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IN THE SUPREME COURT OF THE STATE OF DELAWARE

ELENZA, INC., Plaintiff below, Appellant, v. ALCON LABORATORIES HOLDING CORPORATION and ALCON RESEARCH, LTD., Defendants below, Appellees.	§ § § § § § § § § § § § §	No. 287, 2017 On appeal from the Superior Court of the State of Delaware, C.A. No. N14C-03-185 [CCLD] **PUBLIC VERSION** **FILED: SEPTEMBER 28, 2017**

CORRECTED OPENING BRIEF OF APPELLANT ELENZA, INC.

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NATURE OF THE PROCEEDINGS

Alcon Laboratories Holding Corporation and Alcon Research, Ltd. (together "Alcon") acquired trade secrets from ELENZA, Inc. ("Elenza"), secretly developed a competing product using Elenza's confidential information, and then eliminated Elenza as a potential competitor by claiming Elenza's technology as its own. Elenza filed suit in the Superior Court, alleging misappropriation of trade secrets and other causes of action.

On April 20, 2017, the Superior Court granted summary judgment on Elenza's trade secret and related claims ("Opinion" or "Op.," attached as Exhibit A). Although the court provided little analysis, it appeared to dismiss the trade secret claims on the ground that the presence of aspects of Elenza's technology in the public record precluded the existence of trade secrets. The Superior Court also ruled as a matter of law that Elenza could not present evidence of its lost enterprise value at trial, based on the conclusion that Elenza needed to provide more than a reasonable estimate of the amount of damage Alcon's conduct caused. Because those conclusions were erroneous, Elenza appeals the Superior Court's summary judgment ruling as well as the final judgment.

SUMMARY OF ARGUMENT

I. The Superior Court's dismissal of Elenza's trade secret claims undermines Delaware's trade secret protections and is inconsistent with settled Delaware law. In a sparse analysis, the Superior Court appeared to conclude that Elenza needed to prove—at the pretrial stage—that Alcon could not have found elements of Elenza's product design in the public record. That implicit standard bears no relation to Delaware law. At the heart of Delaware's trade secret inquiry is whether the information at issue derived independent economic value from not being generally known. Elenza advanced evidence sufficient to show that its product design was not known to anyone, including Alcon, before Alcon entered a confidential relationship with Elenza. And Alcon itself—[redacted]—recognized the economic value of Elenza's technology. In such situations, courts reject *post hoc* attempts by defendants to avoid trade secrets liability by claiming that the plaintiff's unique product design incorporated publicly known elements. The Superior Court's refusal to protect Elenza's trade secrets and give Elenza its day in court was a reversible error, and its decision threatens the foundations of Delaware trade secrets law.

II. The Superior Court foreclosed Elenza's evidence of lost enterprise value damages and created a perverse incentive for established companies to destroy new entrants as early as possible. Elenza demonstrated that Alcon's conduct directly caused investors to abandon Elenza, which destroyed Elenza's efforts to develop and bring its product to market. Elenza presented extensive expert analysis and *Alcon's own valuation* of Elenza to show the magnitude of Elenza's enterprise value loss. But the Superior Court ruled that Elenza could not demonstrate damages with sufficient certitude, apparently because its calculations were based on financial projections. That ruling contradicts well-settled Delaware law that plaintiffs must offer evidence to prove the *fact* of damages—not the *amount* of damages—with certainty. By thus foreclosing evidence of enterprise value loss whenever a company's success remains contingent, the Superior Court's ruling creates an incentive for established companies to destroy competitors before they reach maturity.

III. On remand, Elenza should receive a new trial on all claims, including the few that did proceed to trial. Those claims were inextricably intertwined with the claims the court dismissed. At trial, Elenza could not discuss Alcon's misuse of its confidential information, and thus Elenza could neither prove Alcon's breach of the parties' NDA nor supply a motive for Alcon's breach of the parties' stock purchase agreement.

FACTS

Millions of Americans suffer from cataracts, a medical condition that causes clouding of the eye's natural lens.[1] To treat cataracts, a surgeon must remove the clouded lens and replace it with an artificial lens, called an "intraocular lens" or "IOL."[2] The typical IOL allows a patient to see in focus only at a certain distance, while the patient must use vision correction, such as reading glasses, for other distances.[3]

A. Elenza Develops an Accommodative IOL to Address the Limitations of Standard IOLs.

In 2010, Elenza was on the verge of solving that problem.[4] The company's founders, Dr. Ron Blum and Dr. Amitava Gupta, along with CEO Rudy Mazzocchi, designed a revolutionary "accommodative" IOL (sometimes also called an "autofocus" IOL) that would allow clear eyesight at multiple distances. The lens's design used specially developed [redacted] circuitry to deliver an electric charge [redacted], which changed the lens's [redacted] focal distance.[5]

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1 Tab 49 at A1818 ¶ 21. Citations in this format refer to Elenza's opening appendix.

2 *Id.* at ¶ 22.

3 *Id.*

4 Tab 24 at A389-398; Tab 49 at A1822 ¶ 39.

5 Tab 24 at A389-90.

Creating this IOL required Elenza to solve a variety of complex problems. For example, Elenza developed methods to [redacted].[6] The company designed customized circuitry to deliver the necessary electric charge.[7] It developed specialized [redacted] that could function in the human eye.[8] It developed [redacted] [redacted].[9] To [redacted], Elenza developed mechanisms such as [redacted].[10] Elenza also scoured the globe for suppliers capable of producing the components of its accommodative IOL and managed to line up dozens of vendors capable of performing specialized tasks necessary to build the lens.[11]

Elenza viewed these processes and partnerships—its "crown jewels"—as integral to its success and did not disclose the information without a nondisclosure

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6 Tab 49 at A1827; Tab 34 at A695, A991-1177 (providing detailed descriptions of Elenza's trigger algorithms).

7 Tab 49 at A1826; Tab 34 at A695-97, A1163-73 (providing detailed descriptions of Elenza's customized circuitry).

8 Tab 49 at A1825; Tab 34 at A698-99, A1334-35 (providing detailed descriptions of Elenza's battery technology).

9 Tab 49 at A1825; Tab 34 at A692-94, A707-36 (providing detailed descriptions of Elenza's hermetic sealing processes).

10 Tab 49 at A1826.

11 Tab 6 at A105-11.

agreement.[12] And with good reason. Dr. Curtis Frank, an Elenza expert witness, explained that Elenza's know-how constituted a complete "roadmap" for the development of an accommodative IOL, "including individual components and appropriate third parties and vendors."[13]

B. Elenza and Alcon Execute an NDA So that Alcon Can Determine Whether to Invest In Elenza.

In 2010, Elenza sought funding from Alcon for the continued development of its accommodative IOL.[14] [redacted][15]

On May 24, 2010, Alcon and Elenza executed a Confidentiality Agreement ("NDA") that, among other things, [redacted]

[12] *See* Tab 4 at A1524; Tab 42 at A1512:7-19.

[13] Tab 49 at A1824 ¶ 48(a).

[14] *See generally* Tab 4 (A90-99).

