IN THE SUPREME COURT OF THE STATE OF DELAWARE

CALIFORNIA SAFE SOIL, LLC, a Delaware limited liability company, Plaintiff-Below, Appellant, v. KDC AGRIBUSINESS, LLC, a Delaware limited liability company, KDC AGRIBUSINESS FAIRLESS HILLS, LLC, a Delaware limited liability company, KDC AGRIBUSINESS NORTH DAKOTA, LLC, a Delaware limited liability company, DO GOOD FOODS LLC, a Delaware limited liability company, DO GOOD FOODS MANAGED SERVICES LLC, a Delaware limited liability company, DO GOOD FOODS FACILITY MANAGEMENT LLC, a Delaware limited liability company, DO GOOD CHICKEN LLC, a Delaware limited liability company, HAROLD N. KAMINE, JUSTIN KAMINE, MATTHEW KAMINE, and BARRY STARKMAN, Defendants-Below, Appellees.	No. 78,2025 Case Below: Court of Chancery of the State of Delaware, C.A. No. 2021-0498-MTZ

OPENING BRIEF OF APPELLANT
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NATURE OF PROCEEDINGS

This is an appeal from a post-trial, final judgment of the Court of Chancery (Zurn, V.C.), by Memorandum Opinion dated January 10, 2025 ("Op." or "Opinion"),[1] following a seven-day trial held on February 28 through March 7, 2024. In the Opinion, the Court of Chancery found in favor of Appellant California Safe Soil, LLC ("CSS" or "Plaintiff") on CSS's statutory trade secret misappropriation claims against Appellees KDC Agribusiness LLC ("KDC Ag"), KDC Agribusiness Fairless Hills LLC, KDC Agribusiness North Dakota, LLC, Do Good Foods, LLC, Do Good Foods Managed Services, LLC, Do Good Foods Facility Management, LLC, and Do Good Chicken, LLC (collectively, the "Corporate Defendants") and Harold Kamine, Justin Kamine, Matthew Kamine, and Barry Starkman (collectively, the "Individual Defendants," and together with the Corporate Defendants, the "Defendants"). Specifically, the trial court found that Defendants misappropriated CSS's food recycling process (the "CSS Process"), which the court found to be a combination trade secret.

As a remedy for Defendants' trade secret misappropriation, the Court of Chancery ordered Defendants to pay compensatory damages totaling $1,625,502.36. The Court of Chancery's damages award states that it calculated an "established

[1] The Court of Chancery initially issued the Opinion under seal on January 10, 2015, before its public issuance on January 15, 2025.

royalty" under a license agreement between CSS and KDC Ag (the "License Agreement") based on Defendants' subsequent sales, as opposed to a determination of a reasonable royalty based on Defendants' projections at the time of the misappropriation. The Court of Chancery declined to award exemplary damages or counsel fees.

SUMMARY OF ARGUMENT

1. Typical royalty damages in trade secret cases are calculated as of the time the misappropriation began. Here, however, the Court of Chancery erred by awarding an "established royalty" using Defendants' subsequent sales instead of Defendants' own projections from the time the misappropriation commenced. (*See* Op. at 72-80, 85-91.) That was legal error because reasonable royalties should be calculated prospectively from the time of misappropriation. That is particularly true here, where Defendants spent years learning the trade secret CSS Process, used their revenue projections to obtain millions of dollars in third-party bond financing, and where it was the consequences of Defendants' misappropriation—not the value of the stolen trade secrets—that caused their business to fail and their projections to not materialize. The Court of Chancery's "established royalty" approach thus fails to compensate CSS for the true value of its trade secrets and allows Defendants to evade full responsibility for their misappropriation.

2. The Court of Chancery also erred by not awarding CSS at least minimum royalties due under the parties' License Agreement as an alternative to a reasonable royalty. The Court of Chancery erred as a matter of law in concluding that the License Agreement did not require KDC Ag to pay minimum royalties to have *any* license to use the CSS Process, not just an exclusive license. (*See* Op. at 72, 78, 80-82.) Accordingly, in the alternative to a reasonable royalty, the Court of Chancery

should at least have awarded CSS minimum royalties as a measure of CSS's actual loss and as part of the court's attempt to calculate an "established royalty."

3. The Court of Chancery also erred by misapprehending the standard for awarding exemplary damages and attorneys' fees, holding that it could not award such damages because Defendants did not act with "malice." In particular, the Court of Chancery was wrong that "malice" requires an intent to injure the Defendants apart from any self-interest. (*See id.* at 95-97.) In fact, "malice" encompasses a variety of bad acts and is not limited to conduct that is completely unmotivated by self-interest. In misapprehending the relevant standard, the Court of Chancery effectively limited its own discretion, and improperly denied CSS exemplary damages and attorneys' fees.

STATEMENT OF FACTS

I. THE CSS PROCESS IS A COMBINATION TRADE SECRET BODY OF KNOWLEDGE.

This case arises from the Defendants' misappropriation of the CSS Process, a multi-step method for recycling unspoiled food discarded from grocery stores. (*See* Op. at 1-2, 7-8.) The CSS Process solves an important problem given that approximately one-third of food is wasted. (*Id.* at 4.) The CSS Process began development in 2006, and CSS eventually obtained full ownership of the technology in 2011. (Op. at 4-5.) CSS built a pilot manufacturing plant in 2012 and expanded to a commercial demonstration scale facility in 2016. (*Id.* at 6-7, 13-14.) CSS spent significant time and expense to improve the CSS Process. (*See id.* at 5-7, 13-15.) As the Court of Chancery found, the CSS Process is a body of knowledge comprising a valuable combination trade secret. (*See id.* at 38-55.)

II. CSS LICENSED THE CSS PROCESS TO DEFENDANTS.

On December 11, 2015, Defendant KDC Agribusiness LLC ("KDC Ag") and CSS entered a License Agreement, providing KDC Ag a license and access to CSS's trade secrets and CSS Patents (together, "CSS Intellectual Property"). (A183, Op. at 9.) The License Agreement contemplated KDC Ag's use of CSS Intellectual Property to scale up what was then a CSS pilot facility, and to design, build, and operate a new flagship animal feed manufacturing facility that would be a "Licensed Facility" and would be replicated to create additional "Licensed Facilities." (A185, Op.

at 11-12.) Instead, as described below, KDC Ag worked with CSS long enough to learn the CSS Process and then stopped making royalty payments. Then, Defendants constructed their own facility using a process that the Court of Chancery correctly found was "derived from and based on the CSS Process[.]" (Op. at 56.)

Reflecting the value of the CSS Process, the License Agreement required KDC Ag to pay substantial consideration to CSS. In particular, KDC Ag agreed to pay minimum royalties, net sales royalties, and milestone payments. (A190-192 §§ 3.1–3.3, Op. at 12.) To maintain an exclusive license, Section 3.3(b) required KDC Ag to pay minimum annual royalties. If KDC Ag failed to pay minimum royalties when due, then CSS had the right to convert the exclusive license to a non-exclusive license, but only for Licensed Facilities then existing or under construction. (A191 § 3.3(c); *see also* A1888:23-1889:7.) If no such facilities were in existence or under construction when payments stopped, KDC Ag would no longer have *any* license. (*See* A191 § 3.3(c), A1911:10-16.)

The License Agreement included a schedule of minimum royalties and net sales royalties. KDC Ag was required to pay minimum royalties of $0 in 2016, $100,000 in 2017, $500,000 in 2018, $2,500,000 in 2019, and $5,000,000 in 2020. (A191, Op. at 12.) For years from 2021 to 2030, minimum royalties were calculated as the prior year's minimum royalty plus 20%. (*Id.*) Minimum royalties were constant after 2030. Net sales royalties were set at 20 percent of Net Sales of Licensed

Products. (A190 § 3.3(a), Op. at 12.) Finally, CSS was required to "pay CSS a . . . milestone payment of $250,000 within 30 days after closing of financing to fully fund construction of" each of the first 12 "Trains," which were defined as "a single Licensed Product production line using approximately 5,000[ ]tons/year of [feedstock.]" (A190 § 3.2, Op. at 12-13.)

III. DEFENDANTS DERIVED THEIR PROCESS AND FACILITY FROM THE CSS PROCESS.

For years, Defendants gathered the complete roadmap to the CSS Process specifically to develop a "Licensed Facility." (*See* Op. at 16-19.) They constructed an animal feed facility based on the CSS Process in Fairless Hills, Pennsylvania (the "Fairless Hills Facility"). (*Id.* at 16.) As the Court of Chancery found, Defendants' process and facility were derived from the CSS Process. (*Id.* at 29-32.) Indeed, the engineers that Defendants hired to construct the Fairless Hills Facility described it as "a near duplication of the California Safe Soil project except that the food waste processing capacity will be increased." (*Id.* at 16.)

In December 2019, KDC Ag terminated minimum royalty payments. (*Id.* at 22, A228.) CSS asked that KDC Ag confirm whether it had any Licensed Facilities to determine whether KDC Ag even had a *non-exclusive* license. (*See* Op. at 22, A231.) On January 6, 2020, Hal Kamine claimed the Fairless Hills Facility constituted a Licensed Facility. (*See* Op. at 22-23, A232.) Relying on Hal Kamine's assertion, CSS continued assisting the development of the Fairless Hills Facility in early

2020. (*See, e.g.*, A236 (early 2020 email chain between CSS and KDC Ag representatives discussing plan for testing at CSS Facility).)

CSS asked KDC Ag to deliver reports and inspection rights required by the License Agreement concerning the Fairless Hills Facility. (A241, A1892:6-1893:2, A1904:15-1905:8.) That request caused Defendants to suddenly cut ties with CSS. On May 26, 2020, Defendants stated in a letter to CSS that: (1) "KDC Ag agrees that it *does not* have a Licensed Facility"; (2) KDC Ag "decided not to use a Licensed Process to create Licensed Products at any of its facilities . . . "; and (3) the License Agreement was now "inapplicable to KDC Ag's business and operations." (A318; *see also* Op. at 23 (emphasis added).) Accordingly, "[a]s of May 2020, it is undisputed that KDC did not have any license, exclusive or nonexclusive, from CSS." (Op. at 23.)

Hal Kamine admitted that Defendants "made a strategic choice to tell CSS that [KDC did] not have a licensed facility, rather than letting [CSS] in to see whatever was in the Fairless Hills facility at that time." (A1914:14-19.) Construction of the Fairless Hills Facility began in June 2020. (Op. at 23.)

IV. DEFENDANTS PROJECTED AND REPRESENTED TO INVESTORS THAT THEIR BUSINESS WOULD BE HUGELY SUCCESSFUL.

When Defendants terminated KDC Ag's license to use the CSS Process, they had developed a business plan that contemplated a major scale-up and expansion of facilities using the CSS Process and reasonably projected millions of dollars in revenue. That was reflected in Defendants' revenue projections included with a May 2020 Bond Offering Memorandum KDC Ag issued to finance the Fairless Hills Facility—in other words, Defendants considered those projections to be sufficiently reasonable and reliable that they were made as representations to third party investors, with the goal of securing over $126 million in outside financing. (*See* A244, A310.) According to those projections, total net sales would increase to over $61 million per year by 2026. (A310.)

Defendants refined their business model after beginning construction of the Fairless Hills Facility and created a series of corporate entities, also named as Defendants in this action, to monetize their use of the CSS Process. KDC created Do Good Foods LLC and Do Good Chicken LLC in November 2020. (Op. at 32.) They also created other related entities, including Do Good Foods Managed Services, LLC and Do Good Foods Facility Management, LLC (together with Do Good Foods, LLC and Do Good Chicken, LLC, the "Do Good Foods Defendants"). (*See* A619.)

In August 2021, the Do Good Foods Defendants reached a deal to provide chicken feed free of charge to a non-party chicken producer, Allen Harim Foods, LLC ("Allen Harim"). (Op. at 32-33, A323.) Allen Harim used that feed to grow chickens, then processed and packaged the chickens and sold them back to Do Good Foods for resale. (Op. at 32-33.) Defendants only entered this complex structure with

Allen Harim after CSS filed this lawsuit. (A323, A339 (entering agreement in August 2021).) In subsequent projections, Defendants represented to potential investors that they intended to make billions of dollars in revenue from selling chickens raised on feed made through the CSS Process. (A642 (August 2022 projections), *see also* A883-885, A888, A890.)

Expansion—both geographic and with respect to product lines—was key to the Defendants' documented business plan. For instance, Defendants had specific plans to expand by launching several business lines predicated on their animal feed production by 2030. (*See e.g.,* A632, A644, A651, A663, A665, A911-978.) Do Good Foods had long-term plans to launch pork, turkey, and beef lines, and to expand operations through agreements with other "mission-driven" brands that produce snacks and plant-based products. (A644.) At all relevant times, on and after January 1, 2020, Defendants intended to construct similar facilities nationwide based on the CSS Process. (*See* A1946:18-1947:2, A640, A1443.)

V. THE INDIVIDUAL DEFENDANTS DROVE THE CORPORATE DEFENDANTS INTO BANKRUPTCY.

CSS filed this lawsuit in June 2021 after discovering that KDC Ag was continuing to use CSS Intellectual Property after it no longer had a license to do so. (A180-181.) Defendants litigated aggressively for three years. They filed nine counterclaims, eventually dropping all but four of them. (*Compare* A501 with A777.) The Court of Chancery then dismissed two out of four remaining counterclaims on summary judgment. (*See* Op. at 34.) The only two surviving counterclaims were asserted solely by KDC Ag and abandoned entirely at trial. (*Id.* at 35-36.) Defendants also advanced a sweeping summary judgment motion, which the Court of Chancery largely denied. (*See* Op. at 34 (noting partial summary judgment entered against CSS on only 3 claims, of 16 asserted in operative complaint); A670.)

Defendants' litigation strategy culminated in the Defendants' decision to place the Corporate Defendants into bankruptcy on the eve of trial. This case was originally scheduled for trial in the Court of Chancery beginning June 20, 2023. (Op. at 34.) However, on June 16, 2023, just one business day before trial, the Corporate Defendants filed voluntary petitions for relief under Chapter 11 of the Bankruptcy Code. (*Id.* at 34-35.)

Then, on June 20, 2023, the Corporate Defendants commenced an Adversary Proceeding in Bankruptcy Court seeking the same relief sought in this action through a declaration regarding the parties' respective rights to the Fairless Hills Facility manufacturing process. (*In re KDC Agribusiness LLC*, Complaint for Declaratory Judgment, No. 23-01786 (Dkt. No. 21, Filed June 20, 2023).) On July 7, 2023, CSS moved for relief from the stay so that it could proceed to trial in the Court of Chancery. Following a two-day evidentiary hearing, the Bankruptcy Court granted relief from the stay commenting that the Defendants' filing for bankruptcy on the eve of trial was "inherently disrespectful to the Court of Chancery." (A1651:11-16, A1656:24-1657:8 (Bankr. D. Del. Aug. 10, 2023).)

Trial in the Court of Chancery was eventually re-scheduled for February 2024. In the meantime, however, the Corporate Defendants converted their bankruptcy proceeding to a Chapter 7 proceeding. (A1778, A1794.) The Corporate Defendants' bankruptcy trustee opted not to defend the claims against them. (Op. at 2.) Accordingly, the Court of Chancery granted CSS's motion for default, and judgment was eventually entered against the Corporate Defendants. (*Id*.)

Despite their bankruptcy filing, the Corporate Defendants continued to insist that they had a successful business model. During the Bankruptcy Court First Day hearing, the Corporate Defendants' counsel declared that "[t]his is an amazing company, a great concept, and not just a concept: the company can execute on it." (A1484:14-24, *see also* A1917:6-21.) He explained that "it ultimately became impossible to raise money because of the cloud that exists over this company right now and that cloud is in the form of [the Court of Chancery litigation]." (A1484:19-24.) For that reason, Defendants' Counsel declared that resolving this litigation was the key to "unlock the value that we believe exists in this asset . . . ." (A1486:17-1487:2, *see also* A1918:12-16.)

VI. CSS PROVED LIABILITY AND SIGNIFICANT RECOVERABLE DAMAGES.

The case proceeded to a seven-day trial in the Court of Chancery beginning on February 28, 2024. As to liability, the trial resulted in detailed findings against the Defendants, leading the Court of Chancery to conclude that the CSS Process was a valuable trade secret, that the Defendants derived their facility and process from the CSS Process, and that the Defendants were liable for misappropriation under state and federal law. The Court of Chancery found the testimony of Individual Defendants Hal and Matthew Kamine and Barry Starkman and their industry expert to be "not credible." (Op. at 3.) The Court of Chancery found that "Hal, Matthew, and Barry were caught in lies both significant and immaterial" and that their "expert . . . fell apart on cross-examination" and "was impeached over two dozen times." (*Id.* at 3 n.7.) Defendants have filed no cross-appeal, and the Court of Chancery's findings and conclusions on liability are thus unchallenged.

As to damages, CSS presented two damages models supported by its expert, Carla Mulhern. (*See* A867, A1665, A1798.)

First, Mulhern employed "a reasonable royalty framework using a hypothetical negotiation construct" in order to "analyze the outcome of a license negotiation between CSS (hypothetical licensor) and KDC Ag (hypothetical licensee) at the time of the alleged misappropriation, here January 2020[.]" (A1669-1670, A1684-1685, *see also* A1956:10-1957:4.) That framework applied the terms of the License Agreement—including its minimum and net sales royalty rates—but "adjusted [those terms] for the circumstances of the hypothetical license[.]" (A1670.) In particular, Mulhern applied the License Agreement's royalty rate to Defendants' projected sales as a royalty base. (A1688-1689; *see also* A1956:10-1957:4, A1971:14-1972:5.)

In selecting a royalty base to which to apply that rate, Mulhern chose the most conservative and reliable set of May 2020 projections that Defendants included in the Offering Memorandum they used to secure financing for the Fairless Hills Facility. (A1956:10-1957:4, A1977:19-1978:4.) Mulhern used those numbers because they were the available projections "as close as possible to the hypothetical negotiation date"—*i.e.*, the commencement of Defendants' misappropriation in January 2020, right after KDC Ag announced it would no longer make minimum royalty payments. (A1962:10-13, *see also* A1973:21-1974:18.) She then applied a discount rate to convert that running royalty into a single valuation as of January 2020. (A1689.)[2]

The result under Mulhern's reasonable royalty framework was at least a "net present value of the license as of the hypothetical negotiation of $40.7 million."

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[2] Mulhern also made factually-based assumptions about the length of a license and adjusted the royalty downward to account for the fact that the License Agreement covered patents in addition to CSS trade secrets. (A1688-1689.)

(A1670, *see also* A1956:10-1957:4.) That was based upon the Defendants' own reliable business projections near the time of the License Agreement. Mulhern also "looked to test the reasonableness" of her calculations relying on the May 2020 projections by applying the reasonable royalty to a royalty base derived from five of Defendants' subsequent projections. (A1956:10-1957:4, A1973:21-1974:18, A1993:15-1994:13, A1690.) For instance, applying the License Agreement's royalty rate to KDC Ag's July 2022 projections indicated "a value of the trade secrets . . . of $138.1 million . . . which confirms the reasonableness or the conservatism of the $40.7 million number" calculated using KDC Ag's May 2020 projections. (A1956:10-1957:4, A1992:2-14, *see also* A1670.) Likewise, even using KDC Ag's June 2023 projections near in time to the Corporate Defendants' bankruptcy yields a reasonable royalty amount of "about 40 million"—further corroborating the reasonableness of the $40.7 million royalty based on the May 2020 projections. (A1993:15-1994:13, A1731.)

Second, Mulhern calculated "actual damages adequate to compensate CSS in the form of lost royalties[.]" (A1670.) Those actual damages were based on minimum royalty payments that Defendants would have had to pay under the License Agreement but for their misappropriation. Mulhern used minimum royalties to calculate actual damages because, by the time of trial, it was apparent that minimum royalties would have exceeded net sales royalties. (A1678.) As such, it was minimum royalties that represented CSS's actual loss. (*See id.*) Mulhern's calculation of reasonable royalties also followed from the fact that, under the License Agreement, KDC Ag would have had to pay minimum royalties to have any license to use the CSS Process, not just an exclusive license. *See above* at 6-8 and *below* at 34-38.

In addition, Mulhern included milestone payments in CSS's actual loss. Based on analysis from CSS's industry expert, Mulhern determined that "as of May 2020, Defendants closed financing to construct the equivalent of 12 Trains at the Fairless Hills Facility" and therefore owed milestone payments of $3.0 million. (A1679.) For the Individual Defendants, Mulhern calculated damages for CSS's actual loss—including minimum royalties and milestone payments—as "$29.1 million through the date KDC Ag cased operations and entered Chapter 7 Bankruptcy" and for the Corporate Defendants as "$31.5 million through trial in February 2024." (A1670.)

In awarding damages, however, the Court of Chancery adopted neither of the methodologies proposed by CSS. Instead, the Court of Chancery fashioned what it termed an "established royalty" calculation. (Op. at 72.) In so doing, the Court of Chancery used the License Agreement's net sales royalty rate, but it did not apply it to projections from around the time the misappropriation began—*i.e.*, to Defendants' May 2020 bond offering memorandum projections—as expected under the legal framework governing trade secret royalty damages. Instead, the Court of Chancery used the Defendants' later historical sales as the royalty base. (Op. at 85-87.) Moreover, the Court of Chancery declined to award minimum royalties, rejecting without analysis CSS's argument that KDC Ag would have been required to pay minimum royalties to maintain any license, not just an exclusive license, under the License Agreement. (Op. at 81 n.410.) The Court of Chancery also awarded milestone payments, but in a lower amount than requested by CSS. (Op. at 82-85.)

Finally, the Court of Chancery found that Defendants' litigation conduct was "oppressive and defensive," but ultimately declined to award any exemplary damages or even any counsel fees. (Op. at 97.) For both fees and exemplary damages, the court reasoned that the Defendants' conduct was not malicious because their behavior was "consistent with misappropriating the CSS Process to benefit KDC, not to additionally harm CSS." (*Id.*)

ARGUMENT

I. THE COURT OF CHANCERY ERRED IN ITS CALCULATION OF A REASONABLE ROYALTY.

A. Question Presented.

Did the Court of Chancery err by failing to calculate a forward-looking reasonable royalty based on the Defendants' own revenue projections to value the CSS Process at the time of misappropriation, instead calculating an "established royalty" based upon Defendants' subsequent sales, which were substantially less than their projections because of Defendants' own tortious misconduct? (*See* Op. at 72-80, 85-91.)

