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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: NOVEMBER 9, 2017**

REPLY BRIEF OF APPELLANT ELENZA, INC.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Briefs

PRELIMINARY STATEMENT

The Superior Court's summary judgment decision rested on two flawed legal standards that threaten to undermine important protections Delaware offers to innovative companies. First, the Superior Court concluded that Elenza needed expert testimony to prove that its trade secrets were unascertainable from public materials. This ruling contradicts Delaware law. Second, the court concluded that the magnitude of Elenza's loss was too speculative. That holding confuses the certainty required to prove the *fact* of damages with that necessary to prove their *amount*. Indeed, though the fact of damages must be certain, the amount may require estimation. The Superior Court applied a standard that, if allowed to stand, will incentivize established companies to destroy competitors before their value becomes measurable with precision, leaving startups no legal remedy.

Alcon's brief defends these flawed legal standards. Its brief urges that a plaintiff claiming trade secret protections must supply expert testimony to prove the negative that the defendant *could not have found* the information at issue in any public materials. Alcon also ignores this Court's distinction between the fact and the amount of damages, seeking affirmance of a standard under which *no* young company could ever recover for value lost due to misappropriation of its trade secrets. This Court should reverse the Superior Court's summary judgment decision and remand for a full trial on all issues.

ARGUMENT

I. THE STANDARD FOR ESTABLISHING TRADE SECRETS THAT ALCON ADVANCES IS BOTH INCONSISTENT WITH DELAWARE LAW AND UNWORKABLE IN PRACTICE.

Delaware trade secret law precludes the legal standard that Alcon advances, and for good reason. Trade secret law would mean little if companies could steal confidential information with impunity simply because they theoretically *could* have found elements of "the particular information learned" somewhere in the public record.[1] This flawed standard would eviscerate Delaware's protections and discourage companies from entering cooperative arrangements in this state.

In its opening brief, Elenza noted that the Superior Court did not expressly articulate *any* legal standard for the existence of a trade secret. Nevertheless, the Court appeared to agree with Alcon's argument that Elenza needed to produce expert testimony that Alcon *could not* have found elements of Elenza's proprietary IOL design anywhere in the public record. Alcon's brief confirms this understanding of the Superior Court's standard.[2] Alcon defends the Superior Court's decision as holding that Elenza's failure to advance expert testimony to

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1 *See Merck & Co. v. SmithKline Beecham Pharmaceuticals Co.*, 1999 WL 669354, at *18 (Del. Ch. Aug. 5, 1999).

2 Alcon's Corrected Answering Brief 19-20 ("Alcon Br.").

establish that its trade secrets were "unascertainable from the public domain" was "dispositive."[3]

Significantly, however, like the Superior Court, Alcon's brief largely ignores Delaware's statutory definition of "trade secret." Alcon plucks its "not known or ascertainable" requirement from a corner of the statute, and then engrafts an "expert testimony" requirement gleaned from non-Delaware cases that are readily distinguishable.

Alcon also repeatedly claims that Elenza failed to advance sufficient "evidence" to demonstrate that the information that Alcon misappropriated could not be found in the public record.[4] But the issue here is not about the *quantum* of evidence—it is about whether the Superior Court applied the wrong legal standard to Elenza's evidence.

In short, under Alcon's formulation of the trade secrets test, Elenza was required to advance expert testimony to prove the negative that Alcon *could not* have found elements of Elenza's secrets in the public record. That is the standard the Superior Court applied, but it bears no resemblance to Delaware Law.

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[3] *Id*. at 19 (quoting *Miles Inc. v. Cookson Am., Inc.*, 1994 WL 676761, at *11 (Del. Ch. July 21, 1994)).

[4] *Id*. at 17-20.

A. Both the Text of the Trade Secrets Act and the Policies Underlying it Show that the Superior Court Applied the Wrong Legal Standard.

