

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

BIONESS INC.,
Plaintiff and Counter-Defendant,

v.

ARETECH, LLC,
Defendant and Counter-Plaintiff.

No: 1:22-cv-00679-MSN-IDD

MEMORANDUM OPINION AND ORDER

This matter comes before the Court on Plaintiff Bioness Inc.’s Partial Motion to Dismiss Defendant Aretech, LLC’s Amended Counterclaims (Dkt. No. 33). Upon consideration of the motion, the memorandum in support thereof, the opposition, the reply thereto, the arguments of counsel at the hearing held on January 13, 2022, and for the reasons set forth below, the motion is **GRANTED IN PART** and **DENIED IN PART**.

I. CLAIMS AND PROCEDURAL HISTORY

On June 15, 2022, Bioness Inc. (“Bioness”) filed a complaint against Aretech, LLC (“Aretech”) alleging patent infringement of ten patents related to Bioness’s Vector Gait and Safety System (“Vector”), a rehabilitative body weight support device. *See generally* Compl. (Dkt. No. 1).¹ Aretech filed an Answer, Affirmative Defenses, and Counterclaims on August 8, 2022. (Dkt. No. 22). Bioness moved to partially dismiss the counterclaims on September 28, 2022. (Dkt. No. 27).

While Bioness’s motion was pending, Aretech filed an Amended Answer, Affirmative Defenses, and Counterclaims on October 19, 2022, alleging thirty-five causes of action against

¹ The ten patents are: U.S. Patent Nos. 9,862,000 (“the ’000 Patent”); 9,839,569 (the ’569 Patent); 9,855,177 (the ’177 Patent); 10,219,960 (the ’960 Patent); 10,463,563 (the ’563 Patent); 10,537,486 (the ’486 Patent); 10,668,316 (the ’316 Patent); 11,246,780 (the ’780 Patent); 11,253,416 (the ’416 Patent); 11,324,651 (the ’651 Patent). The Court will collectively refer to these ten patents as the Asserted Patents.

Bioness. First Am. Answer, Aff. Defenses, and Countercl. (“Amended Counterclaim” or “FACC”) (Dkt. No. 30). In its Amended Counterclaim, for each of the ten patents at issue in Bioness’s complaint, Aretech seeks (1) a declaration of unenforceability based on inequitable conduct, (2) a declaration of non-infringement, and (3) a declaration of invalidity. *See* FACC ¶¶ 184–363. In addition, Bioness alleges violations of Section 2 of the Sherman Act, *id.* ¶¶ 130–59; tortious interference with its business expectancy, *id.* ¶¶ 160–68; and, with respect to nine of the patents at issue, seeks correction of inventorship under 35 U.S.C. § 256 and a declaration of invalidity for misjoinder of inventors and nonjoinder of inventor, *id.* ¶¶ 169–83.²

On November 16, 2022, Bioness filed a Partial Motion to Dismiss Aretech’s Amended Counterclaims. *See* Pl. Partial Mot. to Dismiss Def. Aretech’s Am. Countercl. (“Mot.”) (Dkt. No. 33); Mem. in Supp. of Partial Mot. to Dismiss Def. Aretech’s Am. Countercl. (“Pl. Mem.”) (Dkt. No. 34). Bioness does not move to dismiss counterclaims requesting declarations of invalidity and non-infringement for each of the Asserted Patents but moves to dismiss the remainder of the counterclaims. *See* Mot. at 1.³

Aretech filed an opposition brief on December 14, 2022. Def. Opp. to Pl. Partial Mot. to Dismiss the Am. Countercl. (“Opp.”) (Dkt. No. 40). Bioness filed a reply brief on December 30, 2022. Pl. Reply Mem. in Supp. of its Partial Mot. to Dismiss Def. Am. Countercl. (“Reply”) (Dkt. No. 44). This Court heard oral argument on the motion on January 13, 2023. (Dkt No. 53).

II. LEGAL STANDARD

A. Rule 12(b)(6)

Dismissal is appropriate under Federal Rule of Civil Procedure 12(b)(6) if it appears that

² The correction of inventorship and declaration of invalidity for misjoinder and nonjoinder of inventors are alleged with respect to each of the Asserted Patents with the exception of the ’316 Patent.

