normally done under the supervision of an employer, 4) the skill required, 5) whether the employer supplies tools and

[9] In moving to dismiss Genentech's original complaint, JHL submitted a declaration discussing Quach's "written consulting services agreement," but notably failed to include the agreement itself as an exhibit. *See* Dkt. 57-1.

> instrumentalities [and the place of work], 6) the length of time employed, 7) whether payment is by time or by the job, 8) whether the work is in the regular business of the employer, 9) the subjective intent of the parties, and 10) whether the employer is or is not in business.

Jones v. Royal Admin. Servs., Inc., 887 F.3d 443, 450 (9th Cir. 2018), *as amended* (Apr. 4, 2018). These factors favor an inference that Quach was JHL's agent. As alleged in the proposed FAC, JHL controlled Quach's activities; Quach reported to JHL's head of engineering; he was engaged in a distinct occupation that required specialized skill; JHL supplied him with an office and granted him access to its manufacturing plant; he worked in JHL's regular business; and JHL was (and remains) in business. FAC ¶¶ 206, 215.[10] Accordingly, Genentech has adequately alleged that "Quach was acting as an agent of JHL in the summer of 2017 when he allegedly used Xanthe's log-in credentials to access the confidential [Genentech] documents." MTD Order at 23.

Genentech has also alleged facts supporting the inference that Xanthe was JHL's agent when she provided Quach with unauthorized access to Genentech's computer system. As set forth in the proposed FAC, Xanthe manifested "apparent authority" to act on JHL's behalf. *See Mavrix*, 873 F.3d at 1055 (explaining that apparent authority arises when a person has permission to perform acts under circumstances creating "a reputation of authority"). Among other things, she was authorized to recruit candidates, interview prospective employees, supervise personnel, manage the company, and receive access to JHL's highly confidential information. FAC ¶ 216. Thus, when Xanthe recruited Quach, gave him access to Genentech's computer systems, and funneled additional Genentech documents to him in China, she was no rogue operator—she was acting as JHL's agent, facilitating and furthering the same conspiracy that JHL knew about, encouraged, and was benefitting from.

3. The CFAA allows for a conspiracy claim.

As Genentech argued in its opposition to defendants' motions to dismiss, the CFAA allows for a conspiracy claim. *See* Dkt. No. 93 at 26-27.[11] Section 1030(b) provides that

[10] Because JHL declined to produce its consulting agreement with Quach, Genentech lacks precise details regarding the agreement's duration and associated compensation. But Genentech has no reason to believe that Quach was paid by the job, or was hired on a short-term basis.

[11] Because the Court's MTD Order assumed without deciding that the CFAA provides for a conspiracy claim, Genentech renews the argument here.

"[w]hoever ***conspires to commit*** or attempts to commit an offense under subsection (a) of this section shall be punished as provided in subsection (c) of this section." 18 U.S.C. § 1030(b). The statute further provides that "[a]ny person who suffers damage or loss by reason of a violation of this section may maintain a civil action against the violator to obtain compensatory damages and injunctive relief or other equitable relief." 18 U.S.C. § 1030(g). Thus, the statute's plain text makes clear that someone who conspires to violate the CFAA is a "violator" subject to liability.

In light of the clear statutory text, courts have held that "Section 1030(b) of the CFAA extends liability to anyone who 'conspires to commit' such acts." *In re: Lenovo Adware Litig.*, 2016 WL 6277245, at *6 (N.D. Cal. Oct. 27, 2016) (J. Whyte); *see also Cloudpath Networks, Inc. v. SecureW2 B.V.*, 157 F. Supp. 3d 961, 984 (D. Colo. 2016) ("The CFAA extends to parties who 'conspire[ ] to commit' any act it prohibits."); *Charles Schwab & Co. v. Carter*, 2005 WL 2369815, at *6, (N.D. Ill. Sept. 27, 2005) ("[T]he Court assumes that Congress drafted the CFAA with an intent to permit vicarious liability."). Vicarious liability under the CFAA also arises when an employee's "transgressions occur in the scope of employment." *NetApp, Inc. v. Nimble Storage, Inc.*, 41 F. Supp. 3d 816, 835 (N.D. Cal. 2014) (J. Koh). Particularly relevant here, when a plaintiff alleges that "[d]efendants are vicariously liable as principals" for their agents' conduct, then a CFAA conspiracy claim survives a motion to dismiss. *Charles Schwab & Co.*, 2005 WL 2369815, at *5.[12]

