

management and fulfillment system. (*Id.* at 4–5). Big Thirst alleges that Donoho developed a data dashboard that provides data analytics to customers and operates in conjunction with third-party software applications including Shopify, which creates the Big Thirst shopping cart. (Compl., Dkt. 1-1, at 1–2).

Matt is Big Thirst’s CEO. (*Id.* at 4). Donoho alleges that she contributed 90% of Big Thirst’s working capital but never had an employment agreement with the company and never assigned nor licensed to it any of her intellectual property. (Counterclaim, Dkt. 2, at 4). She alleges that Matt agreed to split ownership of the company 50/50, but secretly setup Big Thirst with himself as the sole owner. (*Id.* at 4). An ownership dispute arose between Matt and Donoho when Big Thirst sought a loan from the Small Business Administration. (*Id.* at 5). Big Thirst alleges that Donoho demanded a majority ownership interest in the company and exclusive control and threatened that otherwise, she would shut down the data dashboard, which: “For all intents and purposes, [] shuts down the company, and destroys Big Thirst, Inc.’s relationships with its customers and its reputation.” (Dkt. 1-1, at 3–4). Donoho alleges that due to the dispute, she “was forced to resign her ‘title’ of Chief Operating Officer and her position as a Director of Big Thirst” on April 7, 2022. (Counterclaim, Dkt. 2, at 6). Big Thirst alleges that Matt lost access to the data dashboard the same day. (Dkt. 1-1, at 4).

Big Thirst filed this lawsuit against Donoho in state court on April 11, 2022. (Original Complaint, Dkt. 1-1). Big Thirst alleged a sole claim of breach of fiduciary duty and requested temporary and permanent injunctive relief, including a temporary restraining order (“TRO”). (*Id.*). After the state court granted Big Thirst’s motion for a TRO, Donoho removed Big Thirst’s action to this Court on May 12, 2022. (Notice, Dkt. 1).¹ The same day, Donoho filed a crossclaim against Big

¹ After this case’s removal, a flurry of filings followed, with Big Thirst and Donoho accusing each other of violating the state court’s injunction. (Mot. Show Cause, Dkt. 16; Mot. Sanctions, Dkt. 57). After several

Thirst, as well as its three directors: Matt McGinnis, his wife Suzanne McGinnis, and Mark Shilling. (Counterclaim, Dkt. 2). Donoho asserts counterclaims and cross-claims for copyright infringement against Big Thirst; contributory copyright infringement, conspiracy, and fraud by nondisclosure against Matt, Suzanne McGinnis, and Shilling; conversion against Big Thirst and Matt; and minority shareholder oppression, breach of fiduciary duty, and fraud against Matt. (*Id.*).

On June 2, 2022, Big Thirst filed a motion to dismiss the counterclaim. (Mot. Dismiss, Dkt. 17). It argues that it had an irrevocable license to use Big Thirst’s intellectual property (“IP”) and that the claim of conversion is inconsistent with the state court’s injunction. (*Id.* at 2–6). On July 15, the Cross-Defendants filed also filed a motion to dismiss, presenting the same arguments regarding the IP and conversion claims, and also contending that her minority shareholder oppression claim is not legally cognizable, that she does not meet the elements for breach of fiduciary duty, and that her fraud claims lack the particularity required by Rule 9. (Mot. Dismiss, Dkt. 40, at 4–11). Donoho filed responses, (Dkts. 24, 47), and Big Thirst and Cross-Defendants filed replies, (Dkts. 33, 51).

II. LEGAL STANDARD

Pursuant to Rule 12(b)(6), a court may dismiss a complaint for “failure to state a claim upon which relief can be granted.” Fed. R. Civ. P. 12(b)(6). In deciding a 12(b)(6) motion, a “court accepts ‘all well-pleaded facts as true, viewing them in the light most favorable to the plaintiff.’” *In re Katrina Canal Breaches Litig.*, 495 F.3d 191, 205 (5th Cir. 2007) (quoting *Martin K. Eby Constr. Co. v. Dall. Area Rapid Transit*, 369 F.3d 464, 467 (5th Cir. 2004)). “To survive a Rule 12(b)(6) motion to dismiss, a complaint ‘does not need detailed factual allegations,’ but must provide the plaintiff’s grounds for entitlement to relief—including factual allegations that when assumed to be true ‘raise a right to relief above the speculative level.’” *Cuvillier v. Taylor*, 503 F.3d 397, 401 (5th Cir. 2007) (citing *Bell Atl.*

hearings on the cross-motions, the Court found Donoho in contempt and ordered her to pay \$80,137.50 for her violation of the injunction. (Order, Dkt. 78).