Alcon accuses Elenza of "embrac[ing] 'policy' to rewrite the Trade Secrets Act,"[5] but Alcon ignores much of the Act's relevant text. As Elenza's opening brief sets forth, the Act defines a trade secret as "information" that "[d]erives 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" it.[6]

In its opening brief—as before the Superior Court—Elenza argued that the fruits of its labors solving significant problems in accommodative IOL design met this statutory definition of trade secrets. Those advances included developing specific "trigger algorithms" to [redacted], and so on.[7] Elenza also developed relationships with dozens of

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[5] *Id*. at 25.

[6] 6 *Del. C.* § 2001(4)(a)-(b).

[7] Elenza's Opening Brief 4-5 ("Elenza Br.") (citing detailed descriptions).

suppliers capable of producing the necessary components, which resulted in a unique ensemble of companies capable of managing the development and supply chain for manufacturing an IOL.[8]

Elenza argued below that these processes and partnerships—a complete "roadmap" for producing an accommodative IOL—satisfied the statutory definition of "information" that "[d]erive[d] independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by" entities like Alcon. And Alcon itself acknowledged the economic value that Elenza's information derived from its secrecy. Indeed, Alcon's own R&D staff concluded that [redacted][9] Alcon imputed to Elenza an enterprise value of [redacted].[10] Thus, far from "ipse dixit,"[11] Elenza

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[8] *Id.* at 5.

[9] Tab 8 at A125 (emphasis added).

[10] *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)).

[11] *See* Alcon Br. 21.

presented ample evidence that its information satisfied the requirement of, "deriv[ing] independent economic value . . . from not being generally known."[12]

Under the text of the statute, this is a single question: whether the information at issue was sufficiently secret—*i.e.*, not "*generally* known" or "*readily* ascertainable"—to "derive economic value" from being closely held.[13] But at Alcon's urging, the Superior Court distorted the "not generally known" or "readily ascertainable" language into a free-standing requirement that Elenza needed to show that its information was wholly "unascertainable from the public domain."[14] As Elenza explained in its opening brief, that approach not only misunderstands the statutory language but runs headlong into the purposes of trade secret law.[15]

"The policies embodied in a claim for misappropriation of trade secrets include maintaining standards of commercial ethics and encouraging innovation. The essence of the wrong is the breach of confidence, the betrayal of the trust

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[12] *Professional Investigating Consulting Agency, Inc. v. Hewlett-Packard Co.*, 2014 WL 4627141, at *1 (Del. Super. Ct. Sept. 3, 2014).

[13] 6 *Del. C.* § 2001(4)(a)-(b) (emphasis added).

[14] Alcon Br. 19 (quoting *Miles*).

[15] Elenza Br. 26-27.

placed in the recipient."[16] Accordingly, as the Court of Chancery explained in *Merck v. SmithKline*, a defendant cannot be allowed to "gain[] valuable information from access to a trade secret process," and then "attempt[] to avoid liability by pointing to some publication of the particular information used."[17] "[T]he value of trade secrets would be lost if a defendant could . . . use the information gained [from the plaintiff] for its benefit and then avoid liability by saying that the particular information used is 'published.'"[18]

But Alcon advances, and the Superior Court adopted, a standard that yields this exact result. Superimposing a separate "unascertainable-from-the-public-domain" requirement so fundamentally undermines trade secret protections that a defendant like Alcon could actually *admit*, with impunity, that it misappropriated and misused a plaintiff's information, so long as the defendant could *theoretically* have found the information somewhere in the public record.

This case thus poses a stark choice between two legal standards. Alcon's standard *allows* companies to misappropriate trade information that is *not*

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

[17] 1999 WL 669354, at *18.

[18] *Id.* at *17

"*generally* known" or "*readily* ascertainable"—unless the plaintiff can prove the absence of the information from the public record. Of course, Alcon does not even suggest how this could be done as a practical matter. Alcon does attack Elenza's expert witness as "not qualified in most of the fields encompassing Elenza's information."[19] Accordingly, under Alcon's approach, a plaintiff would have to hire multiple experts, have each canvass the public literature in his or her field, and then testify that there is no way the defendant could have obtained the trade secret information from those sources.

This approach misses the point of trade secret protection. The point is not whether the defendant *could* have recreated plaintiff's work from the public record with enough time and effort—the question is whether the defendant *did* do the work, or instead misappropriated it from the plaintiff to save enormous expenditures. Elenza advanced sufficient evidence for a jury to conclude that the latter is what happened here, which is all that Delaware law requires to establish liability.