The proposed FAC pleads a CFAA conspiracy violation against JHL (Claim 7). As explained above, Genentech alleges that Quach and Xanthe were both acting as JHL's agents in the summer of 2017, when Quach downloaded Genentech documents for the obvious purpose of helping JHL. FAC ¶¶ 215–16. Genentech further alleges that, while employed by JHL and ensconced in Wuhan, Quach directed Xanthe's to use her log-in credentials to download and send him additional Genentech information for use in the scope of his work at JHL. *Id.* ¶ 214. These allegations, taken as true and with all inferences running in Genentech's favor, state a claim

[12] JHL previously argued that *Agilysis, Inc. v. Hall*, 258 F. Supp. 3d 1331 (N.D. Ga. 2017), ruled out a conspiracy claim under the CFAA. But *Agilysis* confirms that the CFAA allows for such a claim—that case merely held that the complaint at issue was "devoid of facts to support" it. *Id.* at 1343. For the reasons stated above, that is hardly true here.

against JHL for conspiracy to violate the CFAA. Accordingly, Claims 6, 7, and 8 of the proposed FAC should proceed against JHL.

C. The proposed FAC adequately pleads facts demonstrating that Genentech's state-law claims are timely.

Genentech's state-law claims (Claims 4 and 5 in the proposed FAC) fall within the two-year statute of limitations California provides for such claims. *See Knoell v. Petrovich*, 76 Cal. App. 4th 164, 168 (1999); Cal. Civ. Proc. Code § 339(1). A claim should be dismissed on timeliness grounds under Rule 12(b)(6) "only if the assertions of the complaint, read with the required liberality, would not permit the plaintiff to prove that the statute was tolled." *Jablon v. Dean Witter & Co.*, 614 F.2d 677, 682 (9th Cir. 1980). "In fact, a complaint cannot be dismissed unless it appears beyond doubt that the plaintiff can prove no set of facts that would establish the timeliness of the claim." *Supermail Cargo, Inc. v. United States*, 68 F.3d 1204, 1207 (9th Cir. 1995). Accordingly, resolving "statute of limitations claims on a motion to dismiss [is] generally disfavored as a matter of law." *Blanco v. Am. Home Mortg. Servicing, Inc.*, 2009 WL 4674904, at *6 n.4 (E.D. Cal. Dec. 4, 2009).

Genentech first received notice of claims relating to Xanthe's work for APBio on or about October 11, 2016, through an anonymous tip. FAC ¶ 259. The tip concerned only APBio; it neither included nor suggested any possible misconduct by JHL. *Id.* ¶¶ 259–61. Accordingly, as of mid-October 2016, Genentech had no reason to suspect JHL of any misconduct. *Id.* ¶ 261. Genentech's Healthcare Compliance Office launched an investigation, but did not gain access to Xanthe's email account until November 15, 2016. *Id.* ¶ 263. It obtained a backup copy of Xanthe's user-created files on or about November 17, 2016. *Id.* ¶ 264. It was only after reviewing this information (which took additional time) that Genentech came to suspect possible wrongdoing involving or on the part of JHL. *Id.* ¶ 265. Prior to reviewing those emails and user files, Genentech had no reason to suspect that JHL was engaged in any misconduct whatsoever with respect to Genentech. *Id.* Genentech filed the complaint in this action on October 29, 2018—less than two years after first receiving notice of possible wrongdoing by JHL. Genentech's state-law claims are therefore timely.