B. Scope of Review.

"Whether or not an equitable remedy exists or is applied using the correct standards is an issue of law and reviewed *de novo*." *Schock v. Nash*, 732 A.2d 217, 232 (Del. 1999); *see also Vt. Microsystems v. Autodesk, Inc.*, 138 F.3d 449, 452 (2d Cir. 1998) (explaining that "the formula used" in calculating damages "is a question of law.").

C. Merits of Argument.

1. A Court Should Fashion a Forward-Looking Reasonable Royalty to Make the Plaintiff Whole, Especially Where the Defendants' Business Has Failed Due to Their Own Misconduct.

The "proper measure" of a reasonable royalty is "what the parties would have agreed to . . . at the time the misappropriation took place." *Univ. Computing Co. v.*

Lykes-Youngstown Corp., 504 F.2d 518, 539 (5th Cir. 1974). In other words, it is forward-looking. In violation of that principle, the Court of Chancery erred in calculating a royalty that was not based on Defendants' projections at the time of the misappropriation, but instead on their *subsequent* sales, which were substantially less than their projections because of Defendants' own misappropriation and business failings. That approach misapplied the law of trade secret damages, failed to make CSS whole, and allowed Defendants to evade full responsibility for their misappropriation.

The Court of Chancery found Defendants liable for trade secret misappropriation under relevant state statutes as well as the federal Defend Trade Secrets Act ("DTSA"). (*See* Op. at 36-37.)[3] The DTSA and relevant state statutes specify three measures of compensatory damages: actual loss suffered by the plaintiff; unjust enrichment (to the extent not duplicative of actual damages); or, "in lieu of damages measured by any other methods, the damages caused by the misappropriation measured by imposition of liability for a reasonable royalty for the misappropriator's unauthorized disclosure or use of the trade secret." 18 U.S.C. § 1836(b)(3)(B); *see also*

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[3] A choice of law analysis is unnecessary where, as here, the result would be the same under any applicable law. *See Deuley v. DynCorp. Int'l, Inc.*, 8 A.3d 1156, 1161 (Del. 2010).

6 *Del. C.* § 2003(a); Cal. Civ. Code § 3426.3(a)-(b); N.J. Rev. Stat. § 56:15–4(a); 12 Pa.C.S. § 5304.

The common law of unfair competition has also authorized reasonable royalties as a form of damages in trade secret cases for decades, often turning to patent damages cases by analogy. *See, e.g.*, Restatement (Third) of Unfair Competition § 45 cmt. d; *Vermont Microsystems, Inc. v. Autodesk, Inc.*, 138 F.3d 449, 450 (2d Cir. 1998); *University Computing*, 504 F.2d at 536-37; *see also Agilent Techs., Inc. v. Kirkland*, 2010 WL 610725, at *27 & n.239 (Del. Ch. 2010).

A reasonable royalty is a calculation that typically applies a royalty rate to a royalty base, with those parameters determined by simulating a "hypothetical negotiation" between the trade secret owner and the trade secret user at the time the misappropriation begins.[4] Most relevant here, a reasonable royalty by design is forward-looking from the time of a hypothetical negotiation, *i.e.*, from the time the defendant's misappropriation begins. Consequently, courts routinely use a defendant's financial projections to inform the hypothetical negotiation analysis.

For instance, according to the landmark *University Computing* case, the "proper measure" of a reasonable royalty "is to calculate what the parties would have

[4] In setting a reasonable royalty, courts have long relied on factors articulated in *Georgia Pacific Corp. v. U.S. Plywood Corp.*, 318 F. Supp. 1116 (S.D.N.Y. 1970) (*See* Op. at 77.)

agreed to as a fair price for licensing the defendant to put the trade secret to the use the defendant ***intended at the time the misappropriation took place***." 504 F.2d at 539 (emphasis added); *see also, e.g. Steves & Sons, Inc. v. JELD-WEN, Inc.*, 2018 WL 2172502, at *9 (E.D. Va. May 10, 2018) (approving use of projections since "reasonable royalty is by definition forward-looking because it contemplates a negotiation based on how the licensee will use the licensed information"); *TMRJ Holdings, Inc. v. Inhance Techs., LLC*, 540 S.W.3d 202, 210 (Ct. App. Tex.-Houston Jan. 9, 2018) ("[I]n trade-secrets cases, royalty damages may be derived from the trade secrets' present value to the defendant, regardless of whether the plan to use them comes to fruition.").

Notably, the Federal Circuit in an analogous patent context rejected an argument that to be reliable, projections must "bear a close relation to actual sales revenue" because "[s]uch a proposition would essentially eviscerate the rule that recognizes sales expectations at the time when infringement begins as a basis for a royalty base as opposed to an after-the-fact counting of sales." *Interactive Pictures Corp. v. Infinite Pictures, Inc.*, 274 F.3d 1371, 1385 (Fed. Cir. 2001). To the contrary, the Federal Circuit and other courts encourage the use of financial projections, particularly for reasonable royalty determinations, because that model is based on the parties' expectations "on the date when the infringement began." *TWM Mfg. Co. v. Dura Corp.*, 789 F.2d 895, 899 (Fed. Cir. 1986); *see also Snellman v. Ricoh Co.*, 862 F.2d

283, 288-89 (Fed. Cir. 1988); *Arendi S.A.R.L. v. LG Electronics, Inc.*, 2022 WL 22400977, at *5 (D. Del. Mar. 31, 2022) (holding that "[t]he fact that a negotiating party 'did not subsequently meet [its] projections is irrelevant to [that party's] state of mind at the time of the hypothetical negotiation'") (quoting *Interactive Pictures*, 274 F.3d at 1385). Consistent with that principle, the Federal Circuit has reversed reasonable royalty calculations that improperly focus on an infringer's *actual* profits instead of the parties' expectations at the time of a hypothetical negotiation. *Aqua Shield v. Inter Pool Cover Team*, 774 F.3d 766, 770-73 (Fed. Cir. 2014).

Additionally, in fashioning an appropriate remedy, a court should impose the burden of uncertainty on the misappropriator. For example, in *Agilent*, then-Vice Chancellor Strine observed that the court's remedy in a trade secret misappropriation case should both "bear a reasonable relationship to the breach and the factual record" and it must also "impose the burden of uncertainties on the wrongdoers." *Agilent*, 2010 WL 610725, at *24; *see also Am. Gen. Corp. v. Cont'l Airlines Corp.,* 622 A.2d 1, 10 (Del. Ch. 1992) ("[T]he perils of . . . uncertainty should be laid at defendant's door.") (internal citation and quotation marks omitted).

Consistent with this principle, a forward-looking reasonable royalty is the correct measure of damages to make the plaintiff whole where the defendant's business turned out to be less successful than anticipated at the time the misappropriation began. *See, e.g.*, Restatement (Third) of Unfair Competition § 45, cmt. g. (reasonable royalty "may be the best available approximation of the plaintiff's loss" where "the defendant's inefficiency results in little or no profit from the exploitation of the trade secret."); *University Computing*, 504 F.2d at 540 (rejecting argument that defendant's "inability to market" and generate profits "should insulate them from liability"). Repeatedly, "[c]ourts have held that the absence of actual profits does not preclude defendants from being obliged to pay for what they have wrongfully obtained." *Secure Energy, Inc. v. Coal Synthetics, LLC*, 708 F. Supp. 2d 923, 931 (E.D. Mo. 2010). "Therefore, a reasonable royalty is the best measure of damages in a case where the alleged thief made no profits." *Id.* (internal citation omitted). Were it otherwise, misappropriators—like the Individual Defendants here—could avoid full liability because of their own business failure.

2. The Court of Chancery's "established royalty" misapprehended relevant caselaw and failed to make CSS whole.

Consistent with this well-established law, the primary form of compensatory damages that CSS requested is a reasonable royalty that represents the value that the parties would have placed on the CSS Process at the time the royalty would have been negotiated. Significantly, the reasonable royalty calculation performed by CSS's damages expert, Carla Mulhern, *was* based on the actual bargain that the parties struck in the License Agreement. It used the royalty rate that the parties agreed to, and it made adjustments to account for the value that the parties in the License

Agreement attributed to CSS Patents as opposed to its trade secrets. *See above* at 13-17.

As such, there is no disagreement between CSS and the Court of Chancery that damages should be calculated based on the parties' actual agreement. In particular, the Court of Chancery recognized that "[a] reasonable royalty is meant to determine the amount the licensor and licensee would have agreed to just prior to the infringement." (Op. at 89 (citation and quotation marks omitted).) In order to determine what the parties would have agreed to just prior to the infringement, the Court of Chancery relied on the actual License Agreement the parties had entered into, reasoning that "there is no basis to venture into the speculative realm of a hypothetical reasonable royalty when the License Agreement offers a contemporaneous, negotiated, and consummated price for KDC's use of the CSS Process." *Id.*[5]

However, the Court of Chancery made a fatal error at this point in selecting a royalty base to which to apply the parties' agreed-upon royalty rate. While the Court looked at the parties' negotiated agreement in selecting a royalty rate, the Court

[5] Although it looked to the License Agreement in identifying the royalty rate, the Court of Chancery erred in finding that a lower royalty rate applied to feed provided to Allen Harim as KDC Ag's "Qualified First Customer." (Op. at 86-87.) That is legally wrong because KDC Ag did not *sell* its feed to Allen Harim and because KDC Ag failed to notify CSS that it was a Qualified First Customer. (*See* A216.) In any event, it would be improper to consider Qualified First Customer status in setting a reasonable royalty because it is unknown at the time of a hypothetical negotiation which projected revenues would be attributable to a Qualified First Customer.

failed to look at what the parties believed the value of that agreement to be ***at the time Defendants' misappropriation began*** in selecting a royalty base. Instead, the Court looked at what subsequently happened in the future, under the Defendants' management, and relied upon that future performance to value CSS's trade secret at the time of misappropriation, even though none of the parties had such information at the time. That is contrary to the principle that a forward-looking reasonable royalty is the appropriate measure of damages where the Defendants' business has failed. *See above* at 22-23.

The Court of Chancery's reasoning undermines the purpose of a reasonable royalty calculation, which is to determine how the parties would value a trade secret at the time of misappropriation. At the time of a hypothetical negotiation, the misappropriator's actual future business success is unknown. In this case, for example, KDC's projections at the time their misappropriation began realistically implied a license value of $40.7 million. *See above* at 15. Of course, there was a possibility that Defendants' business would be less profitable than projected—which, in this case, it was, due to Defendants' mismanagement and misappropriation. At the same time, at the time of misappropriation, it was possible that Defendants' business would exceed expectations. In determining how the parties would have valued the trade secret, a Court should look to the parties' reasonable expectations at the time of a hypothetical negotiation. *See Aqua Shield*, 774 F.3d at 770 ("In hypothetical-negotiation terms, the core economic question is what the infringer, in a hypothetical pre-infringement negotiation under hypothetical conditions, would have *anticipated* the profit-making potential of use of the patented technology to be[.]") (emphasis in original).

Instead, the Court of Chancery erred by looking beyond what the parties could have known at the time of the hypothetical negotiation and using that information to effectively cap a reasonable royalty. *See Aqua Shield*, 774 F.3d at 772. The Court of Chancery looked to see how KDC's business actually performed for several years after the misappropriation began, instead of ***just prior to the misappropriation*** as the Court of Chancery acknowledged was appropriate. (*See* Op. at 89 & n.445.) It therefore exposed the parties to the vagaries of the future, including the Defendants' management skills, business conditions, etc. that the parties could not have known at the time of the hypothetical negotiation. As it turned out, the Defendants' business performed poorly and reflected a scenario much worse than its projections. By relying on this subsequent performance, the Court of Chancery effectively punished Plaintiffs for Defendants' own failures rather than determining the value that the parties would have actually agreed upon at the time of misappropriation. *See Aqua Shield*, 774 F.3d at 771 ("An especially inefficient infringer . . . is not entitled to an especially low royalty rate . . .")

The Court of Chancery appears to have rejected Mulhern's reasonable royalty calculation because of its finding that the Individual Defendants would not "have agreed to pay such a large lump sum." (*See* Op. at 90.) However, as described above, Mulhern's calculation in fact applied the parties' agreed-upon royalty rate to a royalty base of projected sales at or near the time of the misappropriation. As Mulhern explained, it would not be accurate to describe her structure as an "upfront lump sum structure," instead explaining that "[w]e take running royalties and express them as lump sums." (A1993:3-14.) That is a practical necessity to convert the running royalty to a single damages figure. *See Univ. of Tenn. Research Found. v. Caelum Biosciences, Inc.*, 2024 WL 3381259, at *17 (E.D. Tenn. July 11, 2024) ("A lump sum payment is simply a paid up royalty.").

The Court of Chancery also erred in finding that the Defendants would not "have agreed to pay such a large lump sum" because that was not a factual question for the Court of Chancery to resolve. The reasonable royalty framework *assumes* that the defendant would be a "willing" licensor. *See, e.g., Tektronix, Inc. v. United States*, 552 F.2d 343, 349 (Ct. Cl. 1977). For instance, in an analogous reasonable royalty copyright damages case, the Ninth Circuit rejected the argument that a copyright owner had to demonstrate it would be "willing" to grant a license in order to recover damages under the hypothetical license reasonable royalty framework. *See Oracle Corp. v. SAP AG*, 765 F.3d 1081, 1087-88 (9th Cir. 2014). "Hypothetical-license damages assume rather than require the existence of a willing seller and buyer. The very word 'hypothetical' indicates that damages may be awarded in the absence of an actual license." *Id.* at 1088.

The Court of Chancery cited *Lucent Techs., Inc. v. Gateway, Inc.*, 580 F.3d 1301 (Fed. Cir. 2009) to explain why it was reluctant to calculate a lump sum royalty based on projected sales at the time of a hypothetical negotiation. (*See* Op. at 90 n.449, 91 n.452.) However, *Lucent* is distinguishable. *Lucent* was a patent case tried to a jury. The plaintiff requested $561.9 million in damages based upon applying a specific royalty rate to the defendants' actual sales, which the court referred to as a "running royalty." *Lucent*, 580 F.3d at 1323-25. The defendant requested a "lump-sum" royalty payment of $6.5 million. *Id.* at 1323. The jury returned what it identified as a lump-sum award of approximately $358 million—substantially more than the lump-sum royalty suggested by defendant, but less than the "running" royalty requested by the plaintiff. *Id.* at 1325. As such, the question before the appellate court was limited to whether that the evidence supported awarding that amount of damages as a lump-sum royalty. The Federal Circuit held that it did not—which was not surprising, given that the jury's damages award was significantly different than what either party had advocated. The Federal Circuit ultimately concluded that the only explanation for the jury's award was that it had relied on "speculation or guess-work" to determine a lump sum royalty in the amount that it did. *Id.* at 1335.

The Court of Chancery's reliance on *Lucent* to reject Mulhern's damages model was misplaced because Mulhern's calculation was based upon a running royalty structure, with the royalty rate being determined from the parties' License Agreement and the royalty base being determined from the Defendants' own projected sales. Moreover, because Mulhern used the parties' agreed-to royalty rate and the Defendants' own projected sales, her calculation did not reflect the uncertainty that troubled the court in *Lucent*. *See id.* at 1327 (observing the absence of "documentary evidence or testimony showing the parties' expectations as to usage of the claimed method").

The Court of Chancery also overlooked substantial evidence to find there was "no basis to conclude KDC or the Individual Defendants would have agreed to pay such a large lump sum." (Op. at 90.) In particular, the Court of Chancery ignored that, despite their lack of sales, Defendants did obtain significant, actual financial benefit from their misappropriation. For example, Defendants' engineering consultants (who, like the Defendants, had no "prior experience in food recycling") relied heavily on the CSS Facility as a basis of their design, even describing the Fairless Hills Facility as "a near duplication of the California Safe Soil Project except that the food waste processing capacity will be increased[.]" (Op. at 16-19.) Defendants also "sought funding for Fairless Hills with open reliance on the CSS Process and all it learned from CSS." (*Id.* at 23.) Drafts of an independent engineering report used to secure financing "explicitly acknowledged the Fairless Hills Facility was based on the CSS Process." (*Id.* at 24.) A draft of the bond financing memorandum that "Justin [Kamine] circulated to potential investors in January 2020 stated that KDC utilized CSS's 'proprietary and patented technology.'" (*Id.* at 24-25.) Materials sent to "other potential investors" in February 2020 explained that "KDC had 'successfully patented and commercialized a process' over 'the past 6 years.'" (*Id.* at 25.) Ultimately, Defendants' leveraged their familiarity with the CSS Process as a basis of obtaining over $126 million in bond financing for the Fairless Hills Facility. (*See id.* at 26.)

In other words, the Defendants obtained significant, actual financial benefits from their misappropriation even in the absence of the actual sales they had projected. The Court of Chancery's refusal to award a prospective reasonable royalty was not only an error of law, it was also contrary to the facts.

II. THE COURT OF CHANCERY ERRED BY CONCLUDING THAT CSS WAS NOT ENTITLED TO MINIMUM ROYALTIES UNDER THE LICENSE AGREEMENT.

A. Question Presented.

Was the Court of Chancery's damages award erroneous because KDC Ag was required to pay minimum royalties under the License Agreement to maintain any license (not just an exclusive license), such that CSS should at least have been awarded minimum royalties as actual damages? (*See* Op. at 72, 78, 80-82.)

B. Scope of Review.

"[Q]uestions of contract law and contract interpretation" are reviewed *de novo*. *Glaxo Grp. Ltd. v. Drit LP*, 248 A.3d 911, 918 (Del. 2021). Accordingly, the Court of Chancery's conclusion that KDC Ag was not required to pay minimum royalties under the License Agreement to maintain any license to use the CSS Process is subject to de novo review.

C. Merits of Argument.

The Court of Chancery erred in concluding that CSS was not entitled to an award of minimum royalties under the License Agreement. In the alternative to a reasonable royalty based on projected sales at the time of misappropriation, CSS requested damages based on its actual loss.[6] "Actual loss" is compensable under

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[6] Minimum royalties were also relevant to CSS's requested reasonable royalty damages because Mulhern's reasonable royalty calculation assumed that for the period of the hypothetical negotiated license, Defendants would have been required to pay

each of the trade secret statutes at issue. 18 U.S.C. § 1836(b)(3)(B)(i)(I); 6 *Del. C.* § 2003(a); Cal. Civ. Code § 3426.3(a); N.J. Rev. Stat. § 56:15-4(a); 12 Pa.C.S. § 5304(a).

Indeed, the Court of Chancery's reliance on the Defendants' subsequent sales as opposed to their projections suggests that its intention may have been to compensate CSS for its actual loss instead of fashioning a true reasonable royalty. However, to the extent the Court of Chancery intended to compensate CSS for its actual loss, it erred by failing to recognize that CSS would have been entitled to minimum royalties but for the Defendants' misappropriation. The result was that the Court of Chancery's damages award was neither a reasonable royalty that valued the trade secret at the time of misappropriation nor compensation for CSS's actual loss.

Here, CSS's "actual loss" is comprised of two forms of payment owed under the License Agreement: (i) minimum royalties under Sections 3.3(b) and (c) of the License Agreement; and (ii) milestone payments under Section 3.2 of the License

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the higher of minimum royalties under the License Agreement or running royalties based on projected sales. (A1738; A1979:13-1973:3.)

Agreement. (A190-191, A1950:17-1952:6; A1677-1679 ¶¶ 17-20.)[7] Mulhern quantified minimum royalty payments as approximately $26.1 million for the Individual Defendants and at least $28.5 million for the Corporate Defendants. (A1963:18-1965:10; A1732.)

The Court of Chancery declined to award damages based on minimum royalties because it found that minimum royalties did not represent the "standalone value" of CSS's misappropriated trade secret. (Op. at 81.) However, CSS requested minimum royalties as part of its actual damages, which it requested in the alternative to a reasonable royalty. Unlike a reasonable royalty—which represents the price the parties would have negotiated to license trade secret—a plaintiff's actual loss is not limited to the value of the trade secret itself. *See Lucent*, 580 F.3d at 1324 ("A reasonable royalty is, of course, 'merely the floor below which damages shall not fall.'") (quoting *Bandag, Inc. v. Gerrard Tire Co.*, 704 F.2d 1578, 1583 (Fed. Cir. 1983)). Instead, a plaintiff may recover as its actual loss any amounts that it was entitled to receive but did not because of the defendant's misappropriation. Accordingly, for purposes of determining actual loss, the "standalone value" of the trade secret is irrelevant. (*See* Op. at 81.)

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[7] The Court of Chancery awarded milestone payments as part of its "established royalty" calculation, but in a lower amount than requested by CSS as actual damages. (Op. at 83-85.) CSS does not challenge the Court of Chancery's calculation of milestone payments.

In this case, CSS's actual loss includes minimum royalty payments that the Defendants would have had to make to CSS under the License Agreement to use the CSS Process without misappropriation. (*See* A1957:17-1958:1 (Mulhern explaining that she calculated actual damages using "a but-for damages framework.")). Because Defendants would have had to pay those minimum royalties under the License Agreement but for their misappropriation, they are actual damages that CSS was entitled to recover in the alternative to reasonable royalties.

The Court of Chancery was also wrong that minimum royalties were only compensation for exclusivity. In fact, payment of minimum royalties was necessary for Defendants to have *any* license to use the CSS Process, not just an exclusive license. The Court of Chancery erred by rejecting that argument, without analysis, in a footnote. (*See* Op. at 81 n.410.) Pursuant to the License Agreement, to maintain its exclusive license, KDC Ag was required to pay minimum annual royalties. (A190-191, §§ 3.3(b)-(c).) If KDC Ag failed to pay minimum royalties when due, then CSS had the right to convert the exclusive license to a non-exclusive license, *but only for Licensed Facilities then existing or under construction.* (A191 § 3.3(c).) if no such facilities were in existence or under construction when payments stopped, KDC Ag would no longer have any license at all.