[15] Tab 4 at A135.

[16] Tab 5 at A101.

[redacted]

C. Alcon Recognizes the Value of Elenza's Accommodative IOL Design and Begins to Incorporate Elenza's Trade Secrets into Its Own Secret Accommodative IOL Development Program.

Before executing the NDA, Alcon had struggled to develop its own accommodative IOL. [redacted]

Alcon recognized the value of the accommodative IOL capabilities that Elenza had developed.[22] [redacted]

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[17] *See*, *e.g.*, Tab 7 (A114-24) (July 21, 2010 document transmitting details of Elenza's development partners to Alcon); Tab 12 (A142-208) (Sept. 22, 2010 Elenza presentation to Alcon regarding work by development partner on Elenza's IOL); Tab 36 at A1402:3-24 (discussing June 18, 2010 meeting in Fort Worth where Elenza explained its IOL design).

[18] Tab 5 at A100.

[19] Tab 44 at A1546:15-25.

[20] Tab 7 at A120-21 (emphasis added).

[21] Tab 2 at A86; Tab 3.

[22] Tab 7 at A120-21.

[redacted]

But unbeknownst to Elenza, [redacted]

[redacted]

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[23] Tab 8 at A125.

[24] Tab 14 at A226.

[25] *See* Tab 48 at A1733 ¶ 123 & Schedule 6 (Navigant analysis of data presented in Tab 13 [redacted]).

[26] Tab 5 at A100-01.

[27] Tab 9 at A127.

[28] *See* Tab 11 at A131 (Aug. 30, 2010 document proposing that Alcon establish "an 'autofocus' IOL systems group" led by "[George] Pettit and Campin"); Tab 10 (A128) (Agenda for Aug. 23-24, 2010 meeting between Alcon and

[redacted].[29] If Elenza had known how Alcon would use its confidential information, it would not have disclosed its "crown jewels" to Alcon.[30]

D. Alcon and Elenza Execute a Stock Purchase Agreement, Which Alcon Breaches to Elenza's Detriment.

On February 7, 2011, Alcon and Elenza executed a Stock Purchase Agreement ("SPA").[31] Alcon agreed to make a two-phased investment in Elenza. Phase 1 would occur immediately at closing of the SPA, and phase 2 would occur if Elenza satisfied a particular milestone: Elenza was developing an algorithm [redacted], and the SPA required Alcon to make its phase 2 investment if tests of the [redacted] algorithm satisfied certain conditions.[32]

Elenza, showing that Pettit attended); Tab 44 at A1567:4-1571:3; Tab 46 at A1617:15-1618:23; Tab 31 at A615:42:18-44:10, A628:94:25-629:98:6.

[29] Tab 37 at A1424:13-21, A1425:24-1426:6; Tab 42 at A1505:18-1506:13, A1510:23-1513:18; Tab 44 at A1554:19-1555:4.

[30] Tab 42 at A1512:7-19.

[31] *See* Tab 15 (A257-327). Though additional investors executed the stock purchase agreement, Alcon was by far the largest purchaser of Elenza stock in each tranche. *See* Tab 15 at A298-301 ([redacted]).

[32] Tab 15 at A263 ¶¶ 2.1(a), (c), A303-04.

After months of collecting data from hundreds of patients, three separate groups evaluated the results: (1) Elenza, led by its Chief Technology Officer and working with [redacted];[33] (2) the "Medical Advisory Board," a group of doctors independent of both Alcon and Elenza;[34] and (3) Elenza's board of directors—which included two Alcon-appointed representatives.[35] Each group concluded that Elenza's technology had met the requirements.[36]

These successful test results further confirmed the viability of Elenza's [redacted] technology. Indeed, [redacted]—one of Alcon's co-investors in Elenza and an Elenza board member—signed a letter concluding that "the Algorithm Milestone has been adequately achieved" and urged Alcon to make its phase 2 investment.[37]

Alcon, however, after more than a year of secretly incorporating Elenza's confidential information into its shadow program, decided to remove Elenza as a

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[33] Tab 35 at A1393:202:4-18.

[34] Tab 21 at A375-80; Tab 35 at A1346:17:24-1347:18:3;Tab 41 at A1477:16-1499:19.

[35] Tab 22 (A381-82).

[36] Tab 20 at A372; Tab 21 at A375-80; Tab 22 (A381-82); Tab 35 at A1387:179:11-25, A1393:202:4-18; Tab 41 at A1477:16-1499:19, A1500:3-1502-9.

[37] Tab 22 at A381-82.

competitor rather than continue to cooperate. To begin, in breach of the SPA, Alcon refused to make any further investment in Elenza, notwithstanding that Elenza's technology had met all contractual requirements.[38] Alcon's exit from the relationship falsely signaled that Elenza's technology had failed, thus making it impossible for Elenza to obtain replacement funding. Key investors feared "some unknown hidden reason that Alcon passed," and an Elenza consultant testified that Alcon's exit, or the "Alcon stink," was "*the* reason" he could not raise money on Elenza's behalf.[39]

E. Alcon Destroys Elenza by Claiming Ownership of Accommodative IOL Technology Based on Elenza's Proprietary Design.

With Elenza reeling, Alcon finished the job by seeking patents for accommodative IOL technologies that it developed using Elenza confidential information.[40] Alcon's patent applications followed the Elenza accommodative IOL roadmap[41] and revealed Elenza's proprietary technologies, including the [redacted],[42] [redacted]

[38] Tab 37 at A1432:11-1433:18; Tab 40 at A1468:11-1469:7.

[39] Tab 38 at A1446:22-1447:21, A1450:2-1451:10 (emphasis added).

[40] Tab 27 (A435-44).

[41] Tab 49 at A1875-76 ¶¶ 254-55.

[42] Tab 49 at A1872 ¶ 239.

[redacted],[43] [redacted] [redacted],[44] and the use of customized electrical circuits and charge amplifiers to power the IOL.[45]

The similarities were no coincidence. Again, before Alcon signed the NDA with Elenza, it had not even begun a formal accommodative IOL program, [redacted]. Even after receiving Elenza's confidential design, [redacted].[46] Alcon instead piggybacked on the development partners that Elenza had identified on a confidential basis,[47] [redacted]

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43 Tab 49 at A1871-72 ¶ 238.

44 Tab 49 at A1871 ¶ 237.

45 Tab 49 at A1872-73 ¶ 240, A1876 ¶¶ 257-58.

46 *See* Tab 49 at A1874 ¶¶ 249-50; *see also* Tab 39 at A1456:8-1457:7, A1457:17-A1459:20, A1460:19-1461:12 [redacted]).

47 *See, e.g.*, Tab 17 at A334-36; Tabs 16, 18, and 23 (A328-30, A338-54, A383-86) [redacted]); Tab 25 at A433 ([redacted].

[redacted].[49] As a result, less than two years after viewing Elenza's trade secrets, Alcon had suddenly managed to develop a complete, *patentable* accommodative IOL comprising Elenza's proprietary technology.

