

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
COLUMBUS DIVISION

REFRESCO BEVERAGES US INC.,

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Plaintiff,

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vs.

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CALIFORMULATIONS, LLC, SYMRISE
INC., THE GREEN ORGANIC
DUTCHMAN HOLDINGS LTD., 6003
HOLDINGS LLC, EDMUND O'KEEFFE,
TYRONE POLHAMUS, KHANH LY,
JASON PONTES, DANA KLAYBOR,
WANDA JACKSON, and KALEENA GEE,

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Defendants.

CASE NO. 4:20-CV-181 (CDL)

O R D E R

Lawyers sometimes make matters unnecessarily complicated. The Complaint in this action exceeds 600 paragraphs and 90 pages. The briefing on the pending motions to dismiss, which required the analysis of no evidence and should have been restricted to the four corners of the complaint, consumed over 200 pages. Yet the theory of the case that will necessarily be whittled down to its essentials if and when it is presented to a lay jury is relatively simple. Plaintiff ("Refresco") maintains that its former employees, while employed by Refresco's predecessor-in-interest, plotted with one of Refresco's competitors to join this competitor after the termination of their employment with Refresco's predecessor-in-interest and in violation of their employment

agreements with the intention of using the predecessor-in-interest's proprietary information for the benefit of that competitor and future employer.¹ According to Refresco's Complaint, this conduct gives rise to various claims against the competitor, its affiliated investors, and the former employees. These claims include misappropriation of trade secrets under federal and state law, breach of contract, tortious interference with contract and business relations, breach of fiduciary duty, conversion, and theft of property.

Unable to resist what this Court has on occasion described as the *Twombly/Iqbal* compulsion, Defendants filed an expansive motion to dismiss every claim instead of targeting those that are truly vulnerable to summary dismissal.² For the reasons explained in the remainder of this order, Defendants' motions to dismiss (ECF Nos. 46, 48, & 49) are denied as to Refresco's claims for trademark misappropriation, usurpation of corporate opportunity, breach of the duty of loyalty, aiding and abetting, tortious interference with contract, tortious interference with business relationships, breach of contract as to all employees except Pontes and Ly, and granted as to Refresco's claims for breach of contract against

¹ The preceding sentence shares some of the characteristics of the Complaint and briefing in this action. It is long and complicated. Whether it is unnecessarily so is subject to reasonable disagreement. As to the complaint and briefing, such a conclusion is doubtful.

² For a discussion of the *Twombly/Iqbal* compulsion, see *Barker v. Columbus Regional Healthcare System, Inc.*, 977 F. Supp. 2d 1341, 1345-46 (M.D. Ga. 2013).

Pontes and Ly, violations of the Georgia RICO Act, civil conspiracy, violations of the Computer Fraud and Abuse Act, and computer theft and trespass under O.C.G.A. § 16-9-93 *et seq.*

MOTION TO DISMISS STANDARD

"To survive a motion to dismiss" under Federal Rule of Civil Procedure 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.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). The complaint must include sufficient factual allegations "to raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555. In other words, the factual allegations must "raise a reasonable expectation that discovery will reveal evidence of" the plaintiff's claims. *Id.* at 556. But "Rule 12(b)(6) does not permit dismissal of a well-pleaded complaint simply because 'it strikes a savvy judge that actual proof of those facts is improbable.'" *Watts v. Fla. Int'l Univ.*, 495 F.3d 1289, 1295 (11th Cir. 2007) (quoting *Twombly*, 550 U.S. at 556).

FACTUAL ALLEGATIONS

In deciding the pending motions to dismiss, the Court accepts as true the following facts alleged by Refresco in its complaint.

I. The Players

The Plaintiff in this action, Refresco Beverages US Inc. ("Refresco"), is the successor-in-interest to Cott Beverages LLC ("Cott Beverages"), which it acquired from Cott Holdings Inc. on February 8, 2019. Compl. ¶ 27, ECF No. 1. No one seriously disputes that Refresco has standing to assert claims that belonged to Cott Beverages prior to this acquisition. Like Cott Beverage's previous operations, Refresco formulates, produces, manufactures, packages, and distributes beverages and concentrates in the United States. *Id.* ¶ 48. Also like Cott Beverages, Refresco offers various "beverage-related services," which include "developing new tastes and flavors, formulation, product development and manufacturing for delivery to retail locations." *Id.* ¶ 49. Before acquiring Cott Beverages, Refresco purchased the shares of another Cott subsidiary, Cott Beverages Inc. ("Cott BI"), from Cott Corporation on January 30, 2018.³ *Id.* ¶ 26. Between January 30, 2018 and February 8, 2019, when Refresco acquired Cott Beverages, Cott Beverages acted as an independent entity. *Id.*

One of Refresco's competitors and a defendant in this action, Symrise Inc., specializes in "developing and selling flavors and scents, including flavors and scents for beverages." *Id.* ¶ 1. In

³ Cott's corporate structure is unclear from the parties' briefing. After clarification during the Court's hearing on the pending motions, the parties clarified that Cott BI and Cott Beverages were two wholly-owned subsidiaries of Cott Corporation, which changed its name to Cott Holdings prior to Refresco's acquisition of Cott Beverages.

November 2017, Symrise launched what it described as a “beverage incubator,” which it called Califormulations. *Id.* ¶¶ 1-2. Califormulations was trumpeted as “an entirely new concept offering a dedicated suite of product development services to beverage entrepreneurs.” *Id.* ¶ 1. A business entity, Califormulations, LLC, was formed in March 2019 by Symrise, The Green Organic Beverage Corp. (“TGOBC”), and 6003 Holdings LLC to implement this beverage incubator vision. *Id.* ¶ 53. Symrise owned 34% of Califormulations, LLC, which became a competitor of Refresco.

Another defendant in this action, The Green Organic Dutchman Holdings Ltd. (“TGOD”), was instrumental in the formation of Califormulations. TGOD is a Canadian producer of organic cannabis products.⁴ *Id.* ¶ 263. Its subsidiary, TGOBC, eventually became a 15% owner of Califormulations, LLC, and TGOD had a representative on the Califormulations, LLC board. *Id.* ¶ 21. Before Califormulations was formed, TGOD began communicating in 2018 with Edmund O’Keefe and Tyrone Polhamus, who were high level Cott Beverages executives at the time and are defendants in this action, about investing in a venture described at that time as NewCo/Califormulations. *Id.* ¶¶ 10-13. O’Keefe was the President

⁴ TGOD filed a separate motion to dismiss for lack of personal jurisdiction. The Court deferred ruling on this motion and ordered jurisdictional discovery. See Order (June 25, 2021), ECF No. 80. Thus, the issues raised in TGOD’s motion (ECF No. 54) will not be addressed in today’s ruling.

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