Accordingly, Defendants would have needed to pay minimum royalties to maintain any license on and after January 1, 2020, the date that they stopped paying minimum royalties. As described above, CSS responded to KDC Ag's notice that it would no longer pay minimum royalties with a letter dated December 30, 2019, making clear that the "non-exclusive license granted to KDC pursuant to Section 2.1 ***shall be further limited*** to just the existing Licensed Facilities and any Licensed Facilities under construction as of the date hereof" and confirming "[t]here are currently no existing Licensed Facilities, so there will hereafter be no non-exclusive license for any existing License Facilities." (A231 (emphasis added).) Accordingly, the Fairless Hills Facility was not a Licensed Facility as of January 1, 2020, and none of Defendants' planned future facilities were either "existing" or "under construction" as of December 31, 2019. The only way for Defendants to implement their business plan was to make required minimum royalty payments.

In the Court of Chancery, Defendants insisted, counterfactually, that the Fairless Hills Facility was a "Licensed Facility" as of January 2020. That was debunked because, among other reasons—as the Court of Chancery found—construction on the Fairless Hills Facility did not even begin until June 2020 (Op. at 23 ("[C]onstruction on the full-scale Fairless Hills facility did not start until June 2020.").) Moreover, the Individual Defendants specifically represented that the Fairless Hills Facility was ***not*** a Licensed Facility and that the License Agreement was "inapplicable." (A311, A318.) Hal Kamine admitted that representation was a "strategic choice" to prevent CSS from learning more about the Fairless Hills Facility.

(A1914:14-19.) CSS relied on that representation, which delayed CSS's discovery of the Defendants' trade secret theft. (*See* A1894:16-1895:6, A1898:24-1899:13.) Having so represented to CSS, Individual Defendants are now estopped from evading liability by claiming that the Fairless Hills Facility was a Licensed Facility. *See, e.g., In re Coinmint, LLC*, 261 A.3d 867, 894-95 (Del. Ch. 2021); *Personnel Decisions, Inc. v. Bus. Planning Sys., Inc*., 2008 WL 1932404, at *6-7 (Del. Ch. May 5, 2008).

Additionally, even if KDC Ag maintained a non-exclusive license with respect to the Fairless Hills Facility after terminating minimum royalty payments (which it did not, as described above), it indisputably would not have had a license for future facilities, because such facilities were not then existing or under construction. Defendants' business model was dependent upon the construction of multiple such future facilities. The Court of Chancery recognized that "KDC agreed to pay a lot of money for access to the CSS Process so that it could scale it up and expand its geographic reach," (Op. at 42), and that the "goal of the License Agreement" was "to scale up and expand the CSS Process across the United States." (Op. at 52.) Indeed, as of August 2022, KDC Ag planned to build at least six additional facilities around the country by Q2 2025. (A1674, A662, A666.) As recently as June 2023, KDC Ag's "business model depends on scaling up their operations to profitability." (A1674, A1543.)

Defendants' geographic expansion plans were not just aspirational. For instance, KDC Ag prepared an engineering RFP for additional facilities to be built across the country with the same design as Fairless Hills. (A1924:16-1927:9, A0359.) KDC Ag issued bond financing for a facility to be constructed in Fort Wayne, Indiana. (A1674, A983.) KDC Ag was developing a facility in North Carolina. (A658; A1908:5-20; A1937:4-7; A1946:18-21.) KDC also leased and operated a pilot facility in North Dakota that operated until 2021. (Op. at 30.) Those were obviously not Licensed Facilities existing or under construction at the time KDC Ag terminated its minimum royalty payments. So, to have any license at all to use the CSS Process to design, finance, develop, or build those facilities, KDC Ag would have been required to maintain minimum royalty payments.

Not only did KDC Ag need to make minimum royalty payments to have any license to operate the Fairless Hill Facility and other facilities, exclusivity was also a key part of its business model. (A1672-1675.) For example, one potential financer of KDC Ag explained in a June 2019 email to Justin Kamine that it was "not worried about [KDC Ag] losing access to the IP license [with CSS], but KDC losing exclusivity that could lead to a flood of other entrants [that] start using the IP and creating similar products, and thus diluting the market." (A220.) Likewise, in an August 2019 email to Piper Jaffray, who advised KDC Ag in its bond offering for the Fairless Hills Facility, Harold Kamine explained that KDC had paid minimum royalties to that point in order to “keep the exclusive license in place which ensures the real value and viability of this plant and our products. Without this exclusive license this plant would not be built.” (A224.)

Significantly, the Court of Chancery did not address any of this evidence in concluding that KDC Ag would not have been required to pay minimum royalties to maintain any license. The Court of Chancery’s conclusion that KDC Ag would not have been required to pay minimum royalties is unsupportable in light of these facts and the clear language of the License Agreement.

III. THE COURT OF CHANCERY MISAPPREHENDED THE LEGAL STANDARD IN DENYING EXEMPLARY DAMAGES.

A. Question Presented.

Did the Court of Chancery err by concluding that exemplary damages and attorney's fees require a finding that the Defendants' conduct was motivated by a desire to harm CSS, apart from any self-interest? (*See* Op. at 95-97.)

B. Scope of Review.

"Whether or not an equitable remedy exists or is applied using the correct standards is an issue of law and reviewed *de novo*. Determinations of fact and application of those facts to the correct legal standards, however, are reviewed for an abuse of discretion." *Schock*, 732 A.2d at 232. Accordingly, the Court of Chancery's definition of "malice" is subject to de novo review.

C. Merits of Argument.

CSS is entitled to attorneys' fees and exemplary damages up to two times actual damages because Defendants' misappropriation was both willful and malicious. *See* 18 U.S.C. § 1836(b)(3)(C); 6 *Del. C.* §§ 2003(b), 2004; 12 Pa.C.S. §§ 5304(b), 5305; Cal. Civ. Code §§ 3426.3(c), 3426.4; N.J.S.A. §§ 56:15-4(b), 56:15-6. "Delaware case law generally describes willfulness as an awareness, either actual or constructive, of one's conduct and a realization of its probable consequences, while malice requires a showing of ill-will, hatred, or intent to cause injury." *Great Am. Opportunities, Inc. v. Cherrydale Fundraising,* *LLC,* 2010 WL 338219, at *28 (Del. Ch. Jan. 29, 2010) (internal citations and quotation marks omitted). "Malice also may be found after a party has demonstrated a reckless disregard for another's trade secrets with the intent to cause injury." *Id.*

In finding that exemplary damages and attorney's fees were not warranted, the Court of Chancery interpreted the malice requirement too strictly as requiring an intent to injure the plaintiff apart from any self-interest. In particular, despite the Individual Defendants' egregious conduct before and during this litigation, the Court of Chancery found that their behavior was not malicious because it was "consistent with misappropriating the CSS Process to benefit KDC, not to additionally harm CSS." (Op. at 97.)

It is evident from cases awarding exemplary damages and attorney's fees—including those cited by the Court of Chancery—that establishing malice does not require a showing of intent to harm divorced from self-interest. In *Agilent*, which the Court of Chancery primarily relied upon, the court found malice where defendants "acted with the intent to cause commercial injury to [plaintiff] by creating a product based on [plaintiff's] trade secrets to compete with [plaintiff]." *Agilent*, 2010 WL 610725, at *34. The court's reasoning does not suggest that the defendants somehow harbored a desire to injure the plaintiff apart from their desire to compete. The Court also noted in support of its finding of malice that the defendants began conspiring against the plaintiff and using misappropriated information while they were still employed there. *Id.* They also lied about their intentions to the plaintiff and "consciously" breached their confidentiality agreements. Those facts also do not imply that the plaintiffs were motivated by an intent to injure apart from a desire to enrich themselves, and in fact, virtually identical facts were established in this case.

Likewise, in *Nucar Consulting, Inc. v. Doyle*, as the Court of Chancery noted, the Court found that the defendant acted with malice by "aggressively solicit[ing]" the plaintiff's prospective clients using a trade secret client list "with the intent to cause injury[.]" (Op. at 96 (quoting *Nucar*, 2005 WL 820706, at *14 (Del. Ch. Apr. 5, 2005)). However, a close reading of the facts of that case clarifies that the defendant was acting in his own interest, which simply had the effect of damaging the defendant. What made the defendant's conduct "malicious" was that he acted with "reckless disregard of [plaintiff's] trade secrets" in utilizing a trade secret client list, not that he was somehow acting to harm the plaintiff apart from an intention to enrich himself. *See Nucar*, 2005 WL 820706, at *14. That reasoning likewise establishes malice in this case, where the Defendants not only made no effort to avoid using CSS trade secrets in constructing their facility or process, but in fact directly copied the CSS Process. *See above* at 7.

Similarly, in denying summary judgment on the issue of exemplary damages, the court in *I-Mab Biopharma v. Inhibrx, Inc.*, 2024 WL 4437227, at *2 (D. Del.

Oct. 1, 2024) noted that the "Plaintiff has pointed to evidence that could support a finding of willfulness and maliciousness—such as evidence that [the defendant] may have retained copies of Plaintiff's documents even after representing that he had destroyed all such documents." (*See* Op. at 95 n.468 (citing *I-Mab*).) Again, such evidence does not necessarily indicate an intention to harm the plaintiff apart from an intention to benefit the plaintiff. Instead, it reflects dishonesty and duplicity, which was abundantly reflected in the Defendants' conduct here.

That malice was found in cases like this follows from the fact that malice, as defined in *Agilent*, includes not only "hatred or intent to cause injury" but also "ill-will." 2010 WL 610725, at *33. The Court of Chancery apparently understood the malice requirement to require an intention to harm apart from self-interest. But the standard itself and cases applying it make clear that "malice" is a flexible construct that can be applied to a variety of bad conduct. In misconceiving the standard, the Court of Chancery made a legal error that improperly constrained its own discretion.

Other courts' description of the "malice" standard also shed light on its application. For instance, in *I-Mab Biopharma*, to interpret the DTSA's malice requirement, the District of Delaware cited a decision from its sister court in the Eastern District of Pennsylvania, *PetroChoice Hldgs., Inc. v. Orobono*, 2022 WL 138008, at *6 (E.D. Pa. Jan. 14, 2022). *See I-Mab*, 2024 WL 4437227, at *2. In *PetroChoice*, the court noted that the Pennsylvania Uniform Trade Secrets Act defines "willful and malicious" as including "such intentional acts or gross neglect of duty as to evince a reckless indifference of the rights of others on the part of the wrongdoer, and an entire want of care so as to raise the presumption that the person at fault is conscious of the consequences of his carelessness." *PetroChoice*, 2022 WL 138008, at *5 (quoting 12 Pa.C.S. § 5302). As the court explained, in applying that standard, courts consider "the duration of misappropriative conduct, the defendant's consciousness of resulting injury, and any efforts to cover up malfeasance." *Id.* (quoting *Advanced Fluid Sys., Inc. v. Huber*, 295 F. Supp. 3d 467, 493 (M.D. Pa. 2018)).

There are many specific examples of dishonesty in this case that demonstrate the "ill-will" necessary to find malice. For example, the Defendants' scheme involving the shifting "Licensed Facility" letters shows clear gamesmanship deliberately calculated to mislead and confuse CSS. *See above* at 7-8. Indeed, this whole case emanates from Defendants' false claim in May 2020 that the License Agreement was now "inapplicable to KDC Ag's business and operations." (A318.)

Another good example is found in the attempts by Matthew Kamine and Justin Kamine to conceal their continued use of CSS trade secret information. In early 2020, Defendants conspired to "wipe[]" references to CSS in their bond offering and marketing documents, while at the same time using substantive CSS information to their advantage, including photos video footage of the CSS Facility on Defendants' website to provide "substance." (*See* Op. at 25.)

Barry Starkman and Matthew Kamine also conspired to hide Defendants' true intentions from CSS during visits to the CSS Facility at the end of November 2019. (A226; A1940:19-1941:12.) These visits are particularly willful and malicious because they occurred right around Defendants' abandonment of CSS. (A829 ¶ 87 (decision made in December 2019).) In other words, the Individual Defendants knew they planned to dump CSS, but they kept going back to the CSS Facility for more information until they closed the Fairless Hills Facility bond financing.

Courts have also found that a lack of contrition or remorse is relevant "to the extent it [is] suggestive of [the defendant's] state of mind at the time of their wrongdoing." *Advanced Fluid Sys. v. Huber*, 958 F.3d 168, 185 (3d Cir. 2020); *see also In re Lemington Home for the Aged*, 777 F.3d 620, 635 (3d Cir. 2015) (upholding award of punitive damages where defendants' "state of mind was illuminated by their own testimony at trial"). However, the Court of Chancery did not address such authority in acknowledging yet dismissing the Individual Defendants' "alleged lack of remorse for their actions." (Op. at 96.)

Finally, the Court of Chancery's overly restrictive understanding of the malice requirement also overlooks that litigation misconduct also supports imposition of exemplary damages and attorney's fees. *See, e.g., Liqwd, Inc. v. L'Oreal USA, Inc.*, 2019 WL 6840353, at *6-7 (D. Del. Dec. 16, 2019), *rev'd on other grounds*, *Olaplex, Inc. v. L'Oreal USA, Inc.*, 855 F. App'x 701 (Fed. Cir. 2021); *EDIX Media Grp.,* *Inc. v. Mahani*, 2006 WL 3742595, at *15 (Del. Ch. Dec. 12, 2006); *StorageCraft Tech. Corp. v. Kirby*, 2012 WL 4467519, at *6 (D. Utah Sept. 27, 2012), *aff'd*, 744 F.3d 1183 (10th Cir. 2014). As the Court of Chancery found, the Individual Defendants' conduct during this litigation has been appalling. (Op. at 3 n.7; *see also above* at 11-13.) That, alone, would have allowed the Court of Chancery to consider awarding exemplary damages and attorney's fees.

CONCLUSION

For the reasons above, this Court should vacate the Court of Chancery's opinion and judgment to the extent that they (1) awarded CSS legally insufficient compensatory damages and (2) declined to award CSS exemplary damages and attorney's fees, and remand for further proceedings limited to damages.

Dated: April 8, 2025

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EXHIBIT A

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Case No. 2021-0498-MTZ

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

CALIFORNIA SAFE SOIL, LLC, Plaintiff, v. KDC AGRIBUSINESS, LLC, et al., Defendants.	)	
KDC AGRIBUSINESS, LLC, et al., Counter-Plaintiffs, v. CALIFORNIA SAFE SOIL, LLC, et al. Counter-Defendants.	)	C.A. No. 2021-0498-MTZ

MEMORANDUM OPINION

Date Submitted: May 24, 2024
Date Decided: January 10, 2025

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Defendants Harold Kamine, Justin Kamine, Matthew Kamine, and Barry Starkman and Counter-Plaintiffs Justin Kamine, Matthew Kamine, and Barry Starkman.

ZURN, Vice Chancellor.

The parties in this action had an honorable mission: reduce global food waste, and thereby decrease greenhouse gases and combat climate change. But the defendants pursued that mission through dishonorable means: the misappropriation of the plaintiff's combination trade secret. Through years of labor, the plaintiff developed a process to recycle food waste into a nutrient-rich byproduct that can be used to make environmentally-friendly fertilizer and animal feed. With permission granted by a license agreement, the defendants learned the minutiae of the plaintiff's entire process, and secured funding to build a large manufacturing facility. Having no further use for the plaintiff, the defendants ended the license agreement but continued to utilize the plaintiff's trade secret process.

This post-trial opinion finds in the plaintiff's favor on its statutory trade secret misappropriation claims. The defendants prevailed on the plaintiff's ancillary claims. The plaintiff is entitled to compensatory damages, and the defendants must return or destroy any records containing the plaintiff's information and are enjoined from using the plaintiff's process. But the plaintiff is not entitled to exemplary damages or fees.

I. BACKGROUND[1]

Plaintiff California Safe Soil, LLC ("CSS") claims Harold ("Hal") Kamine,

[1] Citations in the form "[name] Tr. at –" refer to trial testimony of the referenced witness, available at docket item ("D.I.") 464, D.I. 465, D.I. 466, D.I. 467, D.I. 468, D.I. 469, and

Matthew Kamine, Justin Kamine, and Barry Starkman (together the "Individual Defendants," and together with all other captioned defendants, "Defendants")[2] misappropriated CSS's combination trade secret. The corporate defendants are in bankruptcy, and the trustee elected not to defend their claims: on the plaintiff's motion, I granted a default judgment against them.[3] The claims against the Individual Defendants were tried at a seven-day trial; this opinion resolves those.

CSS bears the burden of proving its misappropriation claim, and other related claims, by a preponderance of the evidence.[4] "Proof by a preponderance of the evidence means proof that something is more likely than not. It means that certain

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D.I. 484. Citations in the form "PTOB" refer to the plaintiff's post-trial opening brief, available at D.I. 461. Citations in the form "PTAB" refer to the individual defendants' post-trial answering brief, available at D.I. 476. Citations in the form "PTRB" refer to the plaintiff's post-trial reply brief, available at D.I. 482. Citations in the form "PTO" refer to the parties' amended joint pre-trial stipulation, available at D.I. 431.

[2] As this action involves three members of the Kamine family, I will refer to them by their first names to avoid confusion. For parity, I will also refer to Barry Starkman by his first name. I intend no familiarity or disrespect.

[3] *See* D.I. 392; D.I. 375; D.I. 447; D.I. 470. The term "Corporate Defendants" refers to KDC Agribusiness LLC, KDC Agribusiness Fairless Hills LLC, KDC Agribusiness North Dakota, LLC, Do Good Foods LLC, Do Good Foods Managed Services LLC, Do Good Foods Facility Management LLC, and Do Good Chicken LLC.

[4] *See, e.g.*, *Beard Rsch., Inc. v. Kates*, 8 A.3d 573, 590 (Del. Ch. 2010) (finding "[t]he plaintiff bears the burden of proving both the existence and misappropriation of a trade secret"), *aff'd sub nom. ASDI, Inc. v. Beard Rsch., Inc.*, 11 A.3d 749 (Del. 2010); *Frye v. Est. of Raphaelson*, 2023 WL 5624717, at *8 (Del. Ch. Aug. 31, 2023) ("The parties have the burden of proving their [unjust enrichment] claims at trial by a preponderance of the evidence."); *Wayman Fire Prot., Inc. v. Premium Fire & Sec., LLC*, 2014 WL 897223, at *8–9 (Del. Ch. Mar. 5, 2014); *Vichi v. Koninklijke Philips Elecs., N.V.*, 85 A.3d 725, 787 (Del. Ch. 2014).

evidence, when compared to the evidence opposed to it, has the more convincing force and makes you believe that something is more likely true than not."[5] And "[i]t is well settled that the trier of fact is the sole judge of the credibility of witnesses and the weight to be accorded their testimony and is responsible for resolving conflicts in the evidence."[6]

The following facts were proven by the preponderance of the evidence. I gave little weight to testimony from Hal, Matthew, Barry, and their food process engineering expert, finding it not credible.[7] As this opinion concludes that CSS's

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[5] *Agilent Techs., Inc. v. Kirkland*, 2010 WL 610725, at *13 (Del. Ch. Feb. 18, 2010) (quoting *Del. Exp. Shuttle, Inc. v. Older*, 2002 WL 31458243, at *17 (Del. Ch. Oct. 23, 2002)).

[6] *Alabama By-Prods. Corp. v. Neal*, 588 A.2d 255, 259 (Del. 1991) (quoting *Shively v. Klein*, 551 A.2d 41, 45 (Del. 1988)); *Gatz Props., LLC v. Auriga Cap. Corp.*, 59 A.3d 1206, 1221 (Del. 2012) ("The law requires the trial judge to weigh the evidence, including the credibility of live witness testimony.").

[7] Hal, Matthew, and Barry were caught in lies both significant and immaterial. Hal misrepresented his salary, attempting to create the impression he had taken a much lower salary from KDC than he actually did. *Compare* Hal Tr. at 449–53 (testifying the Kamines at most made $750,000 a year at KDC), *with* Matthew Tr. at 699 (acknowledging that Hal made $1.37 million in the 12 months preceding KDC's bankruptcy). On direct, Matthew testified that he received no more than 35% of his annual salary at KDC, giving the impression that metric was true every year. *See* Matthew Tr. at 478. On cross, Matthew confessed he made $750,000 his last year with KDC—70% of his annual salary—and the 35% number was of the total across every year. *Id.* at 699–700. Hal implied he had relevant experience in the food recycling industry; in fact, he had merely worked one summer as a teenager at a meatpacking plant. *Compare* Hal Tr. at 263–66, *with id.* at 369. Documentary evidence undercuts Hal's credibility as well. *See* JX 585 (reflecting Hal drafted a letter to CSS requesting an amendment to its contract with KDC as if he was KDC's bond underwriter). As for Barry, he misrepresented that he had experience with enzymatic digestion and was quickly impeached. *See* Barry Tr. at 1173–74. Barry lied that KDC's food recycling process was built "from scratch." Barry Tr. at 1182–83, 1193–

process was a combination trade secret, this opinion describes certain aspects of that process in generalities, with citations to the unredacted, sealed trial transcript.

A. CSS's Process To Recycle Food Waste

Globally, one third of our food is wasted.[8] CSS's mission is to reduce that problem by recycling food waste into a nutrient-rich slurry that can be used to make fertilizer and animal feed, thereby diverting food waste from landfills and reducing the amount of greenhouse gases released into the atmosphere. Nonparty Mark LeJeune and his company Organic Recovery, LLC, originated this process in 2006. LeJeune began developing a way to collect food waste and recycle it into a nutrient-dense and environmentally friendly fertilizer.[9] CSS's founder Dan Morash invested in Organic Recovery in 2008 through his company Renewal Energy Development and Finance ("REDF").[10] In 2009, Organic Recovery licensed its intellectual property to REDF.[11] In 2011, after Organic Recovery began experiencing financial

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96. Matthew would not answer whether the KDC process was created from scratch, *see* Matthew Tr. at 655–56, and was impeached on other topics. *See id.* at 574–81. I give testimony from Hal, Matthew, and Barry the weight it deserves.