After Alcon's patent applications became public, potential investors concluded that "Elenza no longer had an exclusive hold on the technology" and refused to provide additional funding.[50] Elenza was unable to continue development of its accommodative IOL, and its [redacted] plummeted.[51]

F. Alcon Continues Its Misuse of Elenza's Trade Secrets in a Collaboration [redacted].

After eliminating Elenza from the marketplace, Alcon continued to use Elenza's confidential information in the development of its own accommodative IOL, [redacted].[52] Alcon's

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[48] *See* Tab 50 ¶¶ 44, 118.

[49] Tab 49 at ¶¶ 106, 136, 248; Tab 26 (A434); Tab 35 at A1347:20:11-21:25; Tab 39 at A1454:11-A1455:25; Tab 45 at A1594:5-23.

[50] Tab 32 at A652-53; Tab 42 at A1515:13-A1516:6; Tab 43 at A1531:7-22, A1533:24-A1535:6, A1537:17-A1538:5.

[51] Tab 48 at A1733 ¶ 123, A1744-45 ¶ 143.

[52] *See* Tab 28 ([redacted]) (A445-527); Tab 29 (A529-30) (Press Release announcing Alcon's partnership with [redacted]).

presentations to [redacted]

G. Elenza Files Suit Against Alcon, but the Superior Court Grants Summary Judgment on Core Claims in Elenza's Case.

Below, Elenza pursued seven claims for relief against Alcon.[56] Three of those claims—misappropriation of trade secrets, common law conversion, and common law misappropriation—were based on Alcon's misuse and disclosure of Elenza's confidential information. Two additional claims (breach of contract and breach of the implied covenant of good faith and fair dealing) were based on Alcon's failure to provide its second stage investment. The remaining two claims (intentional misrepresentation and affirmative misrepresentation) were based on Alcon's failure to disclose its use of Elenza's information in Alcon's shadow program.

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[53] Tab 49 at A1892 ¶ 303.

[54] *Id.*

[55] Tab 30 at A586.

[56] *See* Tab 33 at A675-87.

Once litigation began, the parties conducted exhaustive discovery and built a substantial record. They took more than 40 depositions, compiled over 1,000 exhibits, generated 15 expert reports, and produced hundreds of thousands of pages of documents.

Alcon moved for summary judgment on all seven claims. The Superior Court's April 20, 2017 decision on summary judgment did not reflect the enormous, detailed record presented to the court.[57] In a 14-page opinion, the court granted summary judgment on all but the breach of contract and breach of the covenant of good faith and fair dealing claims. The court found genuine issues of material fact only as to whether Alcon breached its obligation to invest under the SPA.[58] The court's analysis does not mention the NDA, much less hold that claims for breach of it should be dismissed.

The court's *entire* analysis in support of its decision to dismiss the trade secrets claim—apart from restating the parties' allegations—consisted of a single paragraph:

> The Court finds that ELENZA failed to present evidence upon which a reasonable factfinder could find disclosure

[57] Alcon's opening brief was 61 pages long, with 15 pages of appendices and 88 exhibits. Elenza's opposition brief was 68 pages long with 91 exhibits, and Alcon's reply brief was an additional 40 pages with 41 pages of appendices and 7 additional exhibits. The Superior Court heard lengthy oral argument on Alcon's motion.

[58] Op. at 7.

> of its trade secrets. ELENZA has not established a *prima facie* case, through expert testimony or other evidence, that Alcon used or disclosed any trade secret, defined with a reasonable degree of precision and specificity, that was not already known or readily ascertainable. There is no genuine issue of material fact as to the disclosure of trade secrets.[59]

The court dismissed the misrepresentation and conversion claims based on its conclusion that there had been no disclosure of a trade secret.[60]

The court also ruled that Elenza could not collect damages based on Elenza's lost enterprise value. The crux of the court's analysis can again be found in a single paragraph—finding that Elenza could not obtain such damages as a matter of law because they would be "difficult" to calculate.[61] Subsequently, the court ruled *in limine* that Elenza could not present *any* information related to Alcon's misuse of Elenza's confidential information at trial,[62] even though Elenza's complaint had alleged breach of the NDA as part of its breach of contract count.[63]

Following the summary judgment and *in limine* rulings, Elenza was forced to try its case with one hand tied behind its back. Elenza, for example, sought

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[59] *Id*. at 6.

[60] *Id.*

[61] *Id*. at 11.

[62] Tab 53 at A2199-2200.

[63] *See* Tab 33 at A678 ¶ 36.

damages for Alcon's breach of the covenant of good faith and fair dealing. Elenza, however, could not present crucial evidence that Alcon acted in bad faith by abandoning its funding commitments so that it could pursue its shadow program, which relied upon Elenza's confidential information. Moreover, Elenza's damages—the near complete loss of its enterprise value—were the result of *both* Alcon's failure to honor its funding commitments *and* its misuse of Elenza's confidential information. Deprived of the ability even to mention Alcon's misuse of Elenza's confidential information, Elenza could not fully explain Alcon's destruction of Elenza's value. Based on a deficient trial record, the jury returned a defense verdict. Elenza now appeals the Superior Court's summary judgment ruling and the final judgment that was tainted by the errors in that ruling.

ARGUMENT

I. THE SUPERIOR COURT APPLIED A STANDARD TO ELENZA'S TRADE SECRET CLAIMS THAT IS INCONSISTENT WITH SETTLED DELAWARE LAW AND UNDERMINES CRITICAL TRADE SECRET PROTECTIONS.

A. Question Presented

Did the Superior Court err when it failed to articulate or apply Delaware's well-established standard for the existence of trade secrets, and instead concluded that the presence of some elements of Elenza's technology in the public record precluded the existence of Elenza's trade secrets?[64]

B. Standard and Scope of Review

Review of a grant of summary judgment is *de novo*, and this court is "free to determine . . . whether the record reflects the existence of material factual disputes."[65] If the "parties are in disagreement concerning the factual predicate for the legal principles they advance, summary judgment is not warranted."[66] On a motion for summary judgment, a court's role is "to identify disputed factual issues," viewing "the evidence in the light most favorable to" and drawing all "rational inferences" in favor of the non-moving party.[67]

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[64] Elenza raised this issue below in its opposition to Alcon's motion for summary judgment. Tab 52 at A2134-61.

[65] *See Merrill v. Crothall-American, Inc.*, 606 A.2d 96, 100 (Del. 1992).

[66] *See id.* at 99.

[67] *See id.* at 99-100 (internal citations omitted).

C. Merits of Argument

1. Under Settled Delaware Law, Alcon Was Not Entitled to Summary Judgment on the Existence of Trade Secrets.

As set forth above, the Superior Court's analysis of Elenza's trade secrets claim consists of only a single paragraph. But the court appeared to agree with Alcon's argument that Elenza's experts had failed to establish that Alcon could not have found aspects of Elenza's IOL design in the public record.[68] The Superior Court articulated no standard for determining whether a trade secret exists. But the standard it implicitly applied bears no relation to well-established Delaware law.