³ Specifically, Bioness seeks to dismiss the First, Second, Third, Fourth, Fifth, Sixth, Ninth, Twelfth, Fifteenth, Eighteenth, Twenty-First, Twenty-Sixth, Twenty-Ninth, Thirty-Second, and Thirty-Fifth Causes of Actions in the Amended Counterclaim.

the counter-plaintiff is not “entitled to relief under any legal theory which might plausibly be suggested by the facts alleged.” *Harrison v. United States Postal Serv.*, 840 F.2d 1149, 1152 (4th Cir. 1988) (citation omitted). “Factual allegations must be enough to raise a right to relief above the speculative level.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). A court should “construe facts in the light most favorable to the [counter-plaintiff] and draw all reasonable inferences in [its] favor” but “need not accept as true unwarranted inferences, unreasonable conclusions, or arguments.” *United States ex rel. Oberg v. Pa. Higher Educ. Assistance Agency*, 745 F.3d 131, 136 (4th Cir. 2014) (cleaned up).

B. Rule 9(b)

Rule 9(b) requires that “[i]n alleging fraud . . . a party must state with particularity the circumstances constituting fraud[.]” Fed. R. Civ. P. 9(b). “[I]nequitable conduct, while a broader concept than fraud, must be pled with particularity under Rule 9(b).” *Exergen Corp. v. Wal-Mart Stores, Inc.*, 575 F.3d 1312, 1326 (Fed. Cir. 2009). “A pleading of inequitable conduct under Rule 9(b) must include sufficient allegations of underlying facts from which a court may reasonably infer that a specific individual (1) knew of the withheld material information or of the falsity of the material misrepresentation, and (2) withheld or misrepresented this information with a specific intent to deceive the PTO.” *Id.* at 1328. A claim for inequitable conduct must therefore identify “the specific who, what, when, where and how of the material misrepresentation or omission” committed before the United States Patent Office (“Patent Office” or “PTO”). *Id.* at 1327. A counter-plaintiff must include allegations from which a court may reasonably infer that a specific individual (1) knew of the withheld material information or of the falsity of the material misrepresentation, and (2) withheld or misrepresented this information with a specific intent to deceive the PTO. *Id.* at 1328–29.⁴

⁴ Although the parties agree that inequitable conduct must be pled with particularity under Rule 9(b), they disagree on the specific standard by which this Court is to assess Aretech’s inequitable conduct counterclaims. Under

III. ANALYSIS

A. INEQUITABLE CONDUCT

Bioness moves to dismiss several of Aretech's counterclaims on grounds that Bioness engaged in inequitable conduct.⁵ These inequitable conduct counterclaims are premised on fraud purportedly perpetrated against the PTO by individuals at Bioness and attorneys prosecuting the Asserted Patents. Specifically, Aretech alleges that these individuals intentionally withheld from the PTO (1) one or more written catalogs from Vahle, Inc. ("Vahle") and a Vahle powered conductor system in the filing and prosecution of US Patent Application No. 13/745,830 ("the '830 Application"), which eventually issued as the '000 Patent;⁶ (2) a 2013 Vector Elite Clinician Guide and a version of the Vector system during the filing and prosecution of Patent Application No. 15/896,731 ("the '731 Application"), which eventually issued as the '316 Patent; and (3) the name

Therasense, Inc. v. Becton, Dickinson & Co., 649 F.3d 1276, 1290–91 (Fed. Cir. 2011), the Federal Circuit required that a party prove by clear and convincing evidence that an accused infringer acted with a specific intent to deceive the PTO in withholding prior art and that the PTO would not have allowed a claim had it been aware of the undisclosed prior art ("but-for materiality"). However, *Therasense* was silent on the adequacy of pleading inequitable conduct. In its motion, Bioness cites the inequitable conduct pleading standard articulated in a post-*Therasense* decision from another court in this District, arguing that Aretech must "make an *initial showing* from which it may be *plausibly inferred* that: (1) [a specific] individual knew of the information not disclosed; (2) the information not disclosed was but-for material to the prosecution of the patent; and (3) the intent to deceive is the single most likely explanation for the non-disclosure." Pl. Mem. at 3–4 (quoting *Pfizer Inc. v. Teva Pharms. USA, Inc.*, 803 F. Supp. 2d 409, 432 (E.D. Va.), amended, 803 F. Supp. 2d 464 (E.D. Va. 2011)). Aretech, on the other hand, cites the *Exergen* standard: "[T]he pleading must include sufficient facts from which a Court can reasonably infer that a specific individual knew of the invalidating information that was withheld from the PTO and withheld that information with a specific intent to deceive the PTO." Opp. at 8 (citing *Exergen*, 575 F.3d at 1328–29). Nevertheless, in a post-*Therasense* opinion, the Federal Circuit endorsed the *Exergen* pleading standard. "A charge of inequitable conduct based on a failure to disclose will survive a motion to dismiss only if the plaintiff's complaint recites facts from which the court may reasonably infer that a specific individual both knew of invalidating information that was withheld from the PTO and withheld that information with a specific intent to deceive the PTO." *Delano Farms Co. v. California Table Grape Comm'n*, 655 F.3d 1337, 1350 (Fed. Cir. 2011) (citing *Exergen*, 575 F.3d at 1318, 1330; citing generally *Therasense*, 649 F.3d 1276)). Accordingly, this Court will adopt the pleading standard as set forth in *Exergen* and *Delano*.