The Individual Defendants' expert, Dr. Timothy Bowser, fell apart on cross-examination. He was impeached over two dozen times. *See, e.g.*, Bowser Tr. at 1902–03, 1861–62, 1886–87, 1904, 1916, 1932–34, 1943–44; *see also* PTRB 2; *infra* n. 234. I give Dr. Bowser's testimony no weight.

[8] JX 982 at 15.

[9] Morash Tr. at 12–14; JX 982 at 16.

[10] Morash Tr. at 12–13. REDF was later merged into CSS. *Id.* at 14.

[11] PTO ¶ 59.

difficulties, Morash founded CSS and purchased Organic Recovery's technology.[12] LeJeune was hired as CSS's chief operating officer and remained in that position for a decade.[13]

B. CSS Seeks The Kamines' Capital And Expertise.

Shortly after CSS bought Organic Recovery's technology in 2011, CSS conducted a round of financing. Morash turned to defendant Hal Kamine, whom he had known since the early 1990s.[14] Morash sought out Hal because of his track record of investing in green technology, skill in bringing in investors, and experience in project management.[15] Without a confidentiality agreement in place, Morash emailed Hal materials about CSS's business, including details about its first-generation process built with Organic Recovery.[16] Morash informed Hal that if reception to the CSS Process was positive, the two could enter into an arrangement for Hal to scale up the process.[17]

In February 2012, Hal invested $200,000 in CSS.[18] His sons Justin and

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[12] Morash Tr. at 6, 16; PTO ¶¶ 1–3.

[13] Dr. Steve Zicari became CSS's COO after LeJeune left. PTO ¶ 3. He had previously served as CSS's chief technology officer and director of engineering.

[14] Morash Tr. at 29–30.

[15] *Id.* at 30–32.

[16] JX 11; *see* Morash Tr. at 19. Many of the attached materials were stamped confidential. *See* JX at 4–26.

[17] Hal Tr. at 276–77; Morash Tr. at 31.

[18] Morash Tr. at 30–31; Hal Tr. at 281.

Matthew each invested $100,000.[19] The Kamines were far from passive investors. During that critical growth stage, Hal and Justin helped CSS find additional investors.[20] Justin was appointed to CSS's board as the Kamines' representative, and was heavily involved in CSS's business.[21] Justin attended monthly board meetings, and from 2012 through 2015 he was charged with bringing in additional investors.[22] Justin pitched CSS to upwards of one hundred potential investors.[23] And Hal and Justin assisted CSS in pitching its business to various grocery store chains and other companies.[24] The Kamines made additional investments in CSS in the years that followed: Hal invested a total of approximately $2,000,000, and Justin invested an additional $100,000.[25]

With financing in hand, in 2012 CSS built a small pilot plant in West Sacramento, California, to develop its second generation of technology.[26] The pilot plant was designed to produce just enough product to develop CSS's technology and

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[19] Matthew Tr. at 479; Justin Tr. at 1293–94. At least one of Justin's investments came from his trust fund. Justin Tr. at 1316.

[20] JX 44; JX 41.

[21] JX 652; Morash Tr. at 31.

[22] Justin Tr. at 1297–99.

[23] *Id.*

[24] Hal Tr. at 284–85.

[25] *Id.* at 281–82; Justin Tr. at 1295–96.

[26] PTO ¶ 19; Morash Tr. at 16–19.

conduct research trials.[27] Building off its purchase of Organic Recovery's infant first-generation technology, CSS continued testing, developing, and scaling up its food recycling process.[28] The West Sacramento plant served as the starting ground for much of CSS's initial research and development. To build its technology, CSS hired food scientists and experienced engineers, and forged partnerships with research institutions like the University of California, Davis and the University of Georgia.[29] As Morash described CSS's work: "When you start with a new technology, you don't know what you don't know. So you learn it the hard way. You fix problems as you go."[30]

CSS's food recycling process (the "CSS Process"), which Morash described as "biomimicry," breaks food waste down to a slurry of amino acids, organic acids, and simple sugars.[31] At a high level, the CSS Process begins with CSS's grocery store partners. When produce and meat pass their shelf life, but are still fresh, CSS's grocery store partners collect and store their food waste in specially designed insulated containers.[32] The containers are sent to CSS on a strict timetable and

[27] Morash Tr. at 18–19.

[28] JX 982 at 17.

[29] Morash Tr. at 18, 24; *see* JX 37.

[30] Morash Tr. at 28.

[31] *Id.* at 9.

[32] *Id.*; JX 982 at 27; Zicari Tr. at 1434–36.

immediately processed or refrigerated for later processing.[33] At CSS's plant, the food waste is sorted so that the inputs of meat and produce can be calibrated to specific ratios.[34] After sorting and inspection, the waste is ground, blended, digested, and pasteurized, all using specific equipment, settings, and calibrations. The CSS Process utilizes enzymes to help break down food. Although enzymes are naturally present in animal and plant products, CSS typically adds commercial enzymes during digestion to accelerate the breakdown process.[35] After digestion, the product is reduced, separated, stored, and if not kept liquid, dried;[36] once stabilized, the product is used in fertilizer and animal feed.[37]

C. CSS And KDC Enter Into A License Agreement.

In 2015, CSS sought to expand the CSS Process to other markets outside California. Once again, CSS turned to the Individual Defendants, seeking Hal's experience in project development and in scaling up industrial processes.[38] The Kamines created KDC Agribusiness LLC ("KDC")[39] to enter into a licensing

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[33] Zicari Tr. at 1437–40.

[34] *Id*. at 1443–46, 1454–61; JX 982 at 33.

[35] Morash Tr. at 14.

[36] JX 982 at 18–20.

[37] CSS's products include a fertilizer called Harvest-to-Harvest and an animal feed called Hog Heaven.

[38] Morash Tr. at 30–33; Hal Tr. at 276–77, 289.

[39] KDC stands for Kamine Development Corp. *See* Morash Tr. at 33.

agreement with CSS.[40] KDC planned to scale up the CSS Process by building a much larger commercial facility in Pennsylvania. Hal was KDC's executive chairman, and Justin and Matthew were co-CEOs and directors.[41] Justin "led much of the business development and public partnership efforts for KDC,"[42] and Matthew "led the effort for the development, permitting, engineering, and construction" to scale up the CSS Process for KDC.[43] Barry, who has decades of engineering and manufacturing experience, was hired as KDC's chief manufacturing officer.[44] Barry led the operating and engineering team in charge of building up CSS's manufacturing process for KDC.[45]

On December 11, 2015, CSS and KDC entered into a license agreement (the "License Agreement").[46] The License Agreement provided KDC with an exclusive license to use CSS's intellectual property within the United States, excluding California, where CSS's existing plant was located, and parts of Arizona.[47]

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[40] PTO ¶¶ 4–6.

[41] *Id.* ¶¶ 8–10.

[42] *Id.* ¶ 9.

[43] *Id.* ¶ 10; *see also* JX 787 at 93.

[44] PTO ¶ 11. The Individual Defendants also held positions with other KDC-affiliated entities. *Id.* ¶¶ 8–11.

[45] *Id.* ¶ 11; Hal Tr. at 339.

[46] PTO ¶ 21; JX 69.

[47] JX 69 at 1, 3–5; *id.* § 2.1.

During negotiations the parties discussed CSS's broad definition of Intellectual Property, which included both patents and trade secrets.[48] The Kamines were directly involved in negotiating the License Agreement.[49] Although Barry was not involved in negotiations, he was aware of the License Agreement's contents.[50]

The License Agreement defined CSS's intellectual property as certain patents, copyrights, and "Trade Secrets," defined as:

> [T]rade secret and confidential information, including such rights in inventions (whether or not reduced to practice), know-how, customer lists, technical information, proprietary information, technologies, processes and formulae, software, data, plans, drawings and blue prints, whether tangible or intangible and whether stored, compiled or memorialized physically, electronically, photographically, or otherwise, including, but not limited to, as further described on Exhibit D . . . .[51]

Exhibit D's nonexhaustive list included the following categories of "Trade Secrets":

- Generic facility design and specifications;
- Equipment specifications and manufacturer information;
- Collection procedures and equipment information;
- Feedstock preparation methodology;
- Operating procedures and specifications;
- Workplace safety information;
- Representative Supermarket contract terms;
- Enzyme types, sources, and application methodologies;

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[48] *Id.* at 3; JX 64 at 1; Hal Tr. at 372–74.

[49] *See* Hal Tr. at 372–74; Matthew Tr. at 553; Justin Tr. at 1326 ("'Q. And the agreement was negotiated by you, your father – you and your father and your brother; correct?' 'A. Correct.'").

[50] Barry Tr. at 1188.

[51] JX 69 at 3, 5.

- Product stabilization inputs, sources and methodologies;
- Certified organic production and methodology;
- Quality Control procedures and methodology;
- Quality Assurance procedures and methodology;
- Research and Field Trials results; and
- Representative Employee Handbook.[52]

This list was meant to provide guidance to the parties about the types of confidential information CSS considered as trade secrets that CSS would be licensing to KDC.[53]

The License Agreement granted KDC the right to make, sell, offer or otherwise distribute "Licensed Products," defined as "any liquid fertilizer, animal feed or blend produced . . . through a Licensed Process by the operation of a Licensed Facility, but excluding additives."[54] "Licensed Process" was defined as "an aerobic, enzymatic digestion process covered by or using CSS's Intellectual Property."[55] And "Licensed Facility" was defined as "any facility that uses aerobic, enzymatic digestion . . . to produce one or more Licensed Products."[56] And the License Agreement provided KDC with a grant to use CSS's intellectual property to "permit, construct and finance Licensed Facilities."[57] The Individual Defendants understood

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[52] *Id*. at Ex. D.

[53] Morash Tr. at 34–35.

[54] JX 69 at 3.

[55] *Id.*

[56] *Id.*

[57] *Id*. § 2.1.

they were licensing CSS trade secrets in connection with its enzymatic process.[58]

In exchange for using CSS's intellectual property, KDC would pay CSS royalties and milestone payments.[59] KDC was required to "pay CSS royalties equal to twenty percent (20%) of Net Sales" by KDC, or any KDC affiliate, of any Licensed Products, on a running monthly basis.[60] In exchange for an exclusive license, KDC also agreed to pay CSS minimum royalties, credited against monthly running royalties, on a set schedule that stepped up each year. KDC owed $0 in 2016 and $100,000 in 2017; by 2020, it would owe $5,000,000 in minimum royalties. After 2020, the minimum royalty would be equal to the prior year's minimum plus 20% until 2030, when it would level.[61] If KDC stopped those minimum payments, CSS had the right to convert KDC's license to a nonexclusive license limited to existing Licensed Facilities, including those under construction, at the time of conversion.[62]

Along with royalties, KDC owed certain milestone payments. It agreed to "pay CSS a . . . milestone payment of $250,000 within 30 days after closing of

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[58] Hal Tr. at 372–77 ("'Q. Now you also admit, sir, that when you signed this license agreement, you understood that CSS was going to be licensing to you the use of its trade secrets; right?' 'A. Yes.'"); Matthew Tr. at 614–15; Justin Tr. at 1326–27; Barry Tr. at 1186–88; JX 580 at 10; JX 601 at 11.

[59] JX 69 §§ 3.2, 3.3.

[60] *Id.* § 3.3(a).

[61] *Id.* § 3.3(b).

[62] *Id.* § 3.3(c).

financing to fully fund construction of each 'Train' (a Train will be a single Licensed Product production line using approximately 5,000 tons/year of Residuals), for the first twelve (12) Trains . . . for total potential Milestone Payments of $3,000,000."[63] In connection with the License Agreement, KDC also made a $1,000,000 investment in CSS in exchange for equity membership interests.[64]

Lastly, KDC granted CSS a license to use certain intellectual property KDC controlled.[65] KDC was required to inform CSS of all "Improvements" KDC made to CSS's intellectual property.[66] "Improvements" meant "all modifications, adaptions, changes and improvements, whether developed or introduced by or on behalf of CSS or KDC in respect of any CSS Intellectual Property."[67] Other than that license, "all rights in the KDC Intellectual Property shall remain in KDC."[68]

D. CSS Continues To Build And Market Its Technology.

CSS continued to develop and expand its process. In December 2015, the same month it entered into the License Agreement, CSS closed financing to build a "demonstration scale" commercial plant. In 2016, CSS opened its larger operations

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[63] *Id.* § 3.2.

[64] *Id.* § 3.1; JX 71a.

[65] JX 69 § 2.3.

[66] *Id.*

[67] *Id.* at 2.

[68] *Id.* § 2.3.

in McClellan, California, where it would develop its third generation of technology.[69] The McClellan plant had one processing line and could process upwards of approximately 11,000 tons of material a year.[70] At the McClellan plant, CSS continued to improve its proprietary process through research and development in "manufacturing equipment, food chemistry, food safety, food nutrition, biological processing, logistics, contracts, and customer relations."[71]

Parts of the CSS Process changed through its early development, including centrifugation, wastewater treatment, and the specific input ratio of produce to meat.[72] CSS conducted its research and development with one overarching goal: to retain the nutritional value of food waste upon processing.[73] Between 2015 and 2022, CSS obtained six patents,[74] and as of trial, it had six more pending.[75] CSS created a unique food recycling process different from others in the industry.[76]

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[69] Morash Tr. at 19.

[70] JX 675 at 26; JX 759 at 27.

[71] JX 982 at 26.

[72] Morash Tr. at 89–90; JX 982 at 54.

[73] *Id.* at 21.

[74] U.S. Patent Nos. 10,214,458, 9,416,062, 9,643,895, 10,252,950, 9,388,088, and 11,447,428; *see* PTO ¶ 67.

[75] U.S. Patent Nos. 16/708,299, 16/102,669, 17/493,567, 17/891,933, 18/411,984, and 18/412,192; *see* PTO ¶ 67.

[76] *See* JX 982 at 20–21.

CSS expanded its business with additional grocery store partners, potential investors, strategic partners, supply partners, and customers. When CSS shared information with these third parties, CSS typically entered into NDAs, and for the most part, stamped its materials as confidential.[77] Absent an NDA, CSS would typically receive verbal confirmation to keep its information confidential.[78] CSS employees entered into confidentiality agreements, and kept paper and digital records secure.[79]

CSS marketed itself through online videos and news articles.[80] Some of its marketing included video tours of both its pilot factory and its McClellan plant.[81] CSS let potential grocery store partners and members of the public tour its facilities.[82] In 2016, when CSS opened its McClellan plant, CSS held a public ribbon cutting ceremony.[83] Attendees toured the plant and viewed CSS's equipment in place without signing an NDA.[84]

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[77] Morash Tr. at 24–25.

[78] *Id.* at 25.

[79] *Id.* at 24–25.

[80] *E.g.*, JX 1189; JX 1183; JX 1529.

[81] *E.g.*, JX 36; JX 1389; JX 1401.

[82] JX 1221 at 1–2; JX 84; *see also, e.g.*, JX 1203; JX 1218 at 1; JX 1452 at 1.

[83] JX 95.

[84] Keener Tr. at 1734–35.

E. The Individual Defendants Learn The CSS Process.

With the License Agreement granting use of the CSS Process, KDC started planning its scaled-up facility in Fairless Hills, Pennsylvania ("Fairless Hills"). KDC planned to build a facility 5.5x larger than McClellan.[85] None of the Individual Defendants had experience in food recycling before investing in CSS.[86] KDC hired DPS Group, Inc. ("DPS") to design its Fairless Hills Facility.[87] No one from DPS had prior experience in food recycling either.[88] As described in DPS's design proposal, Fairless Hills was meant to be "a near duplication of the California Safe Soil project except that the food waste processing capacity will be increased," but "the functional requirements, operation and complexity" would remain similar to CSS, albeit with some improvements.[89]

Before KDC and its contractors could build a plant to scale up the CSS Process, they had to learn the CSS Process from CSS. KDC and DPS visited CSS's facilities at Hal's direction,[90] and Hal told his team to learn everything about the

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[85] JX 759 at 27.

[86] Morash Tr. at 33; Matthew Tr. at 555; Barry Tr. at 1173; Justin Tr. at 1290. At trial, Hal implied he had relevant experience because he worked at a rendering plant when he was seventeen. Hal Tr. at 264–66, 369. Hal failed to convince me that childhood summer job offered relevant experience.

[87] PTO ¶ 17.

[88] Heil Tr. at 740–41.

[89] JX 121 at 13.

[90] Hal Tr. at 388.

CSS Process to use at Fairless Hills.[91] CSS had an "open-book philosophy" with KDC and DPS, and shared large amounts of information with them.[92] While licensing its information to KDC, CSS gave the Individual Defendants, DPS, and E3 access to its facilities and information.[93] Each of the Individual Defendants visited CSS's facilities on multiple occasions,[94] and DPS was given full access to the CSS Process and the McClellan plant.[95] Barry visited CSS "more than anybody."[96] He visited CSS's pilot plant in 2016, and visited the McClellan plant so frequently in the next three years that he "could not recall how many times" at trial.[97]

When representatives from KDC and DPS visited CSS, sometimes for several days at a time, they would discuss the CSS Process, observe operations, inspect the facility, and collect samples.[98] DPS sought to learn the "current process

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[91] *Id.* at 440–41.

[92] Zicari Tr. at 1413–14; JX 700 at 53–54 ("As background, the Kamine family office invested in a fertilizer based business in 2011 which utilizes Diverted Grocery Products and produces fertilizer near Sacramento, California. Many of the pieces of equipment that the KDC Ag Project anticipates using are similar to those found in the California facility."); JX 121 at 13.

[93] KDC's underwriters, Piper Sandler & Co., and potential investors, also visited CSS's facilities. PTO ¶¶ 40–41.

[94] *Id.* ¶¶ 27–35; Barry Tr. at 1180–82; Zicari Tr. at 1418–19; Hal Tr. at 283, 370; Matthew Tr. at 480; Morash Tr. at 39–40.

[95] Matthew Tr. at 571; Heil Tr. at 752–53.

[96] Morash Tr. at 41.

[97] Barry Tr. at 1180–82.

[98] Zicari Tr. at 1419–20; PTO ¶¶ 31–33.

steps/equipment" used by CSS in every step of its process, from receiving the food waste, to grinding, digestion, and separation.[99] These visits and walk-throughs with CSS were "invaluable learning tools" for DPS and KDC, and provided them with "the technical details" needed to "design [a] similar process for KDC."[100] As Barry wrote to CSS after a May 2017 visit, they "learned a ton" from visiting CSS's facilities.[101] DPS's notes from its first visit in 2017 reflect DPS learned about the CSS Process in great detail.[102] DPS documented detailed specifications of the CSS Process including the exact temperatures used, how many grams of enzymes to add to each batch, the centrifuge pump rate, yield rates, and equipment details.[103]

DPS intended to improve upon the CSS Process for Fairless Hills.[104] CSS shared with DPS the lessons CSS had learned the hard way, like reducing input of high fiber foods, artichoke skins, and bread because they jam the grinder.[105] Armed with this knowledge, DPS considered using stronger equipment that could withstand

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[99] JX 128 at 1.

[100] Heil Tr. at 753–54; *id.* at 754 ("[T]here's just no substitute for, you know, physically seeing something yourself.").

[101] JX 141 at 1.

[102] JX 133.

[103] *See generally id.*

[104] Heil Tr. at 766–67.

[105] *Id.* at 765–66; JX 133.

high-fiber and tougher foods.[106] KDC built on the information it learned from CSS in pursuit of improvements like automated weighing and scanning of bins upon receipt, and the use of a larger digester tank.[107]

In addition to visits, DPS and KDC asked CSS for information on its process.[108] CSS gave KDC engineering drawings and equipment specifications,[109] copies of their design documents, and piping and instrumentation diagrams.[110] Upon request, CSS also created samples and gave them to KDC.[111]

DPS considered all the information it learned from CSS to be strictly confidential.[112] DPS entered into a confidentiality agreement with KDC and understood all information learned in connection with the Fairless Hills project, including information from CSS, was confidential.[113]

F. KDC Pulls Away From CSS.

As KDC scaled up the CSS Process, it performed additional research and

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[106] Heil Tr. at 764–66.

[107] JX 133 at 4, 6; *see also* JX 626 (listing KDC improvements to "base CSS process" as of October 2019).

[108] JX 141 at 2.

[109] PTO ¶¶ 29–30, 36–37.

[110] Heil Tr. at 791.

[111] Zicari Tr. at 1421–22.

[112] Heil Tr. at 1002–03.

[113] *Id.* at 743.

development on its food recycling process. As of 2019, some of KDC's "[i]mprovements to base CSS process" included redesigning bins that carry the food waste, automating cleaning and sanitizing the bins, replacing the ribbon blenders, changes to the formulation, and modifying the drying method.[114] Among other modifications, KDC aimed to modify the grinders used, its plumbing systems, and food inspection technology.[115] KDC also grew its business and entered into arrangements with grocery stores and food company partners.[116]

By late 2017, KDC started moving away from CSS's focus on fertilizer created with added enzymes.[117] In 2018, it began to explore a process that would not require adding enzymes, while retaining the flexibility to add them.[118] Because of KDC's focus on a nonenzymatic process, other elements of its process needed to change, such as the size of the pumps used for the more viscous nonenzymatic product.[119] Hal first informed Morash about KDC's plan to explore a nonenzymatic process in the summer of 2018.[120]

KDC ventured from fertilizer into dry chicken feed, then pet food palatant. In

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[114] JX 626 at 2.

[115] *Id.*; Heil Tr. at 1000, 1005, 1011.

[116] Hal Tr. at 294–96, 306–07, 313–14.

[117] Heil Tr. at 747.

[118] Justin Tr. at 1302–03; Morash Tr. at 126–27; *see also* JX 754 at 46, 55.

[119] Heil Tr. at 748–49.