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[19] Alcon Br. 20.

B. Alcon's Cases do not Support its Position.

1. Alcon's "unascertainable-from-the public-domain" standard is nowhere to be found in its cases.

As noted above, Alcon isolates the "not generally known" or "readily ascertainable" language from the statutory inquiry into independent economic value, and reshapes it into a burden on Elenza to show that its information was *unascertainable* from the public domain.[20] Alcon purports to ground that approach here in the same cases it cited to the Superior Court, but those cases do not support its position.

First, as set forth in Elenza's opening brief, *Miles v. Cookson*[21]—from which Alcon plucks only friendly phrases[22]—actually held that the processes used to make pigments at issue there *were* trade secrets notwithstanding that aspects of those processes were public. The Court of Chancery properly viewed the question of what was public in the context of the statutory "independent value" analysis. The court found that "[t]he processes used to produce these pigments derive independent economic value because they are not generally known,"

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[20] Alcon Br. 19.

[21] 1994 WL 676761 (Del. Ch. Nov. 15, 1994).

[22] Alcon Br. 19.

notwithstanding that "the literature discloses some of the specific techniques and processes [the plaintiff] uses."[23] The court explained that "[i]f a competitor . . . could copy these processes and begin making comparable products of its own without incurring similar developmental expense, the competitor would be advantaged and [plaintiff] would be disadvantaged."[24] The *Miles* court's analysis is precisely the kind of analysis that Elenza seeks to have applied to its case.

Alcon also cites *Quantum Sail Design Grp., LLC v. Jannie Reuvers Sails, Ltd.*, in which Quantum claimed that its process for making high performance sails was a trade secret.[25] However, the court there found that while Quantum's competitors may not have known, "all of the details of Quantum's process for manufacturing membrane sails," the process it used, "is shown in videos and online materials that Quantum's competitors have made available to the public."[26] Of course, in the present case, Alcon does not maintain that there is anything like a video or other "online material" showing the general public how to make Elenza's accommodative IOL. To the contrary, *Alcon* specifically found in 2010 that

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[23] *Miles*, 1994 WL 676761, *11-12.

[24] *Id.* at *11.

[25] 2015 WL 404393 (W.D. Mich. Jan. 29, 2015).

[26] *Id.* at *7.

[redacted][27] Alcon therefore cannot (and does not) "seriously argue . . . that the alleged trade secrets of [Elenza] did not derive independent economic value."[28] Instead, Alcon argues for an entirely different standard—while Elenza seeks the application of the standard applied by the courts in *Alcon*'s cases.[29]

2. Alcon's claim that Elenza needed more experts is not supported by the case law.

Alcon also maintains that "expert testimony is necessary 'to prove the presence of the trade secret' in technically complex cases[.]"[30] However, that argument is nothing more than a variation on Alcon's argument that Elenza was purportedly required to show that its trade secrets were "unascertainable from the public domain."

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27 Tab 8 at A125.

28 1994 WL 676761, at *11.

29 Alcon also cites *Calloway Golf v. Dunlop Slazenger Grp. Ams., Inc.*, 318 F. Supp. 2d 205 (D. Del. 2004), but that case was about whether there was "substantial identity" between the defendant's product and that of the company claiming infringement. The court held, "no reasonable fact finder could find that [defendant's] polyurethane golf balls were substantially derived from the formulas and processes described in" plaintiff's materials. *Calloway* is irrelevant here.

30 Alcon Br. 20.

In *Trident Products v. Canadian Soiless Wholesale, Ltd.*,[31] the court pointed out that the plaintiff's case turned on whether the defendant's soil additive formula "was similar enough to [defendant's]—and sufficiently distinct from other known additive formulations—to conclude that the former was derived from the latter and not from an independent source."[32] But the plaintiff had failed to designate *any* expert to testify about the "commonalities of the formulae," and where "plaintiff offers no expert, then summary judgment for the defendant is appropriate."[33] Here, in contrast, Alcon does not (and cannot) dispute that Elenza offered detailed expert testimony about the similarities between Elenza's groundbreaking work and Alcon's abrupt advances in accommodative IOL design. Rather, the evidence that Alcon thinks was missing was evidence to satisfy the "unascertainable-from-the-public-record" legal standard for which Alcon advocated. Again, Elenza's response to that claim is not that it advanced evidence to satisfy Alcon's standard, but that it is the wrong standard.