⁵ The inequitable conduct counterclaims that Bioness moves to dismiss are the Fourth, Fifth, Sixth, Ninth, Twelfth, Fifteenth, Eighteenth, Twenty-First, Twenty-Sixth, Twenty-Ninth, Thirty-Second, and Thirty-Fifth Causes of Action.

⁶ Aretech pleads infectious unenforceability with respect to eight patents claiming priority to the '000 Patent. See FACC ¶¶ 75–77. These are the '569 Patent, '177 Patent, '960 Patent, '563 Patent, '486 Patent, '780 Patent, '416 Patent, and the '651 Patent. The sufficiency of the allegations for the causes of action alleging unenforceability based on inequitable conduct for these eight patents will therefore rise and fall with the sufficiency of the allegations concerning the '000 Patent.

of Dr. Hidler as the true inventor of the overhead gait system in the '000 Patent and its continuations.⁷ This Court will consider each of these allegations in turn.

1. Vahle System and Catalog

Aretech first alleges that individuals at Bioness and the prosecuting attorneys of the '000 Patent withheld one or more written Vahle catalogs and one or more versions of a power rail conductor system sold by Vahle in the filing and prosecution of the '000 Patent. FACC ¶¶ 56–74. Aretech alleges that Bioness incorporated an enclosed power rail it had purchased from Vahle into the Vector system and that Bioness intentionally withheld the Vahle system and corresponding written catalogs from the PTO with a specific intent to deceive the PTO. *Id.*

This Court finds that Aretech has sufficiently alleged unenforceability based on inequitable conduct with respect to the Vahle system and catalog. Aretech has provided factual allegations to support a reasonable inference that specific individuals (1) knew of the Vahle system and catalog, and (2) withheld the system and catalog with a specific intent to deceive the PTO. *See Exergen*, 575 F.3d at 1328–29. Aretech identifies by name the fourteen individuals it alleges knew about the Vahle system and catalog and provides detailed allegations from which one could infer these individuals were aware of the undisclosed system and catalog. FACC ¶¶ 47–49, 68. Identifying “a group of inventors by name and alleg[ing] that each one of the group of individuals engaged in inequitable conduct” is sufficient under *Exergen. Diebold Nixdorf, Inc. v. Hyosung TNS, Inc.*, No. 1:19-cv-1695, 2021 WL 861734, at *3 (D. Del. Mar. 4, 2021). Based on Aretech’s allegations that Bioness had already been using the enclosed power rail from Vahle as part of its Vector system at the time it submitted the '830 Application, FACC ¶ 61, it is plausible to infer that the individuals

⁷ The allegedly false oaths with respect to inventorship are a basis for several causes of action, including the Fourth Cause of Action, Fifth Cause of Action, and the causes of action of unenforceability of the '000 Patent and the eight patents claiming priority to the '000 Patent.

connected with the '000 Patent actually knew about the Vahle system's enclosed power rail and catalog at the time of submission.⁸

Aretech also alleges that the Vahle catalog and system were material to patentability because they disclosed an enclosed powered conductor with a portion of the trolley within it, a claim element Aretech alleges the patent examiner determined to be missing from the prior art. *Id.* ¶¶ 63–67. Bioness argues that Aretech failed to adequately plead materiality because the Vahle catalog did not disclose a powered conductor with a portion of the trolley within it and the allegedly material elements were also present in an earlier patent application, U.S. Patent No. 2012/0000876 to Bergenstrale, rendering the Vahle catalog and system cumulative. Pl. Mem. at 7–9. These arguments require this Court to make factual determinations that are improper at the 12(b)(6) stage. *See W.L. Gore & Assocs., Inc. v. Medtronic, Inc.*, 850 F. Supp. 2d 630, 635 (E.D. Va. 2012).