[120] Morash Tr. at 127.

connection with producing feed, KDC experimented with modifications to the CSS Process to make its feed more digestible for chickens, ultimately shifting to a new drying method.[121]

In 2018, CSS and KDC amended the License Agreement.[122] KDC's running royalty rate was reduced from 20% to 10% for its "Qualified First Customer," which was defined as "KDC's first long term off-take client for Licensed Product used for animal feed."[123] KDC agreed to notify CSS when it signed an agreement with its Qualified First Customer.[124]

In the fall of 2019, KDC sought further amendments to the License Agreement, including reduced royalty rates.[125] On September 17, KDC's bond underwriter sent CSS a letter explaining that in its opinion amendments were needed to the License Agreement to make an investment in Fairless Hills more attractive to risk adverse bond purchasers.[126] But trial uncovered this letter was written not by the underwriter, but by Hal, who "took the liberty to write th[e letter] as if [he] was [the underwriter]."[127] The parties negotiated for a few months, but could not

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[121] JX 364; JX 425.

[122] JX 361; PTO ¶ 23.

[123] JX 361 at 1.

[124] *Id.* at 3.

[125] JX 610 at 2–4.

[126] *Id.*

[127] JX 585 at 1.

agree.[128] Morash felt the amendments consisted only of "a series of unilateral give-ups" for CSS,[129] and KDC eventually "g[a]ve up with CSS" because it thought CSS's "demands ha[d] been outrageous" and they "couldn't negotiate anything reasonable."[130]

Having failed to secure a lower royalty, in December 2019, KDC informed CSS it would stop making its minimum royalty payments under the License Agreement,[131] and Justin resigned from CSS's board.[132] CSS responded by converting KDC's exclusive license to a nonexclusive license for any existing Licensed Facilities, but noted CSS was unaware of any existing Licensed Facilities.[133] CSS requested that KDC provide CSS with evidence of any Licensed Facility.[134] In January 2020, Hal responded that Fairless Hills was under construction and operating, and so it was a Licensed Facility.[135] He stated that "[w]ith the necessary equipment installed, KDC Ag has produced numerous

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[128] Morash Tr. at 53–55.

[129] *Id.* at 54.

[130] Hal Tr. at 422–23.

[131] PTO ¶ 24; Morash Tr. at 56.

[132] JX 652.

[133] PTO ¶¶ 25–26.

[134] JX 659 at 3; PTO ¶ 26.

[135] JX 663 at 2–4; *see also* Morash Tr. at 125–26.

variations of the Licensed Products."[136] CSS requested proof that Fairless Hills was under construction. As of that time, KDC had built and was operating a small laboratory at the Fairless Hills location.[137] But construction on the full-scale Fairless Hills facility did not start until June 2020.[138] KDC then changed its story. On May 26, the Individual Defendants told CSS that KDC had no Licensed Facilities because KDC "decided not to use a Licensed Process to create Licensed Products at any of its facilities."[139] KDC believed a nonenzymatic process did not fit the definition of a Licensed Process, so KDC would not be required to pay royalties if it utilized only a nonenzymatic process.[140]

As of May 2020, it is undisputed that KDC did not have any license, exclusive or nonexclusive, from CSS.

G. KDC Obtains Funding For Fairless Hills Based On The CSS Process.

Even as KDC shifted away from CSS, KDC sought funding for Fairless Hills with open reliance on the CSS Process and all it learned from CSS. KDC retained E3 Consulting Services, LLC ("E3") to draft an independent engineer's report in

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[136] JX 663 at 3.

[137] *Id.* at 2–3; Hal Tr. at 334–35.

[138] Matthew Tr. at 603–05; *see* JX 754 at 11 (describing in bond offering that "[b]ased on the currently assumed financial closing schedule, the construction portion of the Project is expected to commence no later than June 2020").

[139] JX 761 at 8.

[140] Hal Tr. at 323–24.

connection with obtaining financing to construct Fairless Hills (the "E3 Report").[141] E3 visited CSS in August 2019.[142] The E3 Report stated it would "[r]eview and summarize [the] operating history of existing facility in Sacramento" and to "[d]iscuss how any past performance issues will be addressed in the new facility."[143] Drafts explicitly acknowledged the Fairless Hills facility was based on the CSS Process.[144] A draft report from November 2019, just a few months before the License Agreement ended, described KDC as "operating a small-scale plant . . . in conjunction with" CSS.[145] The draft report stated that KDC's proposed "overall digestion and product finishing process ha[d] been successfully piloted at the CSS facility in Sacramento."[146]

The bond financing memorandum contained an Appendix A that detailed the plans for Fairless Hills. Matthew wrote the first draft of Appendix A, and Hal, Justin, and Barry all reviewed drafts or sent revisions.[147] A draft Appendix A Justin circulated to potential investors in January 2020 stated that KDC utilized CSS's

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[141] JX 759; PTO ¶¶ 18, 47.

[142] PTO ¶ 34.

[143] JX 646 at 10; JX 759 at 8.

[144] JX 646 at 10, 14; JX 982 at 84–92.

[145] JX 646 at 8.

[146] *Id.* at 14.

[147] JX 580; JX 581; JX 609; JX 616; Hal Tr. at 469–72.

"proprietary and patented technology."[148] That same month, Justin emailed videos of the CSS Process to the bond underwriter, explaining the videos showed the "collection process, the depackaging, the bins and the production process" to be used by KDC.[149] Justin explained that KDC's "production line is a ~1.5x scale up with some automatization / optimizations from what is shown in the video" and that people can see "the entire process from start to finish at the CA facility that we are implementing into Fairless Hills, PA."[150] In February 2020, Justin sent materials to other potential investors that explained KDC had "successfully patented and commercialized a process" over "the past 6 years."[151]

As financing looked more promising, Individual Defendants began wiping CSS from KDC's materials. In February 2020, Justin and Matthew decided to remove any references to CSS from KDC's website "prior to the bond[]" financing.[152] Justin largely "scrapped CSS" from KDC's website, leaving only some limited videos and pictures for "substance."[153] Around the same time, references to CSS were wiped from the E3 Report drafts, leaving only vague references to a

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[148] JX 681 at 4 (sending email to potential investor attaching Appendix A to bond offering that discusses the CSS Process).

[149] JX 664 at 1.

[150] *Id.*

[151] JX 700 at 2.

[152] JX 694 at 2.

[153] *Id.* at 1–2.

facility in California.[154]

On May 14, 2020, the Pennsylvania Economic Development Financing Authority issued a Limited Offering Memorandum for a total of $126,130,000 in bonds to finance Fairless Hills.[155] The E3 Report and Appendix A were attached. While CSS was not mentioned by name, the E3 Report still described and utilized information KDC learned from the CSS Process.[156] The final bond offering and E3 Report described KDC's food recycling process in a manner that is substantially similar to the CSS Process.[157] The "KDC Ag Process" described was similar to the CSS Process: food waste is collected, transported to KDC, sorted, ground, and digested.[158] Appendix A provided an overview of KDC's process, which stemmed from the CSS Process.[159]

Although KDC shifted to a nonenzymatic process, its bond offering touted the flexibility of its process to use additional enzymes, which stated,

> [t]here are potential applications where adding enzymatic digestion of the material to the Process can create additional benefits for the end products. These enzymatic digestion solutions, if ever implemented by the Project, are expected to provide KDC Ag the option and flexibility

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[154] *Compare* JX 675, *with* JX 695; *compare* JX 580, *with* JX 698 (reflecting that references to CSS were removed from Appendix A).

[155] PTO ¶ 43; JX 754.

[156] JX 754; JX 759.

[157] JX 754; JX 759 at 16–19; JX 982 at 89–92.

[158] JX 754 at 55–56.

[159] *Id.*

> to offer additional benefits to KDC Ag customers specifically for palatants.[160]

The bond offering also stated that

> [i]f, in the future, [KDC] determines that there are viable product solutions using enzymatic digestion . . . the enzymatic digestion step would occur after the material is ground into the heating and mixing vessel, with the enzymes being added into the vessel during that step of the process. The remainder of the KDC Ag Process would remain the same.[161]

By touting CSS's process, KDC obtained approximately $126,000,000 in bond financing to fund Fairless Hills.[162] The "bond closing occurred on or before September 22, 2020."[163]

H. KDC Treats The CSS Process As Confidential And Trade Secret.

In connection with financing and constructing the Fairless Hills facility, the Individual Defendants told third parties that the process contained trade secrets. In August 2019, Matthew sent a draft Appendix A to KDC's bond financing materials to the underwriter, copying Hal and Justin.[164] Under a heading titled "Technology Review and License Agreement," it stated, "[t]he CSS Process has multiple patents

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[160] *Id.* at 46.

[161] *Id.* at 56.

[162] PTO ¶ 43; *see* JX 754; JX 764 at 1.

[163] PTO ¶¶ 43–44.

[164] JX 601.

with significant IP and trade secrets associated with it."[165]

In 2017, 2018, and 2020, Matthew sent information to the Pennsylvania Department of Environmental Protection ("PADEP") concerning KDC's application for a permit in connection with Fairless Hills.[166] Matthew requested KDC's information be kept confidential, as information surrounding the Fairless Hills permit would otherwise be published.[167] Matthew described the process as confidential, and stamped the portions of the application describing the process with a footer stating, "Confidential Trade Secret, Commercial, or Financial Information."[168] In another email, Matthew attached documents "related to the confidential and patented KDC Ag process" and stated that "[d]ocuments submitted with this application have been designated CONFIDENTIAL TRADE SECRET, COMMERICAL OR FINANCIAL INFORMATION . . . . KDC Ag believes that each document contains commercial valuable, proprietary, non-public information, including related to its finances, processes and operations."[169] Another set of materials Matthew sent the PADEP also described KDC's process description as a

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[165] *Id.* at 11; *see also* JX 580 at 10.

[166] JX 218 (copying Hal and Barry); JX 402; JX 766.

[167] *See* JX 218 at 1; JX 402; JX 766 at 4; Matthew Tr. at 680–81.

[168]JX 402 at 144–59; *id.* at 1–3; Matthew Tr. at 680–82; JX 766 at 122.

[169] JX 218 at 1; *see* JX 218 at 9.

confidential trade secret.[170]

In a 2020 email to a Pennsylvania senator, Matthew noted KDC's request for construction be kept confidential because it included "some trade secrets related to how we handle our raw material and our overall process."[171] Matthew confirmed at trial that he wanted diagrams summarizing KDC's overall process to be kept confidential.[172]

I. KDC Builds Fairless Hills To Use A Process Derived From The CSS Process.

With funding in place, but without a license to use the CSS Process, KDC pressed forward with its work derived from the CSS Process: it did not pause and start from scratch.[173] Rather, KDC continued to tell third parties that it utilized the

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[170] JX 766 at 121–22.

[171] JX 757 at 1–2.

[172] Matthew Tr. at 680.

[173] JX 798 at 1 ("H2H stands for Harvest to Harvest which is the trade name of the fertilizer product that California Safe Soil produces and was the basis for our current process. We own 20% of that company but no longer are directly involved with them."); Heil Tr. at 753, 798, 835; Keener Tr. at 1684–85 ("My conclusion was that KDC did have an aerobic enzymatic digestion process and that facility was built based on the CSS process or derived from the CSS process."); JX 632 at 13 ("The overall digestion and product finishing process has been successfully piloted at the CSS facility in Sacramento. The proposed Fairless Hills Project will be a scale-up of the Sacramento facility using additional processing lines and substantially the same equipment and process conditions."). Despite the overwhelming evidence that KDC's process was derived from the CSS Process, at trial, Barry testified that KDC's process to make animal feed was built "from scratch." Barry Tr. at 1182–83, 1193. Matthew, when faced with similar questions, refused to answer and only after instructed by the Court, Matthew testified he did not know how to answer, despite his proven involvement with developing Fairless Hills. *See* Matthew Tr. at 655–

CSS Process. In August 2020, Justin told other potential investors that KDC used a "patented process" to recycle food waste.[174] Because KDC had no patents, this was a reference to the CSS Process.[175] In a November 2020 email, Barry informed a third party that the fertilizer "California Safe Soil produces . . . was the basis for [KDC's] current process."[176]

To continue research and development into a process that did not include additional enzymes, Hal and Barry decided to open a pilot facility.[177] In September 2020, KDC leased a facility in North Dakota for that purpose.[178] The North Dakota plant operated until 2021.

Fairless Hills was completed in late 2021, and began production within the following months.[179] There was no delay to create a new process from scratch before constructing the facility.[180] Fairless Hills was a large commercial-scale plant; while CSS's McClellan plant had the capacity to process approximately 11,000 tons of

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56, 798 ("'The first sentence says, "The general process has been adopted from the currently operating plant designed and operated by California Safe Soil." Is that a true statement?' 'Yes, it is.'").

[174] JX 789 at 3.

[175] Justin Tr. at 1362.

[176] JX 798 at 1.

[177] PTO ¶ 49; Hal Tr. at 345–46.

[178] PTO ¶ 49; Barry Tr. at 1139–41.

[179] Hal Tr. at 346–47.

[180] Heil Tr. at 1002 (testifying that Fairless Hills could not have been recreated from scratch in only a few months).

residuals a year, Fairless Hills could process 60,000 tons a year.[181] Fairless Hills was more automated, designed with the capacity to run 24/7, and had more production lines than CSS. As the E3 Report explained, Fairless Hills would "have three operating lines instead of one at California."[182]

KDC's process at Fairless Hills was derived from the CSS Process. According to DPS, while Fairless Hills contained some modifications to the CSS Process, Fairless Hills was still derived from that process.[183] At trial, the DPS lead confirmed "the process that was contemplated as of July 2020 to be used at the Fairless Hills facility still [was] . . . derived from the CSS [P]rocess and used at the CSS facility."[184] DPS also confirmed as of its last visit to Fairless Hills, in August 2021, the process used was "derived from the base process that was used at the CSS facility,"[185] and that he "not believe that [Fairless Hills] could be redesigned from scratch in three months."[186]

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[181] JX 759 at 6, 27; Morash Tr. at 20.

[182] JX 759 at 91; *see also* Matthew Tr. at 633; JX 610 at 3 (noting plans for three production lines at Fairless Hills).

[183] Heil Tr. at 752 ("'Q. Okay. So the intent was that the process that would be designed at the Fairless Hills facility would have changes to the CSS process, but would ultimately be derived from the CSS process?' 'A. Yes, that's – that's correct.'"); *see also id.* at 747–50, 1002; PTOB 30 (conceding at least "some superficial changes" were made "to make the addition of commercial enzymes as a digestion accelerant optional").

[184] Heil Tr. at 844.

[185] *Id.* at 845.

[186] *Id.* at 1002.

CSS's food recycling expert, Dr. Kevin Keener, visited Fairless Hills and reported the same. He observed "no substantial changes to the original process designed by DPS that was derived from the CSS Process."[187] He reported that Fairless Hills was derived from CSS and observed similarities to the CSS Process throughout KDC's process.[188] Dr. Keener reported observing collection totes of similar sizes and insulation, and a similar sorting procedure including the removal of certain produce that may clog the machines. He observed similar digestion, processing, centrifugation and drying processes.[189]

J. KDC Shifts To Poultry, Then Shuts Down.

KDC expanded its business further and changed its revenue model. In November 2020, KDC created Do Good Foods LLC and Do Good Chicken LLC (together, "DGC") to enter into the poultry business,[190] with Justin and Matthew as the face of DGC.[191] Eventually DGC began selling chicken feed and poultry raised on Fairless Hills chicken feed.[192] On August 2, 2021, DGC entered into a master co-pack agreement with Allen Harim Foods, LLC ("Allen Harim").[193] And by early

[187] JX 982 at 75; *see also id.* at 69–70.

[188] *See id.* at 73–82.

[189] *Id.* at 79–81.

[190] *See* PTO ¶¶ 52–55.

[191] *Id.* ¶¶ 9–10; Matthew Tr. at 535.

[192] PTO ¶¶ 56–57; JX 889; JX 1059; Hal Tr. at 347–49.

[193] JX 889; PTO ¶ 56.

2022, it began supplying Allen Harim chicken feed for free; Allen Harim would feed it to chickens, and then process, package, and sell the chickens back to DGC to sell to retailers.[194]

On October 28, 2022, DGC entered into a purchase and distribution agreement with Michael Foods, Inc.[195] Through that agreement, DGC agreed to sell Michael Foods Fairless Hills chicken feed for $3.40 per pound.[196]

The Corporate Defendants continued operations through 2022 and part of 2023 but struggled financially. KDC began to cease operations in September 2023, but as an attempt to stay in business DGC identified a third party, Bright Feeds, as an alternative chicken feed supplier for Allen Harim.[197] Bright Feeds supplied feed based on excess bakery meal that "was mostly bread and cookies and other products like that, crackers."[198]

K. CSS Initiates Litigation And KDC Enters Bankruptcy.

On June 8, 2021, CSS sued KDC and the Individual Defendants for trade secret misappropriation, breach of the License Agreement, and other wrongs.[199] The

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[194] PTO ¶ 57; Matthew Tr. at 534–35; Hal Tr. at 349.

[195] JX 1168.

[196] *Id.* § 3.2.

[197] Hal Tr. at 357–59; JX 1164.

[198] Hal Tr. at 358.

[199] *See* D.I. 1.

complaint was amended three times. The operative complaint, filed October 27, 2022, brings sixteen counts against the Individual Defendants and Corporate Defendants.[200] A subset of the Defendants brought counterclaims.[201] As required in trade secret misappropriation actions, CSS provided trade secret identification disclosures to Defendants on July 9, 2021, April 26, 2022, and September 30, 2022.[202]

On February 6, 2023, I entered a partial summary judgment against CSS on Count IV in full, Count XV in part as to KDC Agribusiness Fairless Hills and KDC Agribusiness North Dakota, and Count VI in part "to the extent Count VI seeks declaratory judgment that [KDC] breached the License Agreement and that [KDC] violated the implied covenant of good faith and fair dealing."[203] As to the Defendants' counterclaims, I granted summary judgment in CSS's favor on Counts III and IV.[204]

Trial was originally scheduled for June 20 through June 28, 2023, but was postponed when the Corporate Defendants filed for Chapter 11 bankruptcy four days

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[200] D.I. 223 [hereinafter "Am. Compl."].

[201] D.I. 224.

[202] JX 880; JX 935; JX 971.

[203] D.I. 308; D.I. 309.

[204] D.I. 307.

before trial.[205] This action was automatically stayed pursuant to 11 U.S.C. § 362. On August 18, upon CSS's motion, the bankruptcy court lifted the automatic stay and permitted CSS to continue prosecuting its claims in this Court.[206] In November 2023, the bankruptcy court converted the Corporate Defendants' bankruptcy to Chapter 7.[207] The Corporate Defendants are either in bankruptcy or dissolved; the Chapter 7 trustee declined to retain counsel to defend against CSS's claims.[208] They are being liquidated.

On April 22, 2024, I found the Corporate Defendants in default on all remaining counts,[209] but deferred entry of a final judgment until entry of a judgment regarding the Individual Defendants.[210] CSS's remaining claims against the Individual Defendants were tried on February 28 through March 7, 2024. Those claims include misappropriation of trade secrets under federal and state law (Counts VII, VIII, IX), tortious interference with the License Agreement (Count V),[211] fraud (Count XIV), civil conspiracy (Count XV), and unjust enrichment (Count XVI). The

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[205] PTO ¶ 68; JX 1115. KDC North Dakota was dissolved earlier.

[206] D.I. 357.

[207] PTO ¶ 69; JX 1127.

[208] D.I. 392; D.I. 396; D.I. 470.

[209] D.I. 470.

[210] *Id.*

[211] CSS no longer seeks relief for Count VI recognizing it is "effectively moot in light of the corporate Defendants' bankruptcy." PTOB 87 n.10.

Defendants abandoned their remaining counterclaims at trial.[212] Trial consisted of 1531 exhibits, 13 lay witnesses, and 4 expert witnesses. Post-trial argument was held on May 24, 2024.

This post-trial opinion concludes judgment should be entered against the Individual Defendants on Counts VII and VIII. Judgment is entered against the Corporate Defendants, and in favor of CSS, for Counts I–III and V–XVI.[213]

II. ANALYSIS

CSS asserts five theories against the Individual Defendants: (1) trade secret misappropriation under federal and state laws; (2) tortious interference with the performance of a contract; (3) conspiracy; (4) unjust enrichment; and (5) fraud. I find in favor of CSS on statutory trade secret misappropriation but enter judgment in favor of the Individual Defendants on tortious interference, conspiracy, unjust enrichment, fraud, and common law misappropriation.

A. Trade Secret Misappropriation

CSS brings claims for trade secret misappropriation related to the CSS Process against the Individual Defendants. It brings claims under federal law (Count VII),

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[212] *See generally* PTAB.

[213] D.I. 470. The remaining claims against the Corporate Defendants, but not the Individual Defendants, were for breach of a License Agreement (Counts I and II), declaratory relief (Count III), violations of the Lanham Act (Count X), and unfair competition and deceptive trade practices (Count XI, XII, XIII).

under Delaware and other state statutes (Count VIII), and under the common law (Count IX).[214] Judgment is entered in CSS's favor on Counts VII and VIII. Count IX is statutorily preempted, so judgment is entered for the Individual Defendants.

1. Choice Of Law

CSS brought trade secret misappropriation claims under statutes from Delaware (the forum state), California (where the Individual Defendants learned the CSS process), New Jersey (KDC's principal place of business), Pennsylvania (the site of the Fairless Hills facility), "and other relevant jurisdictions."[215] At first glance, this appears to present a gating choice-of-law conundrum. But choice of law does not need to be resolved. As CSS explained, "[a] choice of law analysis is unnecessary where, as here, the result would be the same under any applicable law."[216] No party has shown any substantive difference between those statutes, which is unlikely as each statute CSS cites is based on the Uniform Trade Secrets Act. For this opinion, I will proceed under the Delaware statute and law for Count VIII, and federal law for Count VII.

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214 Because of the overlap between the statutes, I will analyze the federal and state law claims together. *See Agrofresh Inc. v. Essentiv LLC*, 2020 WL 7024867, at *3 n.7 (D. Del. Nov. 30, 2020) (collecting cases).