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[31] 859 F. Supp. 2d 771, 776 (E.D. Va. 2012).

[32] *Id.*

[33] *Id.*

Alcon's reliance on *Pepper v. International Gaming* is also misplaced.[34] There, the defendant argued that the bingo software that the plaintiff claimed as a trade secret was "readily ascertainable " by "utiliz[ing] reverse-engineering to discover the innards of [the] computer program."[35] Plaintiff "failed to present an expert" to testify to the contrary.[36] But Alcon does not argue that Elenza's accommodative IOL trade secrets were "readily ascertainable" by experts starting with an Elenza product and working backwards. Indeed, there was no mature, off-the-shelf product for Alcon to reverse-engineer. Rather, there was a complex and confidential "roadmap" for producing an accommodative IOL to which Alcon gained access by signing non-disclosure agreements with strict confidentiality requirements. And unlike the defendant in *Pepper*, Alcon acknowledged the uniqueness of Elenza's work here—again, [redacted][37]

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[34] 312 F. Supp. 2d 853 (N.D. Miss. 2004).

[35] *Id.* at 861-62.

[36] *Id.* at 862.

[37] Tab 8 at A125.

So instead of arguing that Elenza's work could be "readily" reverse-engineered (which it could not do), Alcon claims that the law requires a plaintiff to advance experts to testify that its trade secrets *could not* have been found anywhere in the public record. Again, Elenza's response to that claim is not that it advanced evidence to satisfy Alcon's standard, but that Alcon's standard is the wrong standard.

On the other hand, Elenza *did* present extensive expert evidence addressing the correct standard: whether Elenza's accommodative IOL innovations "derive[d] economic value" from not being "readily known to" or "readily ascertainable by" Alcon or other competitors.[38] Elenza's expert, Dr. Frank, explained in detail that Elenza's know-how constituted a complete roadmap for developing an accommodative IOL as to which Alcon "lacked expertise in most, if not all, of the core technologies," and that Alcon misappropriated Elenza's technology "to develop and commercialize accommodative devices."[39] In short, unlike in *Pepper*, Elenza did not fail to advance expert testimony to make its case—it did not target that testimony to the "unascertainable" standard for which Alcon advocates. As set

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[38] *Pepper*, 312 F. Supp. 2d at 861-62.

[39] *See* Tab 49 at A1824 ¶ 48, A1828 ¶ 49, A1892 ¶ 303.

forth above, however, this Court should reject Alcon's standard because it is both unworkable and inconsistent with Delaware law.

C. The Record Contains more than Enough Evidence to Create a Dispute of Material Fact Regarding Use or Disclosure.

Alcon again relies on its flawed trade secrets standard when it denies misuse or disclosure of Elenza's information. Alcon devotes a substantial portion of its brief to identifying components of Elenza's product design, and then explaining why each component—reduced to its most general terms—appears somewhere in the public domain.[40] But as discussed above, Delaware law does not allow this sort of *post-hoc* defense that elements of the misappropriated information *could* have been found in the public domain.

Delaware law focuses on whether the defendant *did*, in fact, misappropriate the information from the plaintiff. Delaware courts acknowledge that, absent a "Perry Mason moment,"[41] a trade-secret plaintiff must prove such use through 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

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[40] *See* Alcon Br. 28-32.