JHL has argued in its briefing and before this Court that receiving a tip about Xanthe's work with APBio ought to have started the clock running as to JHL. But that is not the law. Notice of a possible claim against one potential defendant does not commence the limitations period with respect to a "separate . . . cause of action against a *different* defendant." *Pooshs v. Philip Morris USA, Inc.*, 51 Cal. 4th 788, 800 (2011) (emphasis in original).

That is the case here. All Genentech knew as of October 2016 was that APBio had listed Xanthe Lam as a consultant and part of the company's leadership team. FAC ¶ 260. Genentech had no reason to suspect *these* separate claims against *these* Defendants until mid-November 2016, after it had located evidence pointing to JHL's involvement in Xanthe's electronic files.

None of the authorities JHL has relied on says anything different. All of them predate *Pooshs*, and are inapposite. *Fox v. Ethicon Endo-Surgery, Inc.*, 35 Cal. 4th 797 (2005), and *Bernson v. Browning-Ferris Industries*, 7 Cal. 4th 926 (1994), both hold that if a plaintiff knows he was injured but isn't sure who injured him, he generally must still file a complaint—even if only a Doe complaint—within the limitations period. But, as the California Supreme Court explained in *Pooshs*, the *Fox* Court refused to lump separate injuries perpetrated by different defendants together into one undifferentiated mass for statute of limitations purposes. *See Pooshs*, 51 Cal. 4th at 800. Accordingly, even if Genentech suspected that it might have had some cause of action against Xanthe and APBio in October 2016, that in no way triggered the limitations period with respect to wholly separate causes of action against completely different defendants. Here, Genentech had no reason to suspect that it had suffered the injuries caused by JHL and its co-conspirators alleged in the proposed FAC until mid-November 2016 at the earliest. Moreover, some of the wrongful conduct by Defendants alleged in the proposed FAC occurred or continued well into 2017, such that these claims are timely without resort to tolling. *See* FAC ¶¶ 202–214, 216. Accordingly, the state-law claims alleged against JHL, Jordanov, Lin, Allen, Chan and Quach in the proposed FAC are timely.

D. The proposed FAC makes clear that CUTSA does not supersede Genentech's state-law claims.

The Court's MTD Order declined to resolve a final question regarding Genentech's state-

law claims: whether CUTSA supersedes them. It doesn't. This Court has articulated a "straightforward" legal test for CUTSA supersession: "After removing the 'trade-secret' facts, the remaining facts alleged are reassembled to determine whether they can independently support other causes of action . . . ." *Qiang Wang v. Palo Alto Networks, Inc.*, 2013 WL 415615, at *4 (N.D. Cal. Jan. 31, 2013) (J. Alsup); *see also Keery*, 2010 WL 727973, at *4 (N.D. Cal. Mar. 1, 2010) (J. Alsup). If a complaint's allegations "focus *entirely* on establishing plaintiffs[']trade secret claims," with "little if anything remain[ing]" in their absence, then CUTSA preempts the other causes of action. *Qiang Wang*, 2013 WL 415615, at *4 (emphasis added). Otherwise, the non-trade-secret claims may proceed alongside the CUTSA claims.

This Court's test aligns perfectly with California case law regarding CUTSA preemption. *Angelica Textile Services, Inc. v. Park*, 220 Cal. App. 4th 495 (2013), *as modified on denial of reh'g* (Nov. 7, 2013), is the most recent case on point. There, the California Court of Appeal held that CUTSA "does not displace noncontract claims that, although related to a trade secret misappropriation, are independent and based on facts distinct from the facts that support the misappropriation claim." *Id.* at 506. The court further explained that "*the determination of whether a claim is based on trade secret misappropriation is largely factual*." *Id.* at 505 (emphasis in original).