215 Am. Compl. ¶ 262.

216 PTOB 46 n.8 (citing *Deuley v. DynCorp. Intern., Inc.*, 8 A.3d 1156, 1161 (Del. 2010)).

2. CSS's Process Is A Combination Trade Secret.[217]

To prove trade secret misappropriation under Delaware and federal law, CSS must show "(1) it possessed a trade secret, and (2) the defendant misappropriated the trade secret."[218] Federal law also requires that "the trade secret [be] related to a product or service used in, or intended for use in, interstate or foreign commerce."[219] Finally, another "element in each [trade secret] claim[] is the need to identify each trade secret asserted with particularity."[220]

At trial, CSS pressed that its entire process is a combination or compilation trade secret. I begin with whether CSS proved that to be so; then consider whether CSS identified that trade secret with adequate specificity; then address the remaining

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[217] During this litigation, CSS argued components of its process are also independently trade secrets. I take no position on whether any individual components are trade secrets because I find the entire process is a combination trade secret.

[218] *Better Holdco, Inc. v. Beeline Loans, Inc.*, 666 F. Supp. 3d 328, 384 (S.D.N.Y. 2023) (describing trade secret misappropriation claim under federal law (quoting *Democratic Nat'l Comm. v. Russian Fed.*, 392 F. Supp. 3d 410, 447 (S.D.N.Y. 2019))); *Agilent*, 2010 WL 610725, at *18 (explaining under Delaware law, "[a]fter proving trade secrecy, a plaintiff alleging trade secret misappropriation must demonstrate that the trade secret has been disclosed or used without authorization").

[219] 18 U.S.C. § 1836(b)(1). This element is readily found here.

[220] *Arconic Inc. v. Novelis Inc.*, 2020 WL 7247112, at *11 (W.D. Pa. Dec. 9, 2020); *Savor, Inc. v. FMR Corp.*, 2004 WL 1965869, at *6 (Del. Super. Ct. July 15, 2004) ("[Plaintiff] must describe its trade secret with a 'reasonable degree of precision and specificity . . . such that a reasonable [fact finder] could find that plaintiff established each statutory element of a trade secret.'" (quoting *IDX Sys. Corp. v. Epic Sys., Corp.*, 165 F.Supp.2d 812, 816–17 (W.D. Wisc. 2001))).

elements of trade secret misappropriation.

a. Existence Of A Trade Secret

The first element of trade secret misappropriation is the existence of a trade secret. That element has several sub-elements under the similar trade secret definitions in the federal Defend Trade Secrets Act ("Federal Act") and the Delaware Uniform Trade Secrets Act ("Delaware Act"). The Delaware Act defines a trade secret as "information, including a formula, pattern, compilation, program, device, method, technique or process" 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 its disclosure or use," and is "the subject of efforts that are reasonable under the circumstances to maintain its secrecy."[221] The Federal Act's definition is substantively the same.[222]

i. The CSS Process Derives Independent Economic Value From Not Being Known Or Readily Ascertainable And Is Unique.

[221] 6 *Del. C.* § 2001(4).

[222] 18 U.S.C. § 1839(3) (defining a trade secret as "financial, business, scientific, technical, economic, or engineering information" where "the owner thereof has taken reasonable measures to keep such information secret" and "the information derives independent economic value . . . from not being generally known to, and not being readily ascertainable through proper means by, another person who can obtain economic value from the disclosure or use of the information"); *see also Battaglia Mgmt., Inc. v. Abramowicz*, 2024 WL 3183063, at *3 (D. Del. June 26, 2024).

"For information to be classified as a trade secret it must 'derive [ ] 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.'"[223] "[I]t is 'well-established that if a method, technique or process in question can be found in the public domain or public literature, it is considered to be generally known and readily ascertainable and thus, cannot qualify as a trade secret.'"[224] But even if "some or all of the components of the trade secret are well-known [it] does not preclude protection for a secret combination, compilation, or integration of the individual elements."[225] Instead "it is the secrecy of the claimed trade secret as a whole that is determinative."[226] "Whether the trade secrets were generally known or readily ascertainable . . . is a question of fact."[227] In *Merck & Co., Inc. v. Smithkline Beecham Pharmaceuticals Co.*, this Court explained "[t]he mere fact that aspects of

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[223] *Beard Rsch.,* 8 A.3d at 594 (quoting 6 *Del. C.* § 2001(4)).

[224] *Nucar Consulting, Inc. v. Doyle*, 2005 WL 820706, at *6 (Del. Ch. Apr. 5, 2005), *aff'd*, 913 A.2d 569 (Del. 2006) (quoting *Miles*, 1994 WL 676761, at *11); *First Health Gp. Corp. v. Nat'l Prescription Adm'rs, Inc.*, 155 F. Supp. 2d 194, 225 (M.D. Pa. 2001) ("Trade secrets which are composed of a compilation or combination of elements must pass the same 'sufficiently secret' test as trade secrets composed of individual pieces of information.").

[225] Restatement (Third) of Unfair Competition § 39 cmt. f (Am. L. Inst. 1995).

[226] *Id.*

[227] *SmithKline Beecham Pharms. Co. v. Merck & Co.*, 766 A.2d 442, 448 (Del. 2000).

a trade secret process can be found in publications does not mean that the process is not a trade secret."[228] "[A] defendant that has had access to such a process may not evade misappropriation on the basis that particular information learned from its access could be found in a publication."[229] "The combination of steps into a process is a trade secret, even if all the component steps are known, so long as it is a 'unique process which is not known in the industry.'"[230]

The CSS Process was not generally known or readily ascertainable. CSS's expert provided a credible opinion that although some components of CSS's process are public, it cannot be fully replicated from public sources.[231] As explained in Dr. Keener's report, "neither the [CSS] patents nor any other public information . . . are sufficient to provide a 'roadmap' of how to assemble the numerous learnings that comprise the CSS Process into a viable business model and manufacturing process."[232] Dr. Keener testified the same at trial.[233] His opinion stands

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228 1999 WL 669354, at *16 (Del. Ch. Aug. 5, 1999), *aff'd*, 746 A.2d 277 (Del. 2000), *and aff'd*, 766 A.2d 442 (Del. 2000).

229 *Id.* at *18.

230 *Id.* at *16 (quoting *Salsbury Labs., Inc. v. Merieux Labs., Inc.*, 735 F.Supp. 1555, 1569 (M.D. Ga. 1989), *aff'd*, 908 F.2d 706 (11th Cir.1990)).

231 JX 982 at 26, 73–78; Keener Tr. at 1728.

232 *Id*. at 26; *see Tewari De-Ox Sys., Inc. v. Mountain States/Rosen, L.L.C.*, 637 F.3d 604, 613 (5th Cir. 2011) ("[Courts] have specifically rejected the contention that a combination of disclosed technologies cannot itself constitute a trade secret.").

233 Keener Tr. at 1676–78.

unrebutted.[234]

"An alleged trade secret derives actual or potential independent economic value if a competitor cannot produce a comparable product without a similar expenditure of time and money."[235] KDC agreed to pay a lot of money for access to the CSS Process so that it could scale it up and expand its geographic reach. The Individual Defendants offered no explanation as to why KDC agreed to those terms if its principals, or anyone else, could have replicated or recreated that process from public sources. KDC also acknowledged the economic value in CSS's Process to third parties.[236]

The public tours of CSS's facilities, videos, and other materials showing its

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[234] The Individual Defendants' expert, Dr. Bowser, opined the CSS Process is generally known and readily ascertainable through public sources, including videos, tours of the CSS facility, patent applications, and other disclosures to third parties. The Individual Defendants assert this supposed publication precludes the CSS Process from being a trade secret. Despite the Individual Defendants' effort to reframe this argument, they are effectively asserting a publication defense, which has been soundly rejected in Delaware. *Merck*, 1999 WL 669354, at *18. Even if their theory was cognizable, I would give Dr. Bowser's opinion no weight. Dr. Bowser was impeached repeatedly and relentlessly with his deposition, in a spectacle that eviscerated his opinion and his credibility. *See, e.g.*, Bowser Tr. at 1861–64, 1886–87, 1892–93, 1896–97, 1902–04, 1916. His cross-examination revealed a deep lack of credibility. Dr. Bowser did not interview anyone from DPS, did not consider their detailed notes in forming his opinion, nor did he understand the extent of what DPS did. *Id.* at 1867–70, 1893. Dr. Bowser did not know who E3 was or that they prepared an independent engineer's report, *see id*. at 1870–71, and he did not seem to understand what a combination trade secret is. *Id.* at 1875–77. I give his opinion no weight.

[235] *Miles Inc. v. Cookson Am., Inc.*, 1994 WL 676761, at *10 (Del. Ch. Nov. 15, 1994).

[236] *E.g.*, JX 580; JX 218; JX 402; JX 766.

process did not destroy the CSS Process's economic value. A tour or other overview of CSS's facilities would not disclose all components of the CSS Process. For example, a tour would not allow an individual to determine exact equipment specifications, temperatures, quantities, ratios, or other more detailed technical information.[237] So although certain components of the CSS Process may not be "sufficiently secret to be trade secrets," the CSS Process as a whole is "sufficiently secret such that [CSS] derived economic value from its not being generally known."[238]

The Individual Defendants assert certain portions of the CSS Process were disclosed in separate litigation. In 2012, an REDF affiliate sued Rainbow Disposal Co. for breach of contract, unjust enrichment, and unfair competition.[239] The Individual Defendants have not demonstrated the court documents are public.[240] And the claims concern confidential and proprietary information, but not trade secrets.

And the CSS Process is unique in its combination, as credibly reported by Dr.

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[237] JX 982 at 60–61.

[238] *First Health.*, 155 F. Supp. 2d at 225.

[239] *See REDF-Organic Recovery v. Rainbow Disposal Co.*, No. 654492/2012 (N.Y. Cty. Sup. Ct.).

[240] *See* JX 312; JX 1239.

Keener.[241] The Individual Defendants contend the CSS Process is not unique and that "numerous third parties, including prior to CSS, used food waste/residuals to create useful products, including fertilizer and animal feed, further disproving any so-called newness or uniqueness."[242] But the CSS Process is unique in its ability to maintain the nutritional value of food waste and was designed to achieve that outcome.[243] The CSS Process was developed over more than fifteen years with that goal in mind. "The extensive work by [CSS] and its predecessors in developing a successful [process] . . . demonstrates the . . . independent economic value" of the CSS Process.[244]

ii. CSS Has Taken Reasonable Efforts To Maintain The Secrecy Of Its Process.[245]

CSS must also prove it used reasonable efforts to maintain secrecy.[246] To be a trade secret, an owner must have "taken reasonable measures to keep such

[241] JX at 982.

[242] PTAB 68.

[243] JX 982 at 20–24, 16; *see* JX 580 at 10 ("The overall thesis of the technology is that there is a higher and better use for the leftover foods than current disposal capabilities (i.e. landfill, anaerobic digesters, composting) as all those technology's waste the core nutrients of the food. The CSS technology upcycles and converts those nutrients to high value finished products.").

[244] *Agilent*, 2010 WL 610725, at *20; *Merck*, 1999 WL 669354, at *16–17.

[245] "[W]hether [Plaintiff] took reasonable precautions to protect their secrecy is a question of fact." *SmithKline Beecham*, 766 A.2d at 448; *see also Savor*, 2004 WL 1965869, at *7.

[246] 18 U.S.C. § 1839(3)(A); 6 *Del. C.* § 2001(4)(b).

information secret."[247] But "[a]lthough the law requires secrecy, it need not be absolute."[248] "[Confidentiality] agreements are not necessary in every case . . . if the other precautions taken by the plaintiff are sufficient."[249] "Rather, a duty of confidentiality may be implied from the circumstances surrounding the parties' relationship."[250] "And the duty of confidentiality is not destroyed merely because the holder 'disclosed its trade secrets to a limited number of outsiders for a particular purpose . . . .'"[251] Limited disclosure in furtherance of investment does not preclude a finding of secrecy.[252] Indeed, "[a]n owner is not required to maintain absolute secrecy to retain trade secret protection."[253] Delaware courts have "found that reasonable efforts [are] taken to preserve confidentiality when . . . a company [i]s in an industry where custom dictated that certain information be kept confidential."[254]

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[247] 18 U.S.C. § 1839(3)(A).

[248] *Metallurgical Indus. Inc. v. Fourtek, Inc.*, 790 F.2d 1195, 1200 (5th Cir. 1986).

[249] *Swift Bros. v. Swift & Sons, Inc.*, 921 F. Supp. 267, 277 (E.D. Pa. 1995); *EXL Labs., LLC v. Egolf*, 2010 WL 5000835, at *6 (E.D. Pa. Dec. 7, 2010).

[250] *Savor*, 2004 WL 1965869, at *7 (quoting *Nilssen v. Motorola, Inc.*, 963 F. Supp. 664, 679 (N.D. Ill. 1997)).

[251] *Id.* (quoting *Rockwell Graphic Sys., Inc. v. DEV Indus., Inc.*, 925 F.2d 174, 177 (7th Cir. 1991)).

[252] *Metallurgical Indus.*, 790 F.2d at 1200.

[253] *Catalyst & Chem. Servs., Inc. v. Glob. Ground Support*, 350 F. Supp. 2d 1, 10 (D.D.C. 2004), *aff'd*, 173 F. App'x 825 (Fed. Cir. 2006).

[254] *Wayman*, 2014 WL 897223, at *15; *Beard Rsch.*, 8 A.3d at 596 (finding that reasonable efforts were made because "throughout the industry it was generally considered inappropriate to use [secret recipes] anywhere outside of the lab in which they were created").

Employee confidentiality agreements and protecting documents from being generally accessible are reasonable efforts to protect secrecy.[255]

CSS met its burden to demonstrate reasonable efforts to maintain the secrecy of the CSS Process. Its employees signed NDAs that generally extended past their time of employment, and its information was kept securely.[256] CSS's physical records were kept locked, and its digital data was password-protected.[257] CSS entered into approximately two hundred NDAs with third parties before distributing information on its combination trade secret.[258] Overall, it was uncommon for CSS to provide information without an NDA.[259] And when there was not an NDA in place, CSS typically relied on verbal confirmation to keep its information confidential,[260] and only provided information to corporations that Morash felt were

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[255] *Great Am. Opportunities, Inc. v. Cherrydale Fundraising*, 2010 WL 338219, at *17 (Del. Ch. Jan. 29, 2010); *c.f. Triton Const. Co. v. E. Shore Elec. Servs., Inc.*, 2009 WL 1387115, at *22 (Del. Ch. May 18, 2009), *aff'd*, 988 A.2d 938 (Del. 2010) ("Triton also has failed to show that it made reasonable efforts under the circumstances to maintain the secrecy of its alleged trade secrets. Triton did not mark any documents handled by Kirk or Bauguess as secret or confidential, and never conducted any training or provided any instructions to its employees on information that the Company considered secret or confidential.").

[256] Morash Tr. at 24.

[257] *Id.*

[258] *Id.* at 24, 251.

[259] *Id.* at 25–26.

[260] *Id*. at 25; *see 2999TC Acqs., LLC v. 2999 Turtle Creek, LLC*, 2021 WL 3145986, at *3 (N.D. Tex. July 6, 2021) ("And '[a]n express contractual provision is not required to establish a duty of confidentiality,' though 'the absence of an agreement restricting

trustworthy and practiced good corporate governance.[261] It was CSS's practice to stamp information as confidential.[262] CSS's infrequent disclosures without NDAs were in furtherance of economic investment, and the record showed certain potential investors would not sign NDAs.[263]

The Individual Defendants point to emails in which CSS shared information without NDAs.[264] CSS sent materials to venture capital firms or other potential investors without NDAs.[265] Some of the disclosures cited by the Individual Defendants were from 2011, early on in CSS's development, before it even opened its pilot operations.[266] For others, Morash credibly testified that NDAs were indeed in place.[267] In other instances where the Individual Defendants say information was sent without an NDA, the record shows NDAs were in place or put in place after

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disclosure of information is a factor the court may consider.'" (quoting *EEMSO, Inc. v. Compex Techs., Inc.*, 2006 WL 2583174, at *7 (N.D. Tex. Aug. 31, 2006))).

[261] Morash Tr. at 25–26.

[262] *Id.* at 25; *e.g.*, JX 1453; JX 1366; JX 1270; JX 726; JX 1272; JX 1411.

[263] Morash Tr. at 26 ("The venture capital companies are particularly sticky about this because they look at so many different ideas that they don't want to expose themselves by signing too many confidentialities too early in the process to potential misunderstandings and disputes. So, basically, we rely, at least in the initial stages, on their professional discretion."); JX 1430 at 3 ("Good Growth VC cannot sign an NDA. This isn't unusual. Many VCs as a policy cannot sign an NDA due to the deal volume they are exposed to.").

[264] PTAB 70–73.

[265] *E.g.*, JX 1272; JX 1280; JX 1260; JX 1415; JX 1242; *see also* Morash Tr. at 26.

[266] *E.g.*, JX 11; JX 1213.

[267] JX 726; Morash Tr. at 202, 216; JX 1477.

sending introductory materials.[268] And almost all of the shared materials were stamped confidential.[269] Much of the materials flagged by the Independent Defendants contained merely introductory overviews or high-level information.[270] While some of the information sent without an NDA includes some details on the CSS Process, they do not disclose the minutiae of the entire combination, like what was shared with KDC.[271]

And Morash credibly testified at trial that CSS struggled with getting certain investors to sign confidentiality agreements.[272] This is supported by the record. One venture capital firm told CSS that it could not sign an NDA, explaining that refusal "[was]n't unusual" and that "[m]any VCs as a policy cannot sign an NDA due to the deal volume they are exposed to."[273] CSS needed to pitch its business to potential

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[268] CSS did enter into confidential agreements with multiple potential investors flagged by the Individual Defendants. *See* PTAB 71–73; PTRB 20; *compare* JX 1279, *with* JX 1037 at 314; *compare* 1464, *with* JX 1307 at 503; *compare* JX 726, *with* JX 1037 at 168, 515; *compare* JX 1272, *with* JX 1037 at 463.

[269] *E.g.*, JX 1453; JX 1366; JX 1270; JX 726; JX 1272; JX 1411; JX 1242.

[270] JX 1464 ("Here is an introductory slide deck, so you can get an idea of our business."); JX 1279 ("I've separately attached Exhibit C, which is the executive summary and introductory presentation, which you can send without an NDA."); JX 1453 ("I've attached a slide deck summarizing our aerobic, enzymatic digestion technology . . . .").

[271] Morash Tr. at 27. For one commonly sent document, titled CSS's "Process and Plant Functional Description," Zicari testified it does not disclose the entire CSS Process such that someone could replicate it. Zicari Tr. at 1432–34; *see, e.g.*, JX 1260 at 212, JX 1480, JX 1482.

[272] Morash Tr. at 26.

[273] JX 1430 at 3.

investors and customers. Because these limited "disclosure[s] to others [were] made to further [CSS's] economic interests, [they] . . . do[] not destroy the requisite secrecy."[274] "To hold otherwise would greatly limit the holder's ability to profit from his secret."[275]

The Individual Defendants also assert that because some of CSS's NDAs were time-limited, CSS did not reasonably protect the CSS Process. These instances largely amount to situations where only portions of the CSS Process were disclosed.[276] And even though time limited, the NDAs required destruction of CSS's information upon written request.[277] Many of these disclosures were to potential investors in furtherance of CSS's economic interests.[278]

Finally, the Individual Defendants point out CSS's lease allows its landlord and the United States Air Force to enter its premises without permission under certain conditions.[279] Access by the party who owns the property, and the United States military, does not preclude a finding that CSS used reasonable efforts to

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[274] *Metallurgical Indus.*, 790 F.2d at 1200.

[275] *Id.*

[276] *E.g.*, JX 1465 (disclosing financials and "introductory" materials, and plant re-design overview); JX 1471 (disclosing "Business Plan Outline" and plant re-design overview); JX 1466 (disclosing "Business Plan Outline"); JX 1479; JX 1480; JX 1482.

[277] *E.g.*, JX 1484 § 4; JX 1471 at 6 § 7; JX 1037 at 450 § 2; JX 1472 at 3 § 3; JX 1479 at 107 § 7; JX 1037 at 272 § 3; JX 1037 at 242 § 7; JX 1037 at 470 § 7.

[278] *E.g.*, JX 1470; JX 1471; JX 1479; JX 1478; JX 1484; JX 1465.

[279] *See* JX 1276.

protect its combination trade secret. I conclude these instances do not undermine CSS's efforts to maintain secrecy or preclude the conclusion that it took such efforts. CSS was not perfect with protecting parts of the CSS Process. But the standard for protection is reasonableness, not perfection. The CSS Process as a whole was reasonably protected.[280]

b. CSS Has Shown Specificity.

"A compilation trade secret must be identified with a reasonable degree of precision and great specificity."[281] "The existence of a trade secret, including whether it was adequately identified, is 'a fact-specific question to be decided on a case-by-case basis.'"[282] A trade secret misappropriation plaintiff must identify the trade secret at two junctures: at the time of disclosure to the defendant, and during litigation against the defendant.[283] Contrary to the Individual Defendants' argument, CSS did both.

"Specificity is required at the moment of divulging so that the party to whom the secret is revealed understands the contours of the secret information and does not

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[280] For the same reasons, I am also unconvinced these limited disclosures ruin the economic value of the CSS Process.

[281] *Incyte Corp. v. Flexus Biosciences, Inc.*, 2018 WL 6333613, at *2 (Del. Super. Ct. Sept. 28, 2018).

[282] *Syntel Sterling Best Shores Mauritius Ltd. v. The TriZetto Gp., Inc.*, 68 F.4th 792, 801 (2d Cir. 2023) (quoting *Oakwood Labs. LLC v. Thanoo*, 999 F.3d 892, 906 (3d Cir. 2021)).