Finally, Aretech has sufficiently pled facts to support an inference that the '000 Patent applicants withheld the Vahle system and catalog from the PTO with a specific intent to deceive. Aretech has, for instance, alleged that Bioness disclosed a version of the Vahle catalog in a child application to the '000 Patent; that Bioness was using the Vahle system in connection with its Vector system prior to the filing of the '830 Application; Vahle had publicly announced that it supplied Vector with energy; and that Bioness amended its claims to more fully describe the enclosed power conductor as part of their invention even after Vahle's public announcement. FACC ¶¶ 61, 64, 72. Aretech provides enough factual support to plausibly infer that the '000 Patent applicants made a “deliberate decision to withhold” the Vahle system and catalog from the PTO.

The cases cited by Bioness do not alter this analysis. Pl. Mem. at 6–7; Reply at 3. The pleadings in two of the cases cited allege a more attenuated connection between the prior art and the parties who allegedly withheld that prior art than is alleged here. *Mike's Train House, Inc. v.*

⁸ This Court finds that although the allegations in the Amended Counterclaim are more detailed with respect to the Vahle system, knowledge of the Vahle catalog can be plausibly inferred as well.

Broadway Ltd. Imports, LLC, No. CIV. JKB-09-2657, 2011 WL 2415014, at *4 (D. Md. June 10, 2011) (allegations that technology in withheld prior art reference was “well known in the field of model railroading” and withheld prior art reference appeared in a trade publication were insufficient to infer plaintiffs knew of the references, let alone reflect deceptive intent); *Activevideo Networks, Inc. v. Verizon Commc’ns, Inc.*, No. 2:10-cv-248, 2011 WL 13113382, at *5 (E.D. Va. Mar. 1, 2011) (finding that, where plaintiff alleged “merely vague and generalized expressions of the general availability of . . . alleged prior art references,” plaintiff failed to allege knowledge, and that failure to sufficiently allege knowledge “necessarily means . . . fail[ure] to allege sufficient facts to demonstrate . . . deceptive intent”).⁹ Unlike in either of these cases, Aretech alleges at least one direct link between the withheld prior art (the Vahle system) and Bioness (its purchase of the Vahle system). *See Gore*, 850 F. Supp. 2d at 635 (concluding that because the exclusion of material prior art “could provide a patent applicant with the significant benefit of having the application granted,” the counterclaimant pled facts sufficient to infer an intent to deceive). Aretech has therefore sufficiently pled “the specific who, what, when, where and how” of inequitable conduct with respect to the Vahle system and catalog. *See Exergen*, 575 F.3d at 1327.

Accordingly, this Court DENIES Bioness’s motion to dismiss Aretech’s counterclaims to the extent they are premised upon inequitable conduct concerning the Vahle system and catalog.

2. Vector Elite Clinician Guide and Vector System

Aretech next alleges inequitable conduct on grounds that in the filing and prosecution of the ’316 Patent, Bioness withheld from the PTO (1) a 2013 Vector Elite Clinician Guide (“VE-Guide”) and (2) a version of the Vector system that included fall prevention and trolley tracking. FACC ¶¶ 78–109.¹⁰ Aretech alleges that Bioness has marketed and sold a version of the Vector

⁹ Bioness also cites *Ist Media, LLC v. Elec. Arts, Inc.*, 694 F.3d 1367, 1374–75 (Fed. Cir. 2012), but the relevant “specific intent to deceive” analysis references evidence adduced at trial and is of limited utility here.

¹⁰ The Thirty-Fifth Cause of Action is the only counterclaim alleging inequitable conduct with respect to the VE-Guide and Vector system.

system with fall prevention and trolley tracking capabilities since at least 2013—more than three years before it submitted its application in connection with the '316 Patent—and that these features were described in the VE-Guide. *Id.* ¶¶ 79–83, 89–108. Aretech asserts that these materials were intentionally withheld with a specific intent to deceive the PTO, and that the '316 Patent would not have issued had the prior art been disclosed. *Id.* ¶¶ 103–05.