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

what plaintiffs allege happened did in fact take place."[42] Further, misuse occurs "where the trade secret is used . . . as a starting point or guide in developing a process," or where the information allows the defendant to avoid having, "to experiment with the broad range" of options to determine what works.[43] As noted above, "[i]f a competitor . . . could copy these processes and begin making comparable products of its own without incurring similar developmental expense, the competitor would be advantaged and [plaintiff] would be disadvantaged."[44]

Here, the record is replete with evidence that would allow a jury, at minimum, to "draw inferences" that Elenza's confidential information probably served as Alcon's "starting point or guide," thereby allowing Alcon to avoid experimenting with a broad range of options and avoid the "developmental expense" that Elenza incurred. Indeed, although Alcon may have launched a development program in 2009, it still had [redacted] development when it considered its 2010 investment in Elenza.[45] Once it gained access to Elenza's proprietary information—[redacted]

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

[43] *Id.* (internal citations and quotation marks omitted).

[44] *Miles*, 1994 WL 676761, at *11.

[45] *See* Elenza Br. 7.

[redacted][46]—Alcon expressed its intent to [redacted] into its own shadow program.[47] Alcon staffed its program with the same employees who had reviewed Elenza's confidential information and instructed them not to discuss the Alcon shadow program with anyone from Elenza.[48] Subsequently, Alcon submitted patent applications for its own accommodative IOL technology, even though Alcon's purported inventor acknowledged that he had done little independent work to develop many IOL components reflected in the applications.[49]

In short, the record contains ample evidence showing that Alcon *used* Elenza's confidential information as a starting point or guide, which allowed Alcon to avoid many of the resource-intensive aspects of developing an accommodative IOL. When Alcon's patent applications *disclosed* the fruits of that misuse, Elenza was unable to obtain funding because investors concluded that Elenza had lost its "exclusive hold on the technology."[50] Alcon's use and disclosure of Elenza's

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[46] *Id.*

[47] *See id*. at 8.

[48] *See id*. at 8-9.

[49] *See id*. at 12-13.

[50] *See id*. at 13.

confidential information destroyed Elenza, and the proper application of Delaware trade secret law should have precluded summary judgment for Alcon.

D. Alcon's Alternative Grounds for Affirmance Are Baseless.

Alcon advances two additional grounds for affirmance, but each is meritless and serves only to distract from the core flaws in Alcon's position.

First, Alcon argues that Elenza did not describe its trade secrets with sufficient specificity. But, as it did below, Alcon myopically focuses on Elenza's trade secret designation ("TSD"). As Elenza has already explained, the TSD serves only to limit the scope of discovery.[51] Because this case proceeded through discovery to summary judgment, the Superior Court must have concluded that Elenza's TSD disclosures were sufficiently specific. Moreover, once discovery begins, a plaintiff can continue to "refine the specifics of its claimed trade secret . . . ."[52] When the case reaches the summary judgment stage, the trial court must then consider the *entire record* developed during discovery in analyzing whether the plaintiff has sufficiently identified its trade secrets.[53]

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[51] *See id*. at 36-37.

[52] *Id.*

[53] *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,

Elenza has produced evidence—including detailed expert analysis[54] and presentations wherein Elenza gave Alcon detailed descriptions of its technology[55]—that identified Elenza's trade secrets with specificity. Alcon offers little in response. With respect to Elenza's expert testimony, Alcon says only that Elenza's expert "provides insufficient specificity," without explaining why a detailed five-page (single-spaced) description of each component of Elenza's technology is not specific enough.[56] Alcon also accuses Elenza of "alluding" to "hundreds of pages" of documents. But Elenza has cited two presentations, spanning roughly 70 pages, that are focused exclusively on descriptions of Elenza's technology.[57]

Second, Alcon argues that the identities of Elenza's vendors cannot constitute a trade secret. As previously discussed, Elenza scoured the globe and ultimately managed to line up a series of specialized vendors qualified to design

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1228 (D. Kan. 2006) (considering specificity of descriptions contained in deposition testimony).

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

[55] *See* Elenza Br. 13-14.