The heart of Delaware's trade secret inquiry is whether the information "[d]erives independent economic value, actual or potential, from not being generally known to . . . persons who can obtain economic value from its disclosure or use . . . ."[69] There is no serious question that Elenza advanced sufficient facts to raise a jury question whether its design for an accommodative IOL was not generally known to companies like Alcon, who could "obtain economic value from its disclosure or use." Moreover, courts have rejected the defense that the lower court accepted here—that there is no trade secret if defendants *could* "have gained their knowledge" of some of the design's individual components from public

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[68] *See* Op. at 5. This argument incorrectly implies that fact witnesses are not competent to prove the existence of a trade secret.

[69] 6 *Del. C.* § 2001(4)(a).

sources.[70] The Superior Court applied the wrong legal standard to the existence of trade secrets, and this Court should reverse to prevent that standard from undermining statutory protections for trade secrets.

a. Under Delaware law, the key question is whether the alleged trade secrets derive independent economic value from secrecy.

As noted above, the Superior Court failed to set forth *any* standard for analyzing whether a trade secret exists. That analysis naturally should begin with the definition of "trade secret" in the Delaware Uniform Trade Secrets Act:

> [I]nformation, including a formula, pattern, compilation, program, device, method, technique or process, that:
>
> (a) Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and
>
> (b) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.[71]

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[70] *See*, *e.g.*, *Monovis, Inc. v. Aquino*, 905 F. Supp. 1205, 1227-28 (W.D.N.Y. 1994) (holding directly to the contrary). Since Delaware has adopted the Uniform Trade Secrets Act, decisions from other jurisdictions are instructive. *See* 6 *Del. C.* § 2008 ("This chapter shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this chapter among states enacting it.").

[71] 6 *Del. C.* § 2001(4)(a)-(b).

In short, to show that Elenza's innovations—and the identities of its vendors—qualify as "trade secrets," Elenza was required to show that "they ha[d] independent economic value, with the potential to give [Elenza] some advantage from not being generally known or readily ascertainable," and that the information was "subject to reasonable efforts to maintain secrecy."[72] And, of course, at the summary judgment stage, Elenza was required to show only that there was enough evidence to support an *inference* that its innovations met this standard.

A recent Superior Court decision illustrates the "independent economic value . . . from not being generally known" standard.[73] There, PICA, the plaintiff, alleged that HP, the defendant, had misappropriated PICA's proposal for "manag[ing] HP's distributors/channel partners" ("MCA Proposal"), as well as PICA's "highly successful anti-counterfeiting measures" ("ACF Measures"). The Superior Court paraphrased the statutory standard as requiring "commercial utility arising from secrecy and reasonable steps to maintain secrecy."[74] The court

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[72] *Agilent Techs., Inc. v. Kirkland*, 2010 WL 610725, at *18 (Del. Ch. Feb. 19, 2010). Notably, Elenza's efforts to maintain secrecy were not disputed below, so that prong of the test is not at issue here.

[73] *See generally Prof'l Investigating & Consulting Agency, Inc. v. Hewlett-Packard Co.*, 2014 WL 4627141 (Del. Super. Ct. Sept. 3, 2014) ("*PICA*") (quoting *Wilmington Trust Co. v. Consistent Asset Mgmt. Co.*, 1987 WL 8459, at *3 (Del. Ch. Mar. 25, 1987)).

[74] *PICA*, 2014 WL 4627141, at *1.

pointed out that "PICA's expert . . . [had] opine[d]" that both the MCA Proposal and the ACF Measures "were unique at the relevant time and were not common 'best practices'"—even though elements of the MCA Program previously "ha[d] been used by the government or other companies," and many of the anti-counterfeiting techniques of the ACF Measures were "commonly known and successfully used" by other entities.[75] Applying that standard, the Superior Court found that "a reasonable jury could find that either or both of the alleged trade secrets met the statutory definition of a 'program . . . that derived independent economic value . . . from not being generally known,'" and therefore denied summary judgment.[76]

That analysis applies with equal force here: the technologies that Elenza developed to create an accommodative IOL "derived independent economic value from not being generally known." As shown above, Elenza's expert set forth in detail the work that Elenza had done to address a variety of challenges in building an accommodative IOL.[77] And Alcon itself recognized both the uniqueness and the economic value of that work: [redacted]

[redacted]

[75] *Id.* at **2-3.

[76] *Id.* at *3.

[77] Tab 49 at A1824-28.

[redacted][78] Alcon imputed to Elenza an enterprise value of nearly [redacted].[79] The fact that Alcon, a self-professed expert in IOL technology, invested heavily in Elenza is further evidence of the value Alcon placed on gaining access to Elenza's confidential information. Thus, as in *PICA*, a reasonable jury in this case could have found that Elenza's "alleged trade secrets met the statutory definition of a '[method, technique or process] . . . that derived independent economic value . . . from not being generally known.'"[80]

b. The existence of a trade secret does not turn on whether aspects of plaintiff's information were in the public record.

Because the Superior Court did not articulate or apply any standard for determining the existence of a trade secret, it is difficult to discern precisely why the court granted summary judgment on the issue. As noted above, however, the court appeared to agree with Alcon that a trade secret does not exist if specific elements of the trade secret are public knowledge. If that was the court's

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[78] Tab 8 at A125.

[79] *See* Tab 48 at A1733 ¶ 123, A1806 (Navigant analysis of data presented in Tab 13 (Alcon's October 2010 Discounted Cash Flow Analysis of Elenza's projected performance)).

[80] *PICA*, 2014 WL 4627141, at *3.

reasoning, its holding represents a departure from Delaware law—beyond the failure to apply the "independent economic value" standard discussed above.

"[E]ven though each and every element of [a] plaintiff's Process is known to the industry, the combination of those elements may be a trade secret if it 'produces a product superior to that of competitors.'"[81] The Superior Court failed to acknowledge that principle, or even address whether Elenza's information could "produce[] a product superior to that of competitors." But in this case, we know the answer to that question *from Alcon*. [redacted]

The Court of Chancery has rejected defendants' efforts to escape trade secrets liability by claiming that they could have obtained stolen secrets from public sources:

> Because a process consisting *entirely of generally known elements* is protectable as a trade secret, . . . the value of trade secrets would be lost if a defendant could obtain the process, learn thereby the important choices made by the trade secret owner at various process steps, use the

[81] *Rohm & Haas Co. v. Adco Chem. Co.*, 689 F.2d 424, 433 (3d Cir. 1982) (citation omitted).

[82] *See* Tab 48 at A1733 ¶ 123, A1806 (Navigant analysis of data presented in Tab 13 ([redacted]).

> information gained for its benefit, and then avoid liability by then saying that the particular information used is "published."[83]

That is precisely what occurred here. *Elenza* solved a variety of technical challenges for the production of accommodative IOLs by making the "important choices" at "various process steps."[84] Those choices included the innovative use of [redacted],[85] the choice of [redacted],[86] the specific materials and dimensions used for Elenza's [redacted],[87] the development of Elenza's specific [redacted],[88] the specific compounds and materials used in its [redacted],[89] and so on. Alcon used this information gained from Elenza for Alcon's benefit and

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[83] *Merck & Co. v. SmithKline Beecham Pharmaceuticals Co.*, 1999 WL 669354, at *17 (Del. Ch. Aug. 5, 1999) (emphasis added and citation omitted).