This Court finds that Aretech has sufficiently alleged facts to plausibly infer inequitable conduct as it concerns the VE-Guide and the Vector system with fall prevention and trolley tracking. Aretech provides detailed allegations identifying the specific individuals who withheld the VE-Guide and the Vector system from the PTO, that those individuals knew of the withheld materials, and that the materials were withheld with a specific intent to deceive the PTO. *Id.* ¶¶ 78–109. Bioness argues that Aretech has failed to plausibly plead that any specific individual made a deliberate decision to withhold a known material reference. Pl. Mem. at 13–14. As an initial matter, Bioness limits its arguments to the VE-Guide and makes no arguments with respect to Aretech's allegations concerning the prior sale of the Vector system. *See id.*; Reply at 6. Moreover, by arguing that portions of the '316 Patent and the VE-Guide are “not identical,” Bioness appears to recognize that there exist extensive and striking similarities. *See* Pl. Mem. at 13. Based on Aretech's allegations describing those similarities, FACC ¶¶ 79–81, 89–102, combined with the allegations that Mr. McBride signed a declaration stating that the Vector system was in commerce in 2014 and attaching excerpts of the clinician guide, *id.* ¶ 106, one could plausibly infer that the '316 Patent applicants directly copied portions of the VE-Guide on their patent application without disclosing the guide or system to the PTO and that the non-disclosure was committed with a specific intent to deceive the PTO. *See* FACC ¶¶ 79–81, 89–102, 106; *Gore*, 850 F. Supp. 2d at 635.

Accordingly, this Court DENIES Bioness's motion to dismiss the Thirty-Fifth Cause of Action.

3. Inventorship

Finally, Aretech alleges inequitable conduct on grounds that the named inventors of the '000 Patent falsely executed oaths of inventorship seeking to omit Dr. Hidler as the true inventor of the '000 Patent and its continuations. *E.g.*, FACC ¶¶ 47–54.¹¹

Based on the factual allegations of the Amended Counterclaim, the original ZeroG technology is not at issue in the '000 Patent; rather, it is the use of a conductive powered rail in the overhead gait device in the Vector system that is central to the '000 Patent and rests at the center of the controversy between the parties. The critical inquiry, therefore, is whether the allegations in the Amended Counterclaim concerning Dr. Hidler's disclosures to Bioness about the idea of a power rail for the ZeroG system are sufficiently pled under Rule 9(b) such that the Court could plausibly infer that the patent applicants falsely identified the joint inventors of the '000 Patent and omitted the true inventor of the '000 Patent. Aretech's only factual allegations supporting such an inference are that Dr. Hidler "detailed his idea of 'powering the rail' of ZeroG to eliminate the need for power cables" in a 2007 grant proposal to the military, FACC ¶ 22, and that Dr. Hidler "discussed adding a power rail with, at least, Keith McBride of Bioness," *id.* ¶ 31. Aretech does not allege that Dr. Hidler shared the substance of the proposal with anyone at Bioness. Nor does Aretech offer any specific details regarding when Dr. Hidler's discussion with Mr. McBride occurred or what specifically Dr. Hidler divulged to Mr. McBride beyond the very general idea of "powering the rail."

Even if "[c]onception is the touchstone of inventorship," as Aretech alleges, the idea giving

¹¹ The allegedly false statements with respect to inventorship are a basis for the Fourth and Fifth Causes of Action and the causes of action alleging unenforceability for the '000 Patent and for each patent claiming priority to the '000 Patent.

rise to the invention must nevertheless be “definite and permanent enough that one skilled in the art could understand the invention.” *Univ. of Pittsburgh v. Hedrick*, 573 F.3d 1290, 1297–98 (Fed. Cir. 2009). An inventor must have “the complete mental picture and . . . describe it with particularity.” *Id.* at 1298. Here, Aretech makes no allegations that Dr. Hidler’s communications to Mr. McBride or anyone else at Bioness about the idea of a powered rail were sufficiently definite and permanent to support an inference that the inventors submitted false oaths of inventorship.