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

[57] *See* Tab 7 (A114-24); Tab 12 (A142-208).

and build the complex components of Elenza's product.[58] Like other aspects of its IOL design, Elenza viewed its vendors' identities as highly confidential and would not disclose them absent an NDA.[59] Alcon previously acknowledged the confidentiality of the identities of Elenza's development partners.[60]

Now, however, Alcon retracts that admission, based solely on an allegation that each of Elenza's partners "has a public website."[61] There are, however, more than one billion "public websites" today, and Elenza has never claimed a trade secret in simply being able to locate its vendors through a web search. Rather, the value lies in Elenza's efforts to identify the right vendors to design and develop each of the intricate components of Elenza's IOL—and that value is why Elenza maintained the secrecy of its vendors' identities. Moreover, unlike the defendant in the sole case that Alcon cites in support of its argument, Alcon does not allege that it learned of any of Elenza's vendors through any source other than Elenza.[62]

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[58] *See* Tab 6 at A105-11.

[59] Tab 4 at A1524; Tab 42 at A1512:7-19.

[60] Tab 4 at A135.

[61] Alcon Br. 28.

[62] *See Giles Const., LLC v. Tooele Inventory Sol., Inc.*, 2015 WL 3755863, at *5 (D. Utah June 16, 2015) (noting that defendant had previously located vendor's website and had received referrals to vendor from other parties).

If the information were so widely available, Alcon would not have needed to invest millions of dollars in Elenza in order to access it.

II. ALCON IGNORES THE UNDESIRABLE INCENTIVES THAT THE SUPERIOR COURT'S IMPROPER DAMAGES STANDARD CREATES.

In its brief, Alcon ignores the implications of the Superior Court's flawed damages ruling. As this Court recently held, once a young company establishes the *fact* of damages with reasonable certainty, it does not need to prove the *amount* of damages with scientific precision. To hold otherwise would give established entities the incentive to destroy nascent competition early with no fear of damages. Alcon's brief does not even address this serious concern.

The *fact* of damages is not at issue here.[63] Rather, the Superior's Court's decision to grant summary judgment went to Elenza's effort to prove the *amount* damages through lost enterprise value. And this Court has specifically held that

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[63] Alcon's sole effort to address the fact of Elenza's damages comes when Alcon declares evidence of investor statements to be hearsay. *See* Alcon Br. 47. As an initial matter, the Superior Court ruled on Elenza's damages theory as a legal matter, not an evidentiary matter, so the question for this Court is whether Elenza's enterprise-value theory of damages is legally sufficient to prove injury—not whether a specific piece of evidence supporting that theory is admissible. Moreover, a potential investor's explanation why it chose not to invest in Elenza is "a statement of the declarant's then existing state of mind . . . such as *intent* . . ." and therefore admissible evidence. D.R.E. 803(3) (emphasis added). In any event, this Court need not attempt determine whether specific evidence can prove Elenza's damages theory—that is a matter for the trial court on remand.

proof of the *amount* of damages "can be an estimate, uncertain, or inexact."[64] Elenza exceeded this standard when it presented detailed evidence from which a jury could estimate the enterprise value that Elenza lost.

That evidence included the Managing Director of Navigant Consulting's assessment of Elenza's lost value, which, among other things, analyzed Alcon's *own* valuation of Elenza and considered sales of companies similarly situated to Elenza.[65] Alcon lodges a number of complaints about that evidence, in the form of attacks on the sufficiency of the expert's valuation comparison, as well the purpose and intent of Alcon's valuation of Elenza. But if anything, Alcon's attacks illustrate the existence of disputed facts regarding Elenza's damages evidence and confirm that summary judgment on this issue was inappropriate.

The damages cases that Alcon cites—primarily federal cases from outside Delaware—only underscore the flaws in Alcon's damages argument. Alcon argues that this Court should follow a Maryland federal district court's application of federal antitrust law. That case specifically highlights Alcon's conflation of the fact of damages with the amount of damages. In *Microbix*, the court stated that

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[64] *Pharmathene, Inc. v. SIGA Techs., Inc.*, 2014 WL 3974167, at *8 n.38 (Del. Ch. Aug. 8, 2014).

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

"the *fact* of damages" cannot be speculative, whereas the *amount* of damages is recoverable unless they are simply "unprovable."[66] There is nothing "unprovable" about Elenza's lost enterprise value here, as the record expert evidence demonstrates.