[84] *Id.*

[85] Tab 35 at A1349:29:10-17; Tab 47 at A1656:124:5-17, A1657:129:11-1658:132:23, A1660:138:7-1661:142:14.

[86] Tab 34 at A1286-87, A1286-88.

[87] Tab 35 at A1354:49:5-A1355:50:4.

[88] Tab 47 at A1631:25:12-1633:30:21.

[89] Tab 34 at A858-59, A861-64, A869-71, A875-84, A895, A924-25, A1336-41; Tab 35 at A1380:151:5-153:20; Tab 49 at A1824 ¶ 48(b).

convinced the Superior Court that it could "avoid liability by then saying that the particular information used [was] 'published.'"[90] That was reversible error.

c. The purposes of trade secret protection, which the Superior Court did not acknowledge or discuss, explain *why* public availability does not negate the existence of a trade secret.

The Superior Court's acceptance of Alcon's *post hoc* publication defense reflects the court's failure to identify not only *what* Delaware trade secrets law protects, but also *why* the protection exists. As many courts have explained, trade secret laws do not primarily protect the exclusive use of information. Rather, the essence of a trade secrets violation is a breach of faith: "The breach of a duty of trust or confidence 'is the gravamen of such trade secrets claims . . . .'"[91] In other words, the heart of "the wrong is the breach of confidence, the betrayal of trust placed in the recipient"—and "[t]he polic[i]es embodied in a claim for misappropriation of trade secrets include maintaining standards of commercial

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[90] *Merck*, 1999 WL 669354, at *17; *see also Monovis*, 905 F. Supp. at 1228 (Once armed with trade secret information, defendants could not "select particular items from a vast sea of public information and contend that they 'could' have divined therefrom the needed critical information . . . ."); *Beard Research, Inc. v. Kates*, 8 A.3d 573, 595 (Del. Ch.) (acknowledging that the "existence and structure" of compounds claimed as trade secrets "could be found in the literature," but finding it would have been expensive to "scale up" production without "an expenditure of time and money similar" to the plaintiffs'), *aff'd*, 11 A.3d 749 (Del. 2010).

[91] *Gates Rubber Co. v. Bando Chem. Indus., Ltd.*, 9 F.3d 823, 847 (10th Cir. 1993).

ethics and encouraging innovation."[92] In short, "trade secret law plays an important role in regulating commercial behavior. If the law forces businesses to take extreme measures to protect themselves against all forms of commercial espionage not otherwise unlawful, 'the incentive to invest resources in discovering more efficient methods of production will be reduced.'"[93] These policies are crucial here because companies look to Delaware as a source of stable and predictable rules governing corporate behavior.

The court in *Monovis, Inc. v. Aquino*[94] applied the principles underlying trade secrets protection in a case much like this one. There, the defendants argued that they should not be liable for misappropriation if they could "reconstruct the plaintiffs' trade secrets from public information upon which they theoretically *could* have relied." But the *Monovis* court correctly rejected this argument based on the purposes of trade secrets protection:

> [Defendants' argument] totally misconceives the nature of the plaintiffs' right. Plaintiffs do not assert, indeed cannot assert, a property right in their development such as would entitle them to exclusive enjoyment against the world. Theirs is not a patent, but a trade secret. The essence of their action is not infringement, but breach of

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92 *Quantum Sail Design Group, LLC v. Jannie Reuvers Sails, Ltd.*, 2015 WL 404393, at *4 (W.D. Mich. Jan. 29, 2015).

93 *Pioneer Hi-Bred Int'l v. Holden Found. Seeds, Inc.*, 35 F.3d 1226, 1239 n.42 (8th Cir. 1994) (citations omitted).

94 905 F. Supp. 1205, 1227-28 (W.D.N.Y. 1994).

> faith. It matters not that defendants could have gained their knowledge from a study of the expired patent and the plaintiffs' publicly marketed product. The fact is that they did not.[95]

The same is true here—and the *Monovis* court's analysis indicates why the Superior Court applied a legal standard that is not only wrong but also misguided: Trade secret law does not, contrary to the Superior Court's analysis, place the burden on plaintiffs to show that defendants *could not* have obtained the information elsewhere. It places the burden on plaintiffs to show that defendants *did not* obtain the information elsewhere, but rather obtained the information—and then used or disclosed it—in a breach of the trust between the parties.

In short, the Superior Court's requirement that Elenza advance expert testimony containing "the analysis necessary to establish that the information in question was not already generally known"[96] was misplaced. Elenza's argument is that Alcon *in fact* misappropriated *Elenza*'s information obtained through their cooperative venture.[97] Contrary to the Superior Court's holding, the correct legal

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[95] *Id*. at 1227.

[96] Op. at 5.

[97] *See Sanirab Corp. v. Sunroc Corp.*, 2002 WL 1288732, at *3 (Del. Super. Ct. Apr. 29, 2002) (finding that whether defendant's product was in fact derived from plaintiff's was a question of fact to be determined by the factfinder).

standard does not require *Elenza* to prove that Alcon *could not* have found the information elsewhere.

d. The cases Alcon cited to the Superior Court do not support its position.

Before the Superior Court, Alcon cited only a handful of cases to support its proposition that Elenza needed to "prove" all components of its trade secrets were not public. Those cases do not support Alcon's argument.

The *Miles* case,[98] for example, supports Elenza's position, not Alcon's. There, Miles argued that "the specific methods, techniques and processes it uses to manufacture high performance organic pigments are trade secrets as defined by the [Delaware Uniform Trade Secrets] Act."[99] Defendants countered that Miles's pigment-manufacturing processes "were generally known and readily ascertainable because they were disclosed in the public literature, particularly in certain United States and European patents."[100] The court did not question that significant elements of Miles's claimed trade secrets were public, but found that "the literature introduced as evidence does not disclose the combination of specific detailed methods, techniques or processes used by Miles to manufacture the pigments at

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98 *Miles Inc. v. Cookson Am., Inc.*, 1994 WL 676761 (Del. Ch. Nov. 15, 1994).

99 *Id.* at *9.

100 *Id.* at *12.

issue here."[101] Again, that was Elenza's claim below—that, as Alcon itself acknowledged, Elenza had made substantial advances in the methods, techniques, and processes needed to produce an accommodative IOL. And Elenza maintained that Alcon had obtained, misused, and disclosed that information *under the NDA with Elenza*—and not from any other source.

Not surprisingly, some Delaware courts have found that basic, publicly known factual information does not qualify for trade secrets protections.[102] But Elenza's product-specific innovations at issue here are akin to those protected in *Miles*, not to the kind of basic factual information at issue in other cases.