Accordingly, this Court GRANTS Bioness’s motion to dismiss the inequitable conduct counterclaims to the extent they are premised on the false oaths or omissions of inventorship for the ’000 Patent and its continuations.

B. ANTITRUST COUNTERCLAIMS

Aretech alleges that Bioness violated Section 2 of the Sherman Act by engaging in (1) Walker Process fraud and attempted monopolization in violation of 15 U.S.C. § 2, FACC ¶¶ 130–44, and (2) Sham Litigation and attempted monopolization in violation of 15 U.S.C. § 2, *id.* ¶¶ 145–59.

This Court finds that the Amended Counterclaim insufficiently alleges antitrust injury. Although Aretech alleges harm to itself as a result of Bioness’s allegedly anticompetitive conduct, an “adverse financial effect on a *particular* competitor” without a “wider impact on the overall competitive market” is not enough. *Otsuka Pharm. Co. v. Torrent Pharms. Ltd.*, 187 F. Supp. 3d 483, 487 (D.N.J. 2016). Only a handful of Aretech’s allegations concern competition generally as opposed to harm to Aretech itself. In its Opposition, Aretech asserts that several of its allegations address harm to competition. *See Opp.* at 21 (directing Court to allegations that “if Bioness is successful in enforcing its fraudulently-obtained patents in this sham litigation, Bioness would prevent Aretech—Bioness’s only viable competitor—from selling its product, thereby restricting consumer choice, eliminating Aretech’s output, and preventing Aretech from providing more

innovative products and superior services” and alleging that Bioness’s conduct has “further harmed competition by raising entry barriers for potential competitors”) (citing FACC ¶¶ 125, 127–29, 144, 159).

But Aretech does not plead sufficient facts to support its conclusory assertions, merely stating that if Bioness were successful in this litigation, it would “limit[] consumer choice to a single source of output,” “deny consumers access to the superior technology and customer service offered by Aretech,” and Bioness will, as a result, “be able to raise prices and reap monopoly profits for its robotic body-weight support systems.” FACC ¶ 128. Nor does Aretech make any allegation as to Bioness’s share of the market relative to Aretech. Aretech only alleges that “Bioness and Aretech currently control over 99% of the relative product market for robotic body-weight support systems in the United States.” *Id.* ¶ 141. It could plausibly be the case that Bioness has control of 98.5% of the market and Bioness only .5%. Under these circumstances, removing Aretech’s product from the market may not harm competition in the way Aretech alleges. Oral Arg. on Mot. to Dismiss Tr. 30:16–31:1. Dismissal for failure to plead antitrust standing is appropriate where a counter-plaintiff “offers no facts to support its conclusory assertion[s].” *See Loren Data Corp. v. GXS, Inc.*, 501 F. App’x 275, 285 (4th Cir. 2012).¹²

Accordingly, this Court GRANTS Bioness’s motion to dismiss the First and Second Causes of Action.

¹² Bioness also asserts that its efforts to enforce its patents through litigation are protected under the *Noer-Pennington* doctrine and that neither the *Walker Process* fraud nor sham litigation exceptions to that doctrine applies here. Pl. Mem. 15–18. The parties both tie the sufficiency of the *Walker Process* fraud allegations to the sufficiency of Aretech’s pleadings alleging inequitable conduct. *E.g.*, Pl. Mem. at 16 (“Aretech’s fraud allegations merely repeat its inventorship and inequitable conduct theories As discussed *supra*, these allegations are insufficient to support inventorship or inequitable conduct claims [and] Aretech’s *Walker Process* claim necessarily fails as well); Opp. at 19 (arguing that *Walker Process* fraud does not apply by referencing its arguments that Aretech has sufficiently pled inequitable conduct). Because this Court finds that certain inequitable conduct counterclaims are adequately pled, this Court does not address *Noer-Pennington* immunity as a basis to dismiss the antitrust counterclaims.

C. TORTIOUS INTERFERENCE WITH BUSINESS EXPECTANCY

Bioness also moves to dismiss the Third Cause of Action alleging tortious interference with business expectancy on grounds that the counterclaim is time-barred and insufficiently pled.