Alcon also suggests that this Court should follow the holding of a federal appellate case applying Florida law to a breach of contract action.[67] Nothing in that case supports Alcon's position that a young company's future profits are *always* too speculative for a jury to consider them. Rather, the *Aronowitz* court held that "a business claiming lost profits is *not* required to show a successful operational track record" and must meet only, "some reasonable standard or yardstick."[68] There, the *particular plaintiff* failed to make the necessary showing.

Nor does Alcon explain why this Court should follow an Illinois federal district court's decision in a patent infringement case. The case is inapposite because the plaintiff was seeking injunctive relief, argued that its future lost profits

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[66] *Microbix Biosystems, Inc. v. Biowhittaker, Inc.*, 172 F. Supp. 2d 680, 697 (D. Md. 2000), *aff'd*, 11 F. App'x 279 (4th Cir. 2001) (emphasis added).

[67] *Aronowitz v. Health-Chem Corp.*, 513 F.3d 1229, 1238 (11th Cir. 2008) ("Under *Florida law*, an award for *expectation damages* will not per permitted unless the expected amount can be established with reasonable certainty") (emphasis added).

[68] *Id*.

could not be calculated, and made no effort to present such a calculation. In the absence of a quantification of lost profits, the district court accepted the plaintiff's own allegations as true.[69]

The smattering of Delaware cases that Alcon does cite are either inapposite or contradict Alcon's position. Alcon, for example, cites a Court of Chancery opinion addressing a trustee's application to pursue claims on behalf of a dissolving corporation to recoup $40 million that the corporation had spent on research and development of a new technology. The court denied the petition, in part because (1) "it does not necessarily follow that the amount a company spends on research and development will be recouped"; (2) "the suggestion that [the corporation's] technology was worth $40 million in 1985 is inconsistent with the record evidence"; (3) and, otherwise, the trustee's claim for lost profits was "entirely speculative."[70] That case misses the mark for two reasons. First, it did not address whether a jury can consider evidence of lost enterprise value when determining the amount of damages. Second, like other cases Alcon has cited, the court found an absence of evidence to support the plaintiff's lost profits claims. By

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[69] *Medco Research, Inc. v. Fujisawa USA, Inc.*, 1994 WL 719220, at *14 (N.D. Ill. Dec. 21, 1994).

[70] *In re Heizer Corp.*, 1990 WL 70994, at *3 (Del. Ch. May 25, 1990).

contrast, Elenza has presented substantial evidence supporting its claim for lost enterprise value.

Another of Alcon's cases supports Elenza's claim for lost enterprise value. In *Callahan*, the owner of a race horse sued a defendant whose car collided with the horse's trailer. The Superior Court concluded that damages "should be based on the difference in the fair market value of [the horse] before and after the incident."[71] That is precisely what Elenza seeks here, and what Navigant's analysis—which was based on Alcon's own analysis—establishes.

[71] *Callahan v. Rafail*, 2001 WL 283012, at *2 (Del. Super. Ct. Mar. 16, 2001).

III. THE COURT SHOULD GRANT ELENZA A RETRIAL ON ALL CLAIMS.

Alcon opposes granting Elenza a full re-trial on remand, but it provides no reason to abandon the settled rule in Delaware that a partial retrial is appropriate only when the issues to be retried are clearly severable from other issues in the case. Both Elenza's trade secret claims and the litigated breach-of-contract claims share a common nucleus of fact, even though they are discrete counts, and a factfinder that knew about Alcon's misappropriation of Elenza's trade secrets would likely reach a different outcome on the contract claims than the jury below.

Elenza did not take a contrary position below: Alcon suggests that Elenza argued that its contract and trade-secret claims are "'wholly independent,'" but that language was the Court's description, not Elenza's.[72] The Court was asking whether a factfinder could find in Elenza's favor on the contract claims if it found for Alcon on the misappropriation claims—not whether the claims shared common evidence.[73] In short, trial counsel's position is not inconsistent with Elenza's position here, and this Court should order a new trial on all claims as Delaware law requires.

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[72] B978 at 83:15.

[73] B978 at 83:15-22.

CONCLUSION

For the reasons stated herein, the Court should reverse the Superior Court's summary judgment decision and remand for a full trial on all issues.

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