Here, the proposed FAC alleges facts that are separate, distinct, and independent from the trade secret misappropriation allegations. Genentech alleges that Xanthe's Proprietary Information Agreement forbade her from "engag[ing] in any employment or activity other than for the Company in any business in which the Company is now or may hereafter become engaged" while employed by Genentech. FAC ¶ 100. The FAC further alleges that Genentech's Good Operating Principles ("GGOP") and Code of Conduct, which also bound Xanthe, forbade her from engaging in "activities for the benefit of others" that could "interfere with [her] work for Genentech" or otherwise create a conflict of interest. *Id.* ¶¶ 101, 118. The Code of Conduct also prohibited Xanthe from maintaining a "relationship with an outside individual or company" that might make her "partial toward the outsider . . . or influence [her] judgment in making sound business decisions solely in the best interest of Roche or Genentech." *Id.* ¶ 120. That included

having a "personal or family investment" in a Genentech competitor, receiving compensation as "a consultant" for a competitor, or engaging in any other outside "business or other activity" related to her duties at Genentech, or to Genentech's "area of interest." *Id.* ¶¶ 121–22. Xanthe violated all of these strictures by moonlighting for JHL on Genentech's time (and the company's dime). *Id.* ¶¶ 10, 12, 152. None of these prohibitions depends in the slightest on the misappropriation of any trade secrets. *Id.* ¶¶ 328–30, 339–41, Indeed, these contractual provisions are all separate and distinct from provisions dealing with the protection of confidential and proprietary information.

The proposed FAC makes clear that JHL, Jordanov, Lin, Allen Lam, and Quach—all former Genentech employees themselves—well knew that Xanthe was breaching her contract and violating her duties to Genentech by surreptitiously working for JHL. *See* FAC ¶¶ 150, 254, 255, 257, 320–23, 334. Even so, they knowingly encouraged her to breach those duties. *Id.* ¶¶ 149–50, 324, 335. Genentech would therefore have claims for intentional interference with contractual relations and aiding and abetting a breach of the duty of loyalty against those defendants even if Xanthe had never disclosed a single trade secret to JHL. Indeed, these claims would remain viable "even if it were ultimately found that the information was *not* a trade secret." *Silvaco Data Sys. v. Intel Corp.*, 184 Cal. App. 4th 210, 242 (2010), *as modified on denial of reh'g* (May 27, 2010) (emphasis in original). Accordingly, CUTSA preempts neither of those state-law claims.

Angelica is instructive. There, a laundry company (Angelica) sued a former employee (Park) who allegedly stole Angelica's trade secrets and left for a new company. *Angelica*, 220 Cal. App. 4th at 500–01. But Angelica also alleged that Park took various actions that harmed Angelica and aided its competitors while he was still Angelica's employee. For instance, Park disparaged Angelica to a local bank, held onto thousands of documents belonging to Angelica, and granted customers non-traditional cancellation rights that allowed them to quickly take their business to Park's new employer. *Id.* at 501. On summary judgment, the trial court had dismissed the plaintiff's claims for breach of contract, breach of fiduciary duty, intentional interference with business relations, and conversion, finding them preempted by CUTSA. *Id.* at 503. The Court of Appeal reversed, holding that Angelica's allegations and theories of harm did "not depend on any

misappropriation of trade secrets and therefore are not displaced by [C]UTSA." *Id.* at 499.

The same logic applies here. While employed by Genentech, Xanthe worked for JHL. In so doing, she breached her contract, violated Genentech's Code of Conduct, and breached her duty of loyalty—and the defendants named in Claims 4 and 5 helped her do it. Whether or not she *also* misappropriated trade secrets is beside the point—these claims stand on their own either way. Accordingly, they should proceed as pled in the proposed FAC.

V. CONCLUSION

For the foregoing reasons, Genentech respectfully asks that the Court grant it leave to file the proposed First Amended Complaint. None of the claims as pled in the FAC is subject to dismissal under Rule 12(b)(6). Accordingly, Genentech asks that the Court order JHL to answer the FAC within 14 days of the Court's order granting leave to file.

Dated: March 22, 2019

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