For example, in *Triton*,[103] which Alcon cited below, the court found that factual information necessary to prepare a bid for an electrical contract—such as standard labor rates and costs for equipment and materials—did not constitute

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[101] *Id.*

[102] *See*, *e.g.*, *Dionisi v. DeCampii*, 1995 WL 398536, at *11 (Del. Ch. June 28, 1995) (names on a rolodex were "generally known throughout the graphic arts services" and so did "not hold independent economic value" and were not trade secrets); *SinoMab Bioscience Ltd. v. Immunomedics, Inc.*, 2009 WL 1707891, at *19 (Del. Ch. June 16, 2009) ("basic modification of a sequence that is publicly known and free for all to use" not a trade secret); *Great Am. Opportunities, Inc. v. Cherrydale Fundraising, LLC*, 2010 WL 338219, at *18 (Del. Ch. Jan. 29, 2010) (consultant schedule was not a trade secret because it "provided . . . almost no information [defendant's employee] could not have obtained by making a modest effort searching" public websites).

[103] *Triton Constr. Co., Inc. v. E. Shore Elec. Servs., Inc.*, 2009 WL 1387115 (Del. Ch. May 18, 2009).

trade secrets.[104] But while the information needed to put together bids for electrical contracts may be "generally known or readily ascertainable," the information about Elenza's design for accommodative IOLs was not.[105] That is why Alcon wanted to partner with Elenza, and that is why Alcon placed such value on Elenza as an enterprise.

Similarly, in *Universal Hospital Services*,[106] which Alcon also cited below, the court found that a company's basic pricing information did not constitute "specific information" that "satisfies the statutory definition of a 'trade secret'"—and, indeed, found that "some information regarding the price and specifications of products must be disclosed to the public in order to sell the products."[107] By contrast, the intricate details of Elenza's "game changing" IOL design, which Elenza provided to Alcon during due diligence pursuant to an NDA, were far removed from basic pricing information disclosed in order to sell a product.

In sum, the cases cited in the Superior Court apply the statutory standard of whether the information that the plaintiff kept secret, in its totality, had "independent economic value . . . from not being generally known." The cases

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[104] *Id.*

[105] *Id.* at *21.

[106] *Universal Hosp. Servs., Inc. v. Henderson*, 2002 WL 1023147 (D. Minn. May 20, 2002).

[107] *Id.* at *4.

involving basic, readily ascertainable factual information find no trade secrets under that standard. But courts considering product-specific innovations leading to the capability to make a superior product, like Elenza's, do find the existence of trade secrets.

2. The Record Forecloses All Other Grounds for Summary Judgment.

The Superior Court's analysis appears to focus solely on the *existence* of Elenza's trade secrets.[108] Thus, although Alcon's summary judgment motion raised other issues—including whether there was sufficient evidence of misappropriation and the adequacy of Elenza's trade secret descriptions—none of those elements appears to have played a role in the Superior Court's decision. In any event, the record forecloses summary judgment on these grounds.

a. Alcon misused and disclosed Elenza's trade secrets.

The Uniform Trade Secrets Act allows a plaintiff to collect damages for the "disclosure or use" of its trade secrets.[109] Delaware courts have enunciated two

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[108] *See* Op. at 4-6.

[109] 6 *Del. C.* §§ 2001(2)(b)(2), 2003(a). The existence of trade secrets is discussed above. Delaware law also requires that the defendant acquire trade secrets "under circumstances giving rise to a duty to maintain its secrecy or limit its use . . . ." 6 *Del. C.* § 2001(2)(b)(2)(B). Here, however, it is undisputed that, before gaining access to Elenza's trade secrets, Alcon, [redacted]. *See supra* at 6. Thus, the "secrecy" prong is not at issue in this appeal. *See* Op.

crucial legal principles governing the "disclosure or use" element of a trade secret claim.

First, a plaintiff can—and frequently must—prove misappropriation through circumstantial evidence: "[M]ore often than not, plaintiffs must construct a web of perhaps ambiguous circumstantial evidence from which the trier of fact may draw inferences which convince him that it is more probable than not that what plaintiffs allege happened did in fact take place."[110] Indeed,

> Rarely will the plaintiff in a misappropriation of trade secrets case discover the "needle" in his opponent's "hay stack" of documents. Nor is it likely that plaintiff's counsel will enjoy the "Perry Mason moment" when the defendant's chief executive officer buckles under the weight of cross examination and admits that his company has misappropriated the plaintiff's trade secret. Consequently, it is now well-settled that the plaintiff may prove misappropriation of trade secrets with circumstantial evidence.[111]

Second, misappropriation occurs "even where the trade secret is used only as a starting point or guide in developing a process," or where the information allows

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at 3 ("[I]t is conceded that ELENZA communicated the information in question to Alcon with the understanding that its secrecy would be protected.").

[110] *Merck*, 1999 WL 669354, at *20 (internal citations and quotation marks omitted).

[111] *Savor, Inc. v. FMR Corp.*, 2004 WL 1965869, at *8 (Del. Super. Ct. July 15, 2004).

the defendant to avoid having "to experiment with the broad range" of options to determine what works.[112]

Combining these two principles, Elenza could defeat summary judgment by presenting circumstantial evidence from which a jury could infer that Alcon, despite executing an NDA and acknowledging the confidentiality of Elenza's design, used Elenza's information as a "starting point or guide" in the development of its own accommodative IOL.

In this case, the circumstantial evidence of use is overwhelming, and the trial court was required to construe that evidence in Elenza's favor at the summary judgment stage. [redacted]

[112] *Merck*, 1999 WL 669354, at *20 (internal citations and quotation marks omitted).

[113] *See supra* at 7.

[114] *Id.*

[115] *See supra* at 8.

[redacted][116] Less than two years later, Alcon submitted patent applications for accommodative IOL technology, even though Alcon's purported inventor acknowledged that he had done little independent work to develop many of the IOL components reflected in the patent application.[117]

Before the Superior Court, Elenza also presented straightforward evidence of the disclosure of its trade secrets by Alcon. Elenza's expert testified, for example, that the IOL design described in Alcon's patent applications incorporated numerous aspects of confidential information Alcon obtained from Elenza. Equally important, Alcon employed Elenza's confidential information extensively in its work with [redacted].[118]

Collectively, all of this evidence would allow a jury to conclude that Alcon used or disclosed Elenza's proprietary and confidential information.

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[116] *See supra* at 8-9.

[117] *See supra* at 12-13.

[118] *See supra* at 13-14.

b. Elenza described its trade secrets with specificity.

Alcon's motion accused Elenza of failing to disclose its trade secrets "with specificity."[119] Alcon, however, based its accusation solely on the contents of Elenza's Trade Secret Disclosure ("TSD").

Alcon's argument was rooted in a misinterpretation of trade secret law. In Delaware, the TSD serves to limit the scope of discovery. In a trade secrets case, courts wish to prevent "disclosure of an adversary litigant's trade secrets beyond what is necessary for the prosecution of the litigation."[120] Thus, "the plaintiff is required to disclose, before obtaining discovery of confidential proprietary information of its adversary, the trade secrets it claims were misappropriated."[121] Because this case proceeded through discovery to summary judgment, the Superior Court must have concluded that Elenza's TSD disclosures were sufficiently specific.

A plaintiff, however, is also entitled to "refine the specifics of its claimed trade secret in light of the information" it obtains during discovery.[122] When the case reaches summary judgment, the trial court must then consider the *entire*

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[119] Tab 51 at A2049.