[283] *Arconic*, 2020 WL 7247112, at *11.

inadvertently or purposefully transgress its boundaries."[284] CSS gave the Individual Defendants notice that the CSS Process comprised trade secrets via the License Agreement. Through the License Agreement, KDC agreed to pay CSS to access and use the CSS Process, comprising both patented and trade secret information. Hal signed the License Agreement and acknowledged it defined broad trade secrets.[285] The License Agreement's definition of "Trade Secrets" contemplated CSS's "technologies, processes and formulae."[286] Exhibit D included a nonexhaustive list of purported trade secrets including CSS's facility design, equipment specifications, collection procedures, operating procedures, certificated organic production methodology, and research and field trial results.[287]

So informed that the CSS Process contained trade secrets in those areas, and agreeing to pay for those trade secrets, the Individual Defendants proceeded to learn and use the CSS Process. Each Individual Defendant visited CSS's facilities to learn the CSS Process, and KDC and DPS requested additional information from CSS about its process. With the understanding that it was licensing trade secrets, KDC

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[284] *Id.* (quoting *Big Vision Priv. Ltd. v. E.I. DuPont De Nemours & Co.*, 1 F. Supp. 3d 224, 258 (S.D.N.Y. 2014), *aff'd*, 610 F. App'x 69 (2d Cir. 2015)).

[285] JX 69 at 3, 33; Hal Tr. at 373–74.

[286] JX 69 at 3. The Individual Defendants argue trade secrets are defined by law, not by contract. That is true. I look to the License Agreement as evidence of CSS putting the Individual Defendants on notice they were going to access CSS trade secrets, not as evidence that the CSS Process actually was a trade secret.

[287] JX 69 at 33.

learned the contours of the CSS Process, from receipt of its food waste, through digestion, separation, and drying, as they must have to accomplish the goal of the License Agreement: to scale up and expand the CSS Process across the United States. DPS understood the information it obtained at those visits was confidential, supporting the inference the Individual Defendants did as well.[288]

Thereafter, the Individual Defendants repeatedly told third parties the CSS Process, or KDC's process derived from it, was a trade secret, including in seeking financing and permits for the Fairless Hills facility.[289] Matthew told a state senator there were "trade secrets related to . . . our overall process,"[290] and sent materials to state regulators referring to KDC's process description as a confidential trade secret.[291] The Individual Defendants' understanding that the CSS Process was a trade secret is evidenced by their own statements. The trial record demonstrates the

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[288] Heil Tr. at 1002–03.

[289] *E.g.*, JX 402 at 5 (describing process flow as "proprietary and internal documents that provide step by step operations and provide much more detail associated with our trade secrets, operational knowledge, and therefore should be kept all Confidential and would have material impact to KDC Ag's business if disclosed"); *id.* at 144 (labeling process description as confidential trade secret); JX 218 at 1 (sending its "process description" labeled as a confidential trade secret); Matthew Tr. at 678–80.

[290] JX 757 at 1–2.

[291] JX 766 at 121–22; JX 218.

Individual Defendants understood "the contours of the secret information."[292]

CSS also adequately identified its trade secret in litigation. "[S]pecificity is required before the court so that the defendant can defend himself adequately against claims of trade secret misappropriation, and can divine the line between secret and nonsecret information, and so that a [fact finder] can render a verdict based on a discriminating analysis of the evidence of disclosure and misappropriation."[293] "In cases involving trade secrets, the plaintiff is required to disclose, before obtaining discovery of confidential proprietary information of its adversary, the trade secrets it claims were misappropriated."[294] "The plaintiff must disclose the allegedly misappropriated trade secrets with reasonable particularity."[295] CSS did not list a combination trade secret in its first complaint, filed June 8, 2021.[296] In its preliminary identification of trade secrets the next month, CSS identified its "overall business model" as a combination trade secret.[297] Two months after that, CSS

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[292] *See* Hal Tr. at 372–74; Matthew Tr. at 553; Justin Tr. at 1326 ("'Q. And the agreement was negotiated by you, your father – you and your father and your brother; correct?' 'A. Correct.'"); Barry Tr. at 1188; JX 69 at 3, 33; *id.* at Ex. D; JX 402; Matthew Tr. at 678–80; JX 218.

[293] *Arconic*, 2020 WL 7247112, at *11.

[294] *SmithKline Beecham*, 766 A.2d at 447.

[295] *Id.*

[296] D.I. 1.

[297] JX 880 at 2–4.

amended its complaint and listed a combination trade secret.[298] CSS pled its entire "business model connects its specific Trade Secrets with other Confidential Information, with information reflected in CSS's patents and patent applications, and with other information in order to form an overall business model that is together unique, secret, and valuable such that the sum of all these parts is a Trade Secret."[299] A year later, CSS amended its disclosure[300] and complaint to state that its entire "business model and manufacturing process" is a combination trade secret.[301] And before expert discovery closed, CSS's expert described the CSS Process and opined it is a combination trade secret.[302] Dr. Keener's report explained each component of the CSS Process and how the components work together to create a combination trade secret.[303]

Delaware law is clear that a plaintiff litigating misappropriation of a combination trade secret can satisfy the specificity requirement by identifying the combination trade secret, then hone in on components the defendant is using as proof

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298 D.I. 72 ¶¶ 130–39.

299 *Id.* ¶ 132.

300 JX 971 at 3–4; *see also* JX 935 (amending disclosure in April 2022).

301 Am. Compl. ¶ 146.

302 JX 982; D.I. 226.

303 JX 982.

of misappropriation.[304] That is what CSS did. The Individual Defendants' cited authorities do not disturb that conclusion.[305] CSS gave the Individual Defendants and this Court notice about its combination trade secret. CSS has satisfied the specificity requirement.[306]

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[304] *SmithKline Beecham*, 766 A.2d at 448 ("In the present case, Merck's initial disclosure described its entire process as a protectable trade secret. Then, following discovery, it narrowed that broad trade secret claim to fit the particular aspects of the production process Merck claimed were misappropriated by SmithKline. SmithKline was initially put on notice through Merck's broad disclosure but was subsequently informed well in advance of trial of the specific aspects of the trade secret Merck believed SmithKline misappropriated. It cannot be said SmithKline was prejudiced in any way.").

[305] PTAB 60–65. In *Next Communications, Inc. v. Viber Media, Inc.*, the appellate court held the plaintiff did not identify its trade secret with enough specificity because the plaintiff changed its trade secrets to different components of its technology throughout the litigation, including on appeal. 758 F. App'x 46, 49 (2d Cir. 2018). In *Arconic Inc. v. Novelis Inc.*, the plaintiff "never explained where it disclosed to [defendant] a full combination or put [it] on notice that [plaintiff] claimed any particular combination as its trade secret." 2020 WL 7247112, at *15. "In sum, [plaintiff] did not put [defendant] or the court on notice of what its trade secrets were." *Id.*

[306] Defendants moved to strike CSS's introduction of two trade secrets: (1) the input ratio of meat and produce and (2) the compositional analysis of processed food waste exiting the centrifuge. D.I. 321 at Mot. 2, 5. That motion is denied. Defendants argued CSS impermissibly identified these alleged trade secrets for the first time after the close of discovery to Defendants' prejudice. "The purpose of [the trade secret disclosure] requirement is to set the outer boundaries of discovery in order to avoid the needless exposure of a [party's] trade secrets." *Magnox v. Turner*, 1991 WL 182450, at *1 (Del. Ch. Sept. 10, 1991). It is "[o]nly after a plaintiff has identified the trade secret that has allegedly been misappropriated can the relevance, and therefore the scope, of discovery be determined." *Id.* Through its various trade secret disclosures, *e.g.*, JX 880; JX 971, CSS set the outer bounds of discovery: its entire food waste recycling process. CSS's "disclosure described its entire process as a protectable trade secret" and "following discovery, it narrowed that broad trade secret claim to fit the particular aspects of the production process [Plaintiff] claimed were misappropriated." *SmithKline Beecham*, 766 A.2d at 448. And the Individual Defendants can hardly cry prejudice. Because of the Corporate Defendants' bankruptcy proceedings, trial was pushed nearly a year; the

c. Misappropriation

CSS must prove misappropriation by a preponderance of the evidence. "Unauthorized use of trade secret information and unauthorized disclosure of trade secret information constitutes misappropriation."[307] CSS has handily met its burden of showing both the use of the trade secret, and the fact that use was unauthorized.

Defendants knew they were licensing trade secrets through the License Agreement, and referred to the CSS Process, or the KDC process, as a trade secret. As the Individual Defendants wrote repeatedly, the KDC process was derived from and based on the CSS Process, albeit with improvements and modifications.[308] Fairless Hills was designed to scale up the CSS Process; CSS and KDC intended it to be built upon information the Individual Defendants and DPS learned from CSS. Fairless Hills was financed through a bond offering in which the Individual Defendants described a fleshed-out process overtly based on the CSS Process.[309] And Fairless Hills was built using the CSS Process, as intended: DPS made it plain

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Individual Defendants were not surprised on the eve of trial. They had an additional year to prepare defenses and had an opportunity to cross examine witnesses at trial. Because Defendants were "initially put on notice through [Plaintiff's] broad disclosure" and "subsequently informed well in advance of trial of the specific aspects of the trade secret[s] . . . [i]t cannot be said [Defendants] w[ere] prejudiced in any way." *Id.* Regardless, CSS has proven misappropriation of the CSS Process as a whole, and I have not focused on the input ratio or compositional analysis in this opinion.

[307] *Merck*, 1999 WL 669354, at *19 (citing 6 *Del. C.* § 2001(2)).

[308] JX 626 at 2; JX 789 at 3; JX 798 at 1; JX 632 at 13.

[309] *See* JX 754; JX 759.

that it built Fairless Hills based on the CSS Process, and the E3 Report said the same.[310] The experts agreed: CSS's expert determined the Fairless Hills facility and KDC's process was derived from the CSS Process,[311] and the Individual Defendants' expert admitted the CSS Process was KDC's starting point.[312]

After cutting ties with CSS, KDC lost no momentum. KDC did not pause and start over. KDC broke ground on Fairless Hills by mid-2020; completed construction by late 2021; and started manufacturing shortly thereafter. KDC continued operations based on the CSS Process, which "would have been impossible without misappropriation of [CSS's] trade secret[]."[313] DPS's lead engineer called it as he saw it: he did "not believe that [Fairless Hills] could be redesigned from scratch in three months."[314]

The Individual Defendants offered no other credible origin story at trial. None of the Individual Defendants or DPS had prior experience in food recycling. It is implausible they could have designed and operated Fairless Hills, or manufactured and sold product through KDC and DGC, without the CSS Process.[315]

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[310] Heil Tr. at 845–55, 1002.

[311] JX 982 at 68–104; Keener Tr. at 1684–85, 1714–15.

[312] Bowser Tr. at 1898.

[313] *Agilent*, 2010 WL 610725, at *23.

[314] Heil Tr. at 1002.

[315] JX 982 at 74.

And Defendants used the CSS Process without authorization. KDC only had permission to use the CSS Process via the License Agreement. KDC learned the CSS Process because it had promised to pay for its use, then rode the CSS Process all the way to the bank; once KDC received funding for Fairless Hills, it backed away from CSS and the License Agreement's royalty obligations and continued to use the CSS Process for free. Without the License Agreement in place, KDC's use of the CSS Process was misappropriation.

To hold each Individual Defendant liable for misappropriation, CSS must prove Hal, Matthew, Justin, and Barry each participated in the misappropriation of the CSS Process. While an individual cannot be held liable for trade secret misappropriation merely by fact of his position, "a corporate official cannot shield himself behind a corporation when he is an actual participant in the tort."[316] "[C]onsidering the purpose of limited liability, a principle central to corporate law, an injured party must prove the officer, director or agent participated in the tort."[317] "[K]nowledge of the act is not enough . . . . The corporate officer must have been

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[316] *Sens Mech., Inc v. Dewey Beach Enters., Inc.*, 2015 WL 4498900, at *3 (Del. Super. Ct. June 23, 2015); *Advanced Fluid Sys., Inc. v. Huber*, 381 F. Supp. 3d 362, 387 (M.D. Pa. 2019) ("[L]iability cannot be imposed on an individual defendant based solely on his status as a corporate officer or director, and that an officer can only be held personally liable if he directs, participates in, or cooperates with the commission of a wrongful act.") *aff'd*, 958 F.3d 168 (3d Cir. 2020).

[317] *Ayers v. Quillen*, 2004 WL 1965866, at *3 (Del. Super. Ct. June 30, 2004); *see also Beard Rsch.*, 8 A.3d at 598 (finding executive liable for trade secret misappropriation).

actively involved in that the officer directed, ordered, ratified, approved or consented to the tort."[318] In *Beard Research, Inc. v. Kates*, the Court of Chancery determined certain employees were liable for misappropriation because they helped "set up . . . operations," had knowledge of the relevant "chemistry and business models" of the corporations at issue and ran the related "projects from start the finish."[319]

Here, each of the Individual Defendants knew the CSS Process was a protected trade secret,[320] and each directed, ordered, ratified, approved, consented, or otherwise participated in the continued use of the CSS Process after termination of the License Agreement. Each was a member of KDC's "essential operating team."[321] "Justin, Hal and Matthew Kamine all cofounded KDC AG together to deploy the CSS Technology nationwide" through Fairless Hills.[322] Hal, as founder and executive chairman, oversaw everything concerning KDC and Fairless Hills.[323] Matthew and Justin were KDC's co-CEOs, and managed the company as directors

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[318] *Ayers*, 2004 WL 1965866, at *3 (quoting *Heronemus v. Ulrick*, 1997 WL 524127, at *2 (Del. Super. Ct. July 9, 1997)).

[319] 8 A.3d at 598–99.

[320] *See e.g.*, Hal Tr. at 372–74; Matthew Tr. at 553; Justin Tr. at 1326 ("'Q. And the agreement was negotiated by you, your father – you and your father and your brother; correct?' 'A. Correct.'"); Barry Tr. at 1188; JX 601 at 11; JX 218 at 1; JX 402 at 5; JX 766 at 4; JX 580; JX 581; JX 609; JX 616.

[321] Hal Tr. at 294.

[322] JX 787 at 93.

[323] Hal Tr. at 432–34; PTO ¶ 8.

alongside Hal. Barry was KDC's chief manufacturing officer who led the engineering team designing Fairless Hills.

The Individual Defendants were involved in Fairless Hills operations, and the improper continued use of the CSS Process. Hal, who held the highest position at KDC, admitted at trial that he directed the businesses.[324] Hal, Matthew, and Justin worked together to make major decisions for KDC and its related entities.[325] Barry visited CSS "more than anybody" and "ran the lab" at the Fairless Hills site.[326] Barry and Matthew were involved with developing Fairless Hills, leading the engineering team that got Fairless Hills off the ground.[327] Their positions did not change after the License Agreement ended: Matthew and Barry continued designing and building Fairless Hills after the breakup with CSS.[328] Hal and Barry decided to open the North Dakota facility in 2020 to continue testing KDC's nonenzymatic process.[329] Barry took the lead in further developing KDC's process, based off the CSS Process.

While Justin was less involved in the construction or design of Fairless Hills, the evidence demonstrates it is more likely than not that he participated in the

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[324] Hal Tr. at 432.

[325] Matthew Tr. at 554–55.

[326] Morash Tr. at 41; Hal Tr. at 425.

[327] Hal Tr. at 339, 294, 434–35; Heil Tr. at 871–74; PTO ¶¶ 10–11.

[328] Matthew Tr. at 596–97.

[329] Hal Tr. at 345–46.

misappropriation. Justin took the lead in KDC's business development,[330] and was involved in DGC and the process of selling feed derived from the CSS Process to customers.[331] Under Delaware law, Justin's knowledge of KDC and DGC's business plan, which included the misappropriation of the CSS Process, along with his participation in implementing those plans, is enough to find him liable for misappropriation.[332]

The Individual Defendants' misappropriation is further reflected in their reliance on the CSS process in seeking financing to construct Fairless Hills. All four of the Individual Defendants were aware of the substance of the bond offering, which described the KDC process as based off the CSS Process and the Fairless Hills project as a scale-up of CSS's facilities.[333] Matthew was the primary author of the first draft of Appendix A, and each of the other Individual Defendants reviewed drafts and sent proposed revisions.[334]

CSS met its burden to prove trade secret misappropriation by the Individual Defendants.

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[330] Justin Tr. at 1312–13; PTO ¶ 9 ("[Justin] led much of the business development and public partnership efforts for KDC.").

[331] Matthew Tr. at 533–35.

[332] *See Beard Rsch.*, 8 A.3d at 598–99.

[333] JX 754.

[334] JX 580; JX 581; JX 609; JX 616; Hal Tr. at 469–72.

d. The Individual Defendants' Arguments Fail.

Faced with the truth that KDC's process is built upon and derived from the CSS Process, without authorization, the Individual Defendants' defense hinges on two main contentions. First, they argue KDC's process was different from the CSS Process, because it shifted to a non-enzymatic process, and so it does not constitute misappropriation. The Individual Defendants argue "KDC produced an entirely different product than CSS's . . . and did so without adding enzymes—requiring equipment changes and adjustment to every equipment setting, and thus a very different process."[335]

But "[t]rade secret protection 'extends not only to the misappropriated trade secret itself but also to materials 'substantially derived' from that trade secret.'"[336] "Misappropriation occurs even where the trade secret is used only as a starting point or guide in developing a process."[337] *Agilent Technologies, Inc. v. Kirkland* is instructive.[338] This Court determined the defendants were liable for misappropriation even though the information was "not identical to th[at] used" by the plaintiff because it was "clear that [the plaintiff's] trade secrets served as a

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[335] PTAB 65.

[336] *Merck*, 1999 WL 669354, at *19 (quoting *Gen. Elec. Co. v. Sung*, 843 F. Supp. 776, 778 (D. Mass. 1994)).

[337] *Id.* at *20.

[338] 2010 WL 610725.

springboard for the defendants, allowing further development to take place."[339] "[W]here a trade secret acts as a starting point for improvements, or a guide by which pitfalls may be avoided," that is trade secret misappropriation.[340]

Here too.[341] Trial showed the CSS Process was the starting point of the KDC process. The addition or removal or enzymes to one step of the CSS Process, and modifications to account for that flexibility, does not change that fact. As of its bond offering, KDC explained it maintained flexibility to add enzymes back into its process and, if so, that "[t]he remainder of the KDC Ag Process would remain the same."[342] The Individual Defendants told third parties the CSS Process was the base of its own process.[343] And CSS's expert offered the unrebutted opinion that KDC's process was not substantially different.[344]

Second, the Individual Defendants argue the License Agreement granted

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[339] *Id.* at *22.

[340] *Agilent*, 2010 WL 610725, at *22.

[341] At trial, the Individual Defendants asserted they did not use CSS's confidential trade secret information in its process, but only publicly available information. PTAB 40–45. I am not convinced. As already noted, Dr. Keener put forth a credible, unrebutted opinion that Fairless Hills was substantially similar to the CSS Process and that CSS Process could not be replicated using only public sources. And "courts have rejected the argument that one who has learned particular information from a trade secret process is not liable if it can show that the information learned is somewhere 'published.'" *Merck*, 1999 WL 669354, at *16.

[342] JX 754 at 56; JX 789 at 3; JX 798 at 1.

[343] JX 789 at 3.

[344] JX 982 at 85–106.

KDC the right to continue using the CSS Process because KDC had modified it.[345] The License Agreement did no such thing. Section 2.3 granted CSS the right to use KDC Intellectual Property; it gives no separate contractual rights to KDC.[346] KDC Intellectual Property was defined as "all Intellectual Property Controlled by KDC or any Affiliate as of the Effective Date or at any time during the Term, or hereinafter created by KDC or any party on behalf of KDC, to construct, own and operate Licensed Facilities and to make, have made, use, offer to sell, sell, import and otherwise exploit Licensed Products."[347] And "Improvements" comprise "all modifications, adaptations, changes and improvements . . . developed or introduced by or on behalf of . . . KDC in respect of any CSS Intellectual Property."[348] At most, KDC owned the rights to its Improvements—but only its Improvements. KDC's alterations may be its intellectual property, but not the underlying CSS information it altered. CSS has met its burden and demonstrated the Individual Defendants misappropriated its combination trade secret.

B. Delaware Statutory Preemption

CSS brought a host of common law tort claims that all rely on the wrongful use of its trade secrets. "[I]f 'common law claims are based on the same alleged

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[345] PTAB 45–50.

[346] JX 69 § 2.3.

[347] *Id.*

[348] *Id.* at 2.

wrongful conduct as the trade secret claims, they are precluded under" the Delaware Act.[349] "To determine whether a tort claim is preempted by [the Delaware Act], courts consider whether the claim is 'grounded in the same facts' as a misappropriation of trade secrets claim."[350] Typically, "[a] common law claim is 'grounded in the same facts' as a trade secret claim 'if the failure of the misappropriation claim would doom the common law claim.'"[351] "[The Delaware Act] preempts 'all claims stemming from the same acts as the alleged misappropriation . . . even if the information at issue is not a trade secret.'"[352]

Because CSS's common law misappropriation, conspiracy, fraud, and unjust enrichment claims "are based on the same alleged wrongful conduct as the trade secrets claims, they are precluded" by the Delaware Act.[353] CSS's common law misappropriation claim, Count IX, is plainly coterminous with the statutory

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[349] *Alarm.com Hldgs., Inc. v. ABS Cap. P'rs Inc.*, 2018 WL 3006118, at *9 (Del. Ch. June 15, 2018), *aff'd*, 204 A.3d 113 (Del. 2019) (quoting *Savor, Inc. v. FMR Corp.*, 812 A.2d 894, 898 (Del. 2002)); *see* 6 *Del. C.* § 2007 ("Except as provided in subsection (b) of this section, this chapter displaces conflicting tort, restitutionary and other law of this State providing civil remedies for misappropriation of a trade secret."); *see also FMR Corp.*, 812 A.2d at 898 ("[Plaintiff's] common law claims seek civil remedies based solely on the alleged misappropriation of a trade secret. Thus, the Superior Court correctly ruled that Savor's common law claims are precluded.").

[350] *Battaglia*, 2024 WL 3183063, at *4 (quoting *You Map, Inc. v. Snap Inc.,* 2024 WL 106498, at *8 (D. Del. Jan. 12, 2021)).

[351] *Id.* (quoting *Ethypharm S.A. Fr. V. Bentley Pharm., Inc.*, 388 F. Supp. 2d 426, 433 (D. Del. 2005)).