Corp. v. Twombly, 550 U.S. 544, 555 (2007)). That is, “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 *Twombly*, 550 U.S. at 570).

A claim has facial plausibility “when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* “The tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.” *Id.* A court ruling on a 12(b)(6) motion may rely on the complaint, its proper attachments, “documents incorporated into the complaint by reference, and matters of which a court may take judicial notice.” *Dorsey v. Portfolio Equities, Inc.*, 540 F.3d 333, 338 (5th Cir. 2008) (citations and internal quotation marks omitted). A court may also consider documents that a defendant attaches to a motion to dismiss “if they are referred to in the plaintiff’s complaint and are central to her claim.” *Causey v. Sewell Cadillac-Chevrolet, Inc.*, 394 F.3d 285, 288 (5th Cir. 2004). But because the court reviews only the well-pleaded facts in the complaint, it may not consider new factual allegations made outside the complaint. *Dorsey*, 540 F.3d at 338. “[A] motion to dismiss under 12(b)(6) ‘is viewed with disfavor and is rarely granted.’” *Turner v. Pleasant*, 663 F.3d 770, 775 (5th Cir. 2011) (quoting *Harrington v. State Farm Fire & Cas. Co.*, 563 F.3d 141, 147 (5th Cir. 2009)).

III. DISCUSSION

Because both Big Thirst’s and Cross-Defendants’ motions to dismiss raise the same implied license and conversion claims, the Court will first address those two issues. The Court will then turn to Cross-Defendants’ remaining arguments regarding shareholder oppression, breach of fiduciary duty, and fraud.

A. Implied License

Big Thirst and Cross-Defendants both argue that Donoho's copyright infringement claim should be dismissed because Big Thirst and its directors had an implied, irrevocable, nonexclusive license to use its IP. (Big Thirst's Mot. Dismiss, Dkt. 17, at 4; Cross-Defendant's Mot. Dismiss, Dkt. 40, at 10). An implied nonexclusive license is created when "(1) a person (the licensee) requests the creation of a work; (2) the creator (the licensor) makes the particular work and delivers it to the licensee who requested it; and (3) the licensor intends that the licensee requestor copy and distribute his work." *Lulirama Ltd., Inc. v. Access Broadcast Services, Inc.*, 128 F.3d 872, 879 (5th Cir. 1997) (cleaned up). "A nonexclusive license may be irrevocable if supported by consideration." *Id.* at 882.

Big Thirst argues that "an implied nonexclusive license clearly arose under the circumstances" because it "requested Donoho to create Big Thirst's IP" and Donoho created and delivered it to Big Thirst in her capacity as the company's co-founder. (Mot. Dismiss, Dkt. 17, at 4). However, a "district court is limited to considering the contents of the pleadings and the attachments thereto when deciding a motion to dismiss under Rule 12(b)(6)." *Villarreal v. Wells Fargo Bank, N.A.*, 814 F.3d 763, 766 (5th Cir. 2016). While Big Thirst may successfully prove that it had an implied license to the IP at the summary judgment stage, that defense appears premature as a Rule 12 motion. The Court must accept Donoho's well-pled facts as true and draw reasonable inferences in her favor. *In re Katrina Canal Breaches Litig.*, 495 F.3d 191, 205 (5th Cir. 2007).² Based on her complaint, Donoho's facts do plausibly show that Big Thirst specifically requested the creation of her work. (*Id.*). Donoho alleges that she did not intend for Big Thirst to copy and distribute the work and that she developed the work as an owner of the company, which in fact, she was not. (*Id.* at 10). Drawing reasonable inferences in Donoho's favor, it appears plausible that she developed the

² Even disregarding Donoho's purely legal conclusions, such as the statement that she "never assigned any of her intellectual property to Big Thirst[.]" Donoho has still stated a plausible claim. (Counterclaim, Dkt. 2, at 5); *Iqbal*, 556 U.S. at 678.

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