[120] *SmithKline Beecham Pharm. Co. v. Merck & Co., Inc.*, 766 A.2d 442, 447 (Del. 2000).

[121] *Id.*

[122] *Id.*

record developed during discovery in analyzing whether the plaintiff has sufficiently identified its trade secrets.[123]

Alcon thus urged an incorrect legal standard when it focused solely on the specificity of trade secret descriptions contained in Elenza's TSD. Alcon ignored substantial record evidence—including detailed expert analysis[124] and presentations wherein Elenza, pursuant to the NDA, gave Alcon detailed descriptions of its technology[125]—that identified Elenza's trade secrets with specificity.

3. The Superior Court's Erroneous Trade Secrets Decision Was Also the Sole Basis for Dismissing Additional Claims, So this Court Should Reverse the Grant of Summary Judgment on Those Claims as Well.

In addition to dismissing Elenza's trade secrets claim, the Superior Court granted summary judgment against Elenza's misrepresentation and common law conversion and misappropriation claims.[126] But the Superior Court did so without

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[123] *See, e.g.*, *Imax Corp. v. Cinema Techs., Inc.*, 152 F.3d 1161, 1164 (9th Cir. 1998) (considering particularity of plaintiff's interrogatory responses); *Dow Chem. Canada Inc. v. HRD Corp.*, 909 F. Supp. 2d 340, 347 (D. Del. 2012) (same); *Bradbury Co., Inc. v. Teissier-duCros*, 413 F. Supp. 2d 1209, 1218, 1228 (D. Kan. 2006) (considering specificity of descriptions contained in deposition testimony).

[124] *See* Tab 49 at A1824-28.

[125] *See supra* at 13-14.

[126] Op. at 6.

analyzing those claims separately. The court stated that "there has been no disclosure of a trade secret. It follows that there is no basis for a misrepresentation claim."[127] Similarly, on the conversion and misappropriation claims, the court stated that "there has been no disclosure of trade secrets. Therefore, there are no genuine issues of material fact relating to these claims."[128]

As established above, the court's conclusion that there was "no disclosure of trade secrets" constituted legal error. Because that error served as the sole basis for the court's ruling on the misrepresentation, conversion, and misappropriation claims, this Court should reverse the Superior Court's grant of summary judgment on those claims as well.

[127] *Id.*

[128] *Id.*

II. THE SUPERIOR COURT'S DECISION TO PROHIBIT ELENZA FROM SEEKING DAMAGES BASED ON LOST ENTERPRISE VALUE WAS REVERSIBLE ERROR.

A. Question Presented

Did the Superior Court err when it ruled, as a matter of law, that Elenza could not recover its lost enterprise value, simply because the calculation of that value was contingent on future events?[129]

B. Standard and Scope of Review

The standard and scope of review on appeal from a lower court's summary judgment ruling is set forth in Section I.B. above.

C. Merits of Argument

The Superior Court ruled as a matter of law that Elenza could not recover the enterprise value loss that Alcon's conduct caused. The court reasoned that because Elenza was "a relatively new company,"[130] it would be "difficult" and "speculative" to "estimate" the "reasonableness" of Elenza's enterprise value damages.[131]

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[129] Elenza raised this issue below in its opposition to Alcon's motion for summary judgment. Tab 52 at A2173-84.

[130] Op. at 10.

[131] *Id.*

The Superior Court's reasoning misstates Delaware damages law. The law only requires certainty as to the *existence* of damages, but the Superior Court erroneously required certainty as to the *amount* of damages. The Superior Court's holding contradicts controlling law on damages and leaves companies with no remedy when they are illegally destroyed before they become profitable.

1. When a Plaintiff Demonstrates the *Fact* of Damages, Delaware Law Does Not Require Certainty in Proof of the *Amount.*

The Court of Chancery recently addressed this issue in a decision adopted by this court.[132] In *SIGA*, the plaintiff accused the defendant of bad-faith negotiations over the terms of an agreement to license the defendant's smallpox vaccine. The Court of Chancery concluded that the defendant's bad faith denied the plaintiff the ability "to develop the vaccine, to enhance its reputation, and to access government funding to support continued drug development."[133] The Court of Chancery awarded lump-sum damages based on sales the plaintiff could have generated had it been able to license the smallpox vaccine, even though the vaccine was still in

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[132] *See generally SIGA Techs., Inc. v. PharmAthene, Inc.*, 132 A.3d 1108, 1130 (Del. 2015).

[133] *Id.* at 1131 (citing *PharmAthene, Inc. v. SIGA Techs., Inc.*, 2014 WL 3974167, at *8 n.41 (Del. Ch. Aug. 8, 2014)).

the development phase. The court explained, "[w]hile proof of the *fact* of damages must be certain, proof of the *amount* can be an estimate, uncertain, or inexact."[134]

On appeal, this court adopted the Vice Chancellor's reasoning that the defendant's wrongful act "caused [plaintiff] to lose out on the opportunity to develop the vaccine, to enhance its reputation, and to access government funding to support continued drug development."[135]

In addition, the court affirmed a lump-sum damages award based on the plaintiff's loss of future sales. The court acknowledged sales were "difficult to measure for undeveloped products and new businesses, and especially so in the case of new drugs subject to regulatory approval."[136] But "[w]hen the injured party has proven the *fact* of damages—meaning that there would have been some profits from the contract—less certainty is required of the proof establishing the *amount* of damages."[137]

This court also affirmed the Vice Chancellor's application of the "wrongdoer rule." Under that rule, where a defendant's conduct creates

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[134] *PharmAthene*, 2014 WL 3974167, at *8 n.38 (emphasis added).

[135] *SIGA Techs.*, 132 A.3d at 1131.

[136] *Id.* at 1130.

[137] *Id.* at 1131 (emphasis in original).

uncertainty over damages, "doubts about the extent of damages are generally resolved against the breaching party."[138]

The Superior Court's damages ruling cited a single, distinguishable case for the proposition that enterprise value damages for a "young company" are always too speculative.[139] There, the plaintiff sought specific performance of a contract in the Court of Chancery, and claimed it lacked legal remedy because it could not calculate damages for its own unproven technology. The defendant, on a motion to dismiss for lack of subject matter jurisdiction, argued that plaintiff's damages were not speculative and that plaintiff had an adequate remedy at law. The Court of Chancery, as it was required to do, accepted the allegations in plaintiff's complaint as true and allowed the case to proceed.[140] Thus, *Amaysing* does not stand for the proposition that damages for a new company are always too speculative as a matter of law.

2. The Record Contains Ample Evidence from Which a Jury Could Find as Fact that Alcon's Conduct Harmed Elenza.

By proceeding to trial on the breach of contract and breach of implied covenant claims in this case, the Superior Court implicitly acknowledged that a

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[138] *Id.*

[139] *See* Op. at 10 (citing *Amaysing Techs. Corp. v. Cyberair Commc'ns, Inc.*, 2004 WL 1192602 (Del. Ch. May 28, 2004)).