[352] *Id.*

[353] *FMR Corp.*, 812 A.2d at 898.

misappropriation claim.[354] Its conspiracy claim, Count XV, is based upon the allegation that a "combination or confederation existed with the common purpose and goal of misappropriating CSS's Trade Secrets and perpetrating fraud upon CSS."[355] That allegation is "grounded in the same facts which purportedly support" CSS's misappropriation claim, so it is preempted.[356] CSS's unjust enrichment claim, Count XVI, is preempted as well.[357] CSS alleged the Individual Defendants "have been enriched by their access to and use of CSS's Trade Secrets, Intellectual Property, and/or Confidential Information."[358] That is based on the Individual

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[354] CSS effectively abandoned this claim in its opening brief. *See* PTOB 46; PTAB 88.

[355] Am. Compl. ¶ 355; *see* PTOB 69 ("Here, each of the Individual Defendants joined in a combination in furtherance of misappropriating CSS's trade secrets and causing KDC Ag to breach the License Agreement."). To the extent CSS claims the Individual Defendants "caus[ed] KDC Ag to breach the License Agreement," CSS's underlying tortious interference claim fails, and so the conspiracy claim tied to it must fail as well. *Kuroda v. SPJS Hldgs., L.L.C.*, 971 A.2d 872, 892 (Del. Ch. 2009) (dismissing conspiracy claim because it "ha[d] not properly alleged an underlying wrong on which a claim of conspiracy could be based," including tortious interference with contract).

[356] *Savor, Inc. v. FMR Corp.*, 2001 WL 541484, at *4 (Del. Super. Ct. Apr. 24, 2001), *aff'd,* 812 A.2d 894 (Del. 2002) (dismissing conspiracy claim because it was "grounded in the same facts which purportedly support the [m]isappropriation of [t]rade [s]ecrets claim"); *see* Am. Compl. ¶¶ 353–61.

[357] *Id.* ¶¶ 362–72; PTOB 71 ("[E]ach of the Individual Defendants extracted extremely high compensation from KDC Ag, which should be disgorged as predicated entirely on the use of stolen trade secrets."); *250ok, Inc. v. Message Sys., Inc.*, 2021 WL 225874, at *5 (Del. Ch. Jan. 22, 2021) ("[B]oth Delaware and federal courts have consistently held that unjust enrichment claims 'based on the same alleged wrongful conduct as the trade secret claims' are preempted by the [Delaware Act]." (quoting *Incyte Corp. v. Flexus Biosciences, Inc.*, 2017 WL 7803923, at *3 (Del. Super. Ct. Nov. 1, 2017))).

[358] Am. Compl. ¶ 364; PTOB 71 ("Defendants were unjustly enriched by their misconduct.").

Defendants' unjust enrichment from CSS's protected information, so it is preempted.[359] This is true even to the extent CSS contends the Individual Defendants were unjustly enriched by information that does not rise to the level of a trade secret.[360]

That leaves CSS's fraud claim, Count XIV. It was undeveloped at trial, and hardly briefed: even setting preemption aside, CSS has not met its burden of proof.[361] Looking to CSS's complaint, CSS pled the Individual Defendants made "false representations and omissions with the intent that CSS would rely on them in providing CSS Intellectual Property and Confidential Information."[362] CSS alleged the Individual Defendants made two misrepresentations. First, CSS asserts the Individual Defendants stated they "would pursue animal and pet food opportunities

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[359] *250ok*, 2021 WL 225874, at *6 ("Given the factual overlap, 250ok's unjust enrichment claim is preempted by the DUTSA and, therefore, must be dismissed.").

[360] *iBio, Inc. v. Fraunhofer USA, Inc.*, 2020 WL 5745541, at *13 (Del. Ch. Sept. 25, 2020) ("Delaware 'has joined the "majority view" that Section 2007 of [the Delaware Act] precludes common law claims based on misappropriation of business information even in cases in which the claim does not meet the statutory definition of "trade secret" under the Code.'").

[361] *See Revolution Retail Sys., LLC v. Sentinel Techs., Inc.*, 2015 WL 6611601, at *9 (Del. Ch. Oct. 30, 2015) ("Plaintiffs . . . have the burden of proving each element, including damages, of each of their causes of action. . . ."). CSS did not even provide the elements of common law fraud in its post-trial briefing, and it made no attempt to apply facts to those elements. Nor am I convinced by the trial record that fraud has occurred. *See HControl Hldgs. LLC v. Antin Infrastructure P'rs S.A.S.*, 2023 WL 3698535, at *31 (Del. Ch. May 29, 2023) ("Buyers have not briefed the law sufficiently to bear their burden of proving that they contracted for the right to terminate the Merger Agreement based on this aspect of Iqbal's claim.").

[362] Am. Compl. ¶ 350.

and that CSS should avoid such opportunities, thereby causing CSS to avoid work in the animal feed space on the false promise of substantial royalties" causing harm to CSS.[363] CSS alleged the Individual Defendants made these statements "to misappropriate CSS Intellectual Property to develop the animal feed market for themselves and not pay CSS any future royalties."[364] Second, CSS asserts KDC's letters in January and May 2020, concerning whether it had a Licensed Facility, were fraudulent and "omitted that they are using, and would use, CSS Intellectual Property, Trade Secrets, and Confidential Information for any purpose other than pursuant to the License Agreement."[365] CSS asserts the Individual Defendants made those statements so it could misappropriate the CSS Process and get away with it.[366] Because CSS's claim is based on fraud with the intent to misappropriate the CSS Process, it is preempted by the Delaware Act.[367]

C. CSS's Tortious Interference With Contract Claim Fails.

Count V claims Hal, Justin and Matthew tortiously interfered with the License Agreement. "To state a claim for tortious interference with contract, a plaintiff must

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[363] PTOB 70; Am. Compl. ¶ 345.

[364] Am. Compl. ¶ 345.

[365] *Id.* ¶ 344; PTOB 70–71 (basing fraud claims on existence of trade secrets).

[366] PTOB 70–71.

[367] *Smash Franchise P'rs, LLC v. Kanda Hldgs., Inc.*, 2023 WL 4560984, at *17–18 (Del. Ch. July 14, 2023), *aff'd sub nom. McLaren v. Smash Franchise P'rs, LLC*, 319 A.3d 909 (Del. 2024).

allege that the defendant 'intentionally and improperly interfere[d] with the performance of a contract' between the plaintiff 'and a third person by inducing or otherwise causing the third person not to perform the contract.'"[368] "To prevail on its claim of tortious interference, [CSS] must prove five elements: (1) there was a contract, (2) about which the defendant knew, (3) that the defendant committed an intentional act that is a significant factor in causing the breach of such contract, (4) the act(s) [were] without justification, and (5) the act caused injury."[369]

But because the Kamines were KDC officers and directors, CSS has an initial hurdle for its tortious interference claim: it must show that the Individual Defendants' actions were beyond the scope of their agency authority from KDC.[370]

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[368] *Am. Bottling Co. v. Repole*, 2020 WL 7787043, at *6 (Del. Super. Ct. Dec. 30, 2020) (quoting *Smith v. Hercules, Inc.*, 2002 WL 499817, at *2 (Del. Super. March 28, 2002)).

[369] *Wavedivision Hldgs., LLC v. Highland Cap. Mgmt. L.P.*, 2011 WL 5314507, at *6 (Del. Super. Ct. Nov. 2, 2011), *aff'd*, 49 A.3d 1168 (Del. 2012).

[370] CSS relied on Delaware law for its tortious interference claim; the parties did not brief choice of law and have thus waived any argument that another jurisdiction's law applies. *In re Am. Int'l Grp., Inc., Consol. Deriv. Litig.*, 976 A.2d 872, 882 (Del. Ch. 2009*), aff'd sub nom. Teachers' Ret. Sys. of La. v. Gen. Re Corp.*, 11 A.3d 228 (Del. 2010) ("The parties chose not to burden me with an analysis of what law applies . . . . Because the parties have failed to brief the issue, they tacitly concede that Delaware law is applicable."); *Oxbow Carbon & Mineral Hldgs., Inc. v. Crestview-Oxbow Acq., LLC*, 202 A.3d 482, 502 n.77 (Del. 2019) ("The practice in the Court of Chancery is to find that an issue not raised in post-trial briefing has been waived, even if it was properly raised pre-trial."). In any event, from my brief perusal, it appears all states at issue (Delaware, California, New Jersey, and Pennsylvania) have some sort of agent's privilege, finding company agents liable for tortious interference in only certain circumstances, such as acting outside the scope of employment or acting with malice. *See Vosough v. Kierce*, 97 A.3d 1150, 1160 (N.J. Super. Ct. App. Div. 2014) ("To recover for tortious interference, plaintiffs were required to prove that the alleged wrongful actions of [defendants] were outside the scope of their

"An officer of a Delaware limited liability company cannot be held liable for tortiously interfering with his own company's contract unless he 'acted beyond the scope of [his] agency.'"[371] "The act must be committed beyond the authorized boundaries of the person's employment and must not be motivated by that person's employment. Acts that are considered outside the course and scope of one's employment are often those which are carried out for an employee's own personal

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employment and done for personal motives, out of malice, beyond their authority, and otherwise not in good faith in the interests of [their employer]."); *Rutherford v. Presbyterian-Univ. Hosp.*, 612 A.2d 500, 508 (Pa. Super. Ct. 1992) ("Where employees or agents for the corporation act within the scope of their employment or agency, the employees, the agents and the corporation are one and the same; there is no third party."); *Huynh v. Vu*, 4 Cal. Rptr. 3d 595, 607 (Cal. Ct. App. 2003); *Calero v. Unisys Corp.*, 271 F. Supp. 2d 1172, 1179 (N.D. Cal. 2003).

[371] *Am. Bottling*, 2020 WL 7787043, at *6 (quoting *Grand Ventures, Inc. v. Paoli's Rest., Inc.*, 1996 WL 30022, at *4–5 (Del. Super. Jan. 4, 1996)); *City of Pittsburgh Comprehensive Mun. Pension Tr. Fund v. Conway*, 2024 WL 1752419, at *23 (Del. Ch. Apr. 24, 2024); *Grand Ventures*, 1996 WL 30022, at *4 ("[A]n officer or director may be held personally liable for tortious interference with a contract of the corporation if, and only if, said officer or director exceeds the scope of his agency in so doing." (quoting *Local Union 42 v. Absolute Env't Serv.*, 814 F. Supp. 392, 400 (D. Del. 1993))).

Readers who have made it this far will observe that while agency law limits the instances in which an officer can be liable for interference with the company's contract, tort law supports holding company agents liable for trade secret misappropriation. The former is based on the premise that the agent cannot commit a separate act of tortious interference when causing her principal, the company, to breach a contract, except when acting outside the scope of that agency relationship. *See Am. Bottling*, 2020 WL 7787043, at *6; *Grand Ventures*, 1996 WL 30022, at *4. But the latter is based on the premise that an agent who commits a tort, even for the principal's benefit, remains responsible for her actions. *See Sens Mech.*, 2015 WL 4498900, at *3 ("According to the personal participation doctrine, a corporate official cannot shield himself behind a corporation when he is an actual participant in the tort.").

motives and benefit and not for their employer."[372] "Accordingly, in order to state a claim for tortious interference against a corporate officer, a plaintiff must plead adequately that the officer (1) 'was not pursuing legitimate profit-seeking activities of the affiliated enterprise in good faith,' or (2) 'was motivated by some malicious or other bad faith purpose to injure the plaintiff.'"[373]

CSS has not shown the Kamines acted outside their scope of employment. While CSS's brief asserts "[t]he record is rife with . . . examples of Individual Defendants acting intentionally for their own interests, and against KDC Ag's interests," I disagree.[374] CSS cites no convincing evidence, and I see none. Rather, it appears the Kamines acted in KDC's interest—the company the father and sons founded—and that the Kamines decided to end the License Agreement and move forward with Fairless Hills to earn profits for KDC. Because CSS has not carried its burden to show the Kamines' "actions that cause[d] the corporation to breach a

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[372] *Nye v. Univ. of Del.*, 2003 WL 22176412, at *7 (Del. Super. Ct. Sept. 17, 2003) ("An act that is considered outside the scope and course of the employment is an act that is different than that authorized under that person's employment."). For example, CSS can show the Kamines were "not pursuing legitimate profit-seeking activities of [KDC] in good faith," or were "motivated by some malicious or other bad faith purpose to injure the plaintiff." *Yu v. GSM Nation, LLC*, 2018 WL 2272708, at *15 (Del. Super. Ct. Apr. 24, 2018) (quoting *Shearin v. E.F. Hutton Gp., Inc.*, 652 A.2d 578, 591 (Del. Ch. 1994)); *see also Smith*, 2002 WL 499817, at *3 ("[A]n interference executed by [an officer] may not be improper, so long as he did not employ wrongful means, and he was acting to protect the welfare of [the company].").

[373] *Am. Bottling*, 2020 WL 7787043, at *6 (quoting *Yu*, 2018 WL 2272708, at *15–16).

[374] PTRB 30–31.

contract were [not] taken for the corporation's benefit,"[375] judgment on Count V shall be entered in favor of the Kamines.

D. Remedies

CSS has proven by a preponderance of the evidence that the Individual Defendants are liable for trade secret misappropriation. CSS must prove damages by a preponderance of the evidence as well.[376] This portion of the opinion also resolves damages from trade secret misappropriation for the Corporate Defendants whose liability was found by default.[377]

CSS requests a variety of remedies. It requests two alternative methods of compensatory damages: lost royalties and milestone payments under the License Agreement, or a hypothetical reasonable royalty. I find the appropriate method is to use the License Agreement to set an established royalty. CSS also requests an injunction, exemplary damages, and attorneys' fees and costs. I grant CSS a narrower injunction. I do not grant exemplary damages or fees.

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[375] *Am. Bottling*, 2020 WL 7787043, at *6.

[376] *Enhabit, Inc. v. Nautic P'rs IX, L.P.*, 2024 WL 4929729, at *29 (Del. Ch. Dec. 2, 2024).

[377] CSS requested damages against the Individual Defendants on all claims. CSS's request for damages from the Corporate Defendants is focused on trade secret misappropriation. PTOB 88. It has not briefed or substantiated damages on the other claims found by default.

1. License Agreement Royalties

"Damages in trade secrets cases are difficult to calculate."[378] Delaware courts "do[] not 'require certainty in the award of damages where a wrong has been proven and injury established.'"[379] "[E]very case requires a flexible and imaginative approach to the problem of damages" and "each case is controlled by its own peculiar facts and circumstances."[380] "[C]ases reveal that most courts adjust the measure of damages to accord with the commercial setting of the injury, the likely future consequences of the misappropriation, and the nature and extent of the use the defendant put the trade secret to after misappropriation."[381]

The Federal Act and Delaware Act provide three grounds for damages for trade secret misappropriation. A court may grant an award of "damages for actual loss;" "damages for any unjust enrichment" to the extent "that it is not addressed in computing damages for actual loss;" or, "in lieu of damages measured by any other methods, . . . damages caused by the misappropriation measured by imposition of

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[378] *Caudill Seed & Warehouse Co. v. Jarrow Formulas, Inc.*, 53 F.4th 368, 387 (6th Cir. 2022) (quoting *Acuity Brands Lighting, Inc. v. Bickley*, 2015 WL 12976104, at *2 n.2 (E.D. Ky. June 8, 2015)).

[379] *Enhabit*, 2024 WL 4929729, at *29 (quoting *Red Sail Easter Ltd. P'rs, L.P. v. Radio City Music Hall Prods., Inc.*, 1992 WL 251380, at *7 (Del. Ch. Sept. 29, 1992)).

[380] *Univ. Computing Co. v. Lykes-Youngstown Corp.*, 504 F.2d 518, 538 (5th Cir. 1974) (quoting *Enter. Mfg. Co. v. Shakespeare Co.*, 141 F.2d 916, 920 (6th Cir. 1944)).

[381] *Id.*

liability for a reasonable royalty."[382]

Patent and trade secret jurisprudence has shaped various methods of quantifying damages for actual loss.[383] One is to identify actual lost revenue, perhaps in the form of lost royalties. "The plaintiff's loss usually consists of profits lost on sales diverted from the plaintiff by the appropriation, loss of royalties or other income that would have been earned by the plaintiff but for the appropriation, or the value of the trade secret if it has been destroyed through a public disclosure by the defendant."[384] Actual lost royalties will be granted when they are "not speculative," such as being "calculated based on . . . the royalty agreements entered into."[385]

When lost profits are not identifiable, but there is evidence the parties previously agreed on a price to use the technology, damages may be calculated using an established royalty. This method "looks to whether the parties have themselves

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[382] 18 U.S.C. § 1836(b)(3)(B); *see MedImpact Healthcare Sys., Inc. v. IQVIA Hldgs. Inc.*, 2022 WL 5460971, at *9 (S.D. Cal. Oct. 7, 2022) ("The [Federal Act] allows for the reasonable royalty as an alternative form of relief."); 6 *Del. C.* § 2003(a). Defendants have been found liable under federal and multiple state statutes. To avoid any choice of law issues that may arise under CSS's numerous state claims, I focus my damages inquiry under the federal claim.

[383] It is "generally accepted that 'the proper measure of damages in the case of a trade secret appropriation is to be determined by reference to the analogous line of cases involving patent infringement.'" *Univ. Computing*, 504 F.2d at 535 (quoting *Int'l Indus., Inc. v. Warren Petroleum Corp.*, 248 F.2d 696, 699 (3d Cir. 1957)).

[384] Restatement (Third) of Unfair Competition § 45 cmt. d (Am. L. Inst. 1995).

[385] *Joseph Bancroft & Sons Co. v. Enter. Mach. & Dev. Corp.*, 1990 WL 63825, at *8 (Del. Super. Ct. May 2, 1990).

agreed to a remedy which is capable of a factual determination by the Court. Such situations arise, for example, where the parties have entered into or negotiated a royalty agreement."[386] If "the parties have agreed to the value of the trade secrets, either in a royalty agreement, a licensing contract, or an 'agreement in principle,' such that the damages will be subject to exact measurement, that course should be followed."[387]

Established royalties may be set in multiple ways.[388] An established royalty can be set when the parties to a litigation "previously entered into an agreement by which the [parties] set the price for a license, but one or both of the parties did not perform under the agreement."[389] Even an agreement in principle, which was not consummated, offers the court "the value the parties themselves assigned to the

[386] *Biodynamic Techs., Inc. v. Chattanooga Corp.*, 658 F. Supp. 266, 270 (S.D. Fla. 1987); *accord Univ. Computing*, 504 F.2d at 538–39 ("[I]n some cases the damages will be subject to exact measurement, either because the parties had previously agreed on a licensing price . . . or because some industry standard provides a clear measure."); William C. Rooklidge et al., *Compensatory Damages Issues in Patent Infringement Cases*, at 8 (2017) ("Where it can be proven, an established royalty usually will be the best measure of damages.") [hereinafter "Rooklidge"].

[387] *Biodynamic Techs.*, 658 F. Supp. at 270; *Comput. Assocs. Int'l, Inc. v. Am. Fundware, Inc.*, 831 F. Supp. 1516, 1527 (D. Colo. 1993) ("[C]ontractually established [royalties] will be the best measure of the parties' intent.").

[388] Established royalties are more common in patent litigation, but trade secret cases have recognized the similar aim of valuing information used by a party that does not own it. *See, e.g.*, *Vitro Corp. of Am. v. Hall Chem. Co.*, 292 F.2d 678 (6th Cir. 1961); *Biodynamic Techs., Inc.*, 658 F. Supp. at 270.

[389] Rooklidge at 9 ("In that circumstance, the royalty required by the agreement ordinarily will be treated as an established royalty.").

appropriated information" and the use of an established royalty.[390] And courts have set established royalties using third-party agreements licensing the same intellectual property at issue.[391]

When there is no evidence of actual lost royalties or a negotiated price, courts try to recreate a royalty that would have been negotiated, called a reasonable royalty.[392] A reasonable royalty "attempts to measure a hypothetically agreed value

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[390] *Biodynamic Techs.*, 658 F. Supp. at 270; *see also Vitro Corp. of Am. v. Hall Chem. Co.*, 292 F.2d 678, 682–83 (6th Cir. 1961); *Saco-Lowell Shops v. Reynolds*, 141 F.2d 587, 598 (4th Cir. 1944) ("In view of the provisions of the licensing agreement, however, the measure of the recovery is the royalties therein provided; for plaintiffs are entitled to recover merely what would have been theirs if defendant had done what it should have done, i.e. treated the ideas embodied in the [patented product] as belonging to the Reynolds invention and paid royalties on that basis.").

[391] Rooklidge at 9–10. As seen primarily in patent cases, to determine if third party agreements amount to an established royalty, courts will analyze the contracts using a multifactor test. *See Mobil Oil Corp. v. Amoco Chemicals Corp.*, 915 F. Supp. 1333, 1342 (D. Del. 1994) ("In order for a patentee's negotiated royalties to constitute an 'established' royalty they must meet five criteria: (1) they must be paid or secured before the infringement began; (2) they must be paid by a sufficient number of persons to indicate the reasonableness of the rate; (3) they must be uniform in amount; (4) they must not have been paid under threat of suit or in settlement of litigation; and (5) they must be for comparable rights or activity under the patent."). This form of established royalty is not at issue in this case. *See* Rooklidge at 9–10 (explaining the difference between established rate in agreements between litigation parties and with third parties).

[392] 2 Dan B. Dobbs, *Law of Remedies: Damages–Equity–Restitution* § 6.2(3), at 35 (2d ed. 1996) (commending actual or established royalties as "excellent and objective evidence" of compensatory damages); *Biodynamic Techs.*, 658 F. Supp. at 270; *Computer Assocs.*, 831 F. Supp. at 1527. There is some lack of clarity in misappropriation caselaw on what to call an established royalty. Some cases refer to an established royalty as a "reasonable royalty," while others treat it separately. Because I have distinguished this method from the reasonable royalty method CSS proposed, I will call my chosen method an established royalty.

of what the defendant wrongfully obtained from the plaintiff,"[393] and there is a notable "high degree of artificiality involved in such an analysis."[394] "[T]he hypothetical negotiation approach attempts to ascertain the royalty upon which the parties would have agreed had they successfully negotiated an agreement just before [the misappropriation] began."[395] In making this determination, courts consider fifteen factors set out