This Court finds that Aretech's tortious interference with business expectancy counterclaim is not time-barred. Under Virginia choice-of-law rules, this Court applies the statute of limitations from Virginia law. *L-3 Commc'ns Corp. v. Serco, Inc.*, 926 F.3d 85, 96 (4th Cir. 2019). Under Virginia law, claims of tortious with business expectancy are subject to a five-year statute of limitations. *Dunlap v. Cottman Transmission Sys., LLC*, 287 Va. 207, 222 (2014) (applying Va. Code § 8.01-243(B)). Bioness argues that because the counterclaim "sounds in fraud," a two-year statute of limitation applies. Pl. Mem. at 29. Although Aretech alleges an underlying fraudulent scheme, the scheme that is alleged was perpetrated against the PTO—not Aretech or any prospective client. Aretech's conclusory assertion that "Bioness threatened Encompass [Health] with the patents that Bioness had fraudulently obtained," FACC ¶ 164, without further factual allegations about alleged fraud surrounding the proposal submission is insufficient to transform the tortious interference with business expectancy counterclaim into one that sounds in fraud. *See L-3 Commc'ns Corp. v. Serco, Inc.*, No. 1:15-cv-701, 2018 WL 1352093, at *10 (E.D. Va. Mar. 15, 2018), *aff'd in part and vacated in part on other grounds*, 926 F.3d 85, 97 (4th Cir. 2019) (finding tortious interference claim subject to a five-year statute of limitations even when underlying complaint alleged state RICO claims predicated on an alleged fraudulent scheme subject to two-year statute of limitations).¹³ This Court finds that the tortious interference with business expectancy counterclaim is therefore subject to a five-year statute of limitations.

¹³ This Court finds Bioness's argument that the two-year personal injury statute applies unpersuasive. *See* Pl. Mem. at 29–30. Bioness cites *Unlimited Screw Prods., Inc. v. Malm*, 781 F. Supp. 1121 (E.D. Va. 1991), to support its argument, but the Virginia Supreme Court subsequently clarified that interference with a contract or business expectancy "is directed at and injures a property right, i.e., the right to performance of a contract and to reap profits and benefits not only from the contract but also from expected future contracts or otherwise advantage business relationships." *Dunlap*, 287 Va. at 221.

This Court also finds that Aretech has alleged facts sufficient to articulate a business expectancy and the but-for causation necessary for its claim to survive motion to dismiss. *See Heard Constr., Inc. v. Waterfront Marine Construction Co.*, 91 Va. Cir. 4, 2015 WL 12804564, at *3 (2015) (unpublished) (citing *Dunlap*, 287 Va. at 216). In *Heard*, the court held that pleading status as a runner-up for a contract was sufficient to demonstrate a reasonable expectancy. *Id.* This Court finds *Heard* persuasive. Aretech alleges that Encompass Health solicited proposals from Aretech and Bioness and that there was a “high probability that Encompass would award its business to Aretech” given the “superior functionality of [Aretech’s ZeroG] system.” FACC ¶ 162–64. Aretech alleges that based on Bioness’s “threaten[ing]” conduct, “Encompass declined to contract with Aretech.” *Id.* ¶ 164. Finding that Aretech has alleged that it was runner-up to Bioness in obtaining the contract with Encompass Health, and that Aretech would have obtained the contract but for Bioness’s intentional interference using improper means, this Court concludes that Aretech has adequately alleged tortious interference with a business expectancy.

Accordingly, this Court DENIES Bioness’s motion to dismiss the Third Cause of Action.

IV. CONCLUSION

For the reasons stated above, Plaintiff’s Motion to Dismiss (Dkt. No. 33) is **GRANTED IN PART** and **DENIED IN PART**.

This Court **DENIES** the motion to dismiss the counterclaims to the extent they are premised upon inequitable conduct concerning the Vahle system and catalog; **DENIES** the motion to dismiss the Thirty-Fifth Cause of Action seeking a declaration of unenforceability of the ’316 Patent based on inequitable conduct; **GRANTS** the motion to dismiss inequitable conduct counterclaims to the extent they are premised on the false oaths or omissions of inventorship for the ’000 Patent and its continuations; **GRANTS** the motion to dismiss the First and Second Causes

of Action alleging antitrust violations; and **DENIES** the motion to dismiss the Third Cause of Action alleging tortious interference with a business expectancy.

It is **SO ORDERED**.

/s/

Hon. Michael S. Nachmanoff
United States District Judge

Alexandria, Virginia
January 23, 2023