[140] *Amaysing*, 2004 WL 1192602, at **4-5.

reasonable jury could find as a fact that Alcon caused damages to Elenza. [redacted].[141]

As discussed above, however, Alcon's failure to fund to Elenza left it underfunded and created the "Alcon stink" that scared away investors.[142] Alcon's efforts to patent Elenza's IOL design caused other potential investors to fear that Elenza had lost "exclusive hold on the technology" and prevented them from investing in Elenza.[143] This left Elenza unable to continue developing its product, and it could never reach profitability. To the extent that Alcon's breaches and misappropriations—and consequent elimination of funding opportunities—created uncertainty about the ultimate viability of Elenza's product, the "wrongdoer rule" requires that those uncertainties be resolved against Alcon.

This evidence shows that, like the licensor in *SIGA*, which lost access to the ability to develop an "undeveloped product" that was "subject to regulatory approval,"[144] Elenza lost the opportunity to develop, test, and seek approval for its

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[141] Tab 13.

[142] *See supra* at 11.

[143] *See supra* at 13.

[144] *SIGA Techs.*, 132 A.3d at 1130.

product. That lost opportunity destroyed Elenza's value, and that lost value demonstrates the fact of Elenza's damages.

3. The Record Provided a Reasonable Basis for a Jury to Use Enterprise Value Loss to Calculate the Amount of Damages.

Given Elenza's proof of *injury*, its showing regarding the *amount* of damages could be "an estimate, uncertain, or inexact."[145] Elenza, however, exceeded that standard by providing expert analysis, based on Alcon's own valuation of Elenza, demonstrating the substantial loss Alcon's conduct caused to Elenza's enterprise value.

On August 19, 2016, James Pampinella, a Managing Director at Navigant Consulting, Inc., produced a thorough report on Elenza's damages.[146] He concluded that Elenza's "actual losses" should be measured by Elenza's "lost enterprise value."[147] Based on a discounted cash-flow analysis, which relied on conservative versions of assumptions stated in Alcon's own probability-adjusted projections of Elenza's financial performance, Mr. Pampinella concluded that Alcon's conduct reduced Elenza's enterprise value by approximately [redacted][148] Mr. Pampinella performed "reasonableness checks" and concluded that

[145] *Id.* at 1122.

[146] *See* Tab 48 (A1664-1808).

[147] Tab 48 at A1703-1705.

[148] *See* Tab 48 at A1706-73.

Elenza's lost enterprise value was consistent with prices paid for other companies similarly situated to Elenza, as well as Alcon's own valuation of its relationship with [redacted].[149] There should be little question that this type of expert analysis qualifies, at a minimum, as the sort of "estimate" that Elenza needed to put forward to prove the amount of its damages.

Separately, Elenza presented evidence that other companies developing accommodative IOLs had sold for approximately [redacted], but the Superior Court dismissed this argument as "erroneous[]" simply because those companies had made profits, and their products had reached a different stage of development.[150] But the value of similarly situated companies, whose products may have been more developed but less innovative, for example, is probative of Elenza's value.

The cases that Alcon cited to the Superior Court are consistent with this analysis. For example, in one case, the plaintiff had not provided *any* evidence whatsoever to support his lost profits claims, depriving the jury of a "sufficient basis" to calculate damages.[151] In another case, the court excluded the plaintiff's

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[149] *See* Tab 48 at A1734-35.

[150] Op. at 10.

[151] *Villare v. Beebe Med. Ctr., Inc.*, 2014 WL 1095331, at *4 (Del. Super. Ct. Mar. 19, 2014).

expert testimony, which left the record devoid of evidentiary support for plaintiff's damage claims.[152] Unlike those cases, Elenza has put forward detailed, reliable evidence of the magnitude of the loss that Alcon's conduct caused.

[152] *Chemipal Ltd. v. Slim-Fast Nutritional Foods Int'l, Inc.*, 350 F. Supp. 2d 582, 597 (D. Del. 2004).

III. THE COURT SHOULD GRANT A NEW TRIAL ON ELENZA'S BREACH OF CONTRACT AND BREACH OF COVENANT OF GOOD FAITH AND FAIR DEALING CLAIMS.

A. Question Presented

The Superior Court's dismissal of all claims based on misuse and disclosure of Elenza's confidential information prevented the jury from hearing all evidence necessary to decide Elenza's claims for breach of contract and breach of the covenant of good faith and fair dealing. On remand, is Elenza entitled to a retrial on all its claims?[153]

B. Standard and Scope of Review

On remand, a partial retrial is appropriate only when the issues to be retried are clearly severable from the other issues in the case, and limiting the issues on retrial will not result in an injustice.[154]

C. Merits of Argument

Alcon destroyed Elenza through breach of contract and misuse and disclosure of Elenza's confidential information. At trial, however, Elenza was able to present evidence only of Alcon's failure to fund its second tranche investment.

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[153] Elenza raised these issues in its opposition to Alcon's motion for summary judgment, and in its opposition to Alcon's motions *in limine*. Tab 52 at 2134; Tab 53 at A2188-93.

[154] *See Temple v. Raymark Indus., Inc.*, 716 A.2d 975 (Table), 1998 WL 138929, at *2 (Del. Feb. 27, 1998) (citing *Chrysler Corp. v. Quimby*, 144 A.2d 123, 136-37 (Del. 1958)).

In addition, Elenza's breach of contract claim included an express claim that Alcon breached the NDA, and Elenza's breach of the covenant of good faith and fair dealing claim was centered on Alcon's failure to fund Elenza after developing its own accommodative IOL using Elenza's confidential information. Without the confidential-information claims, and without being able even to present evidence relevant to those claims, Elenza could not present material elements of its breach claims to the jury.

A full retrial on all counts is justified under these circumstances. The evidence of Alcon's breach of contract and breach of covenant of good faith is inextricably tied to the evidence of Alcon's misuse and disclosure of Elenza's confidential information, because all those claims arose from the same common set of facts. Because the same conduct—Alcon's decision to secretly develop its own IOL using Elenza's technology despite its agreement and legal obligations not to do so—caused Elenza's loss of value, the claims that proceeded to trial are not severable from the claims that the Superior Court erroneously dismissed.

Moreover, there can be little doubt that a reasonable jury might have reached a different conclusion as to whether Alcon breached the implied covenant of good faith and fair dealing, had the jury known about Alcon's improper use of Elenza's

confidential information to develop a competing product.[155] Elenza is entitled to a full retrial.

[155] In an analogous context, courts will allow a new trial upon newly discovered evidence when, *inter alia*, the new evidence "will probably change the result if a new trial is granted . . . ." *Mendez v. Residential Constr. Servs. LLC*, 2014 WL 957441, at *2 (Del. Super. Ct. Feb. 19, 2014).

CONCLUSION

For the foregoing reasons, Elenza respectfully requests that this Court reverse the Opinion and Judgment and hold that: (i) Elenza is entitled to a trial on each count that the Superior Court dismissed; (ii) Elenza is entitled to a new trial on the counts that proceeded to verdict; and (iii) Elenza is entitled to present evidence of its "enterprise value" damages to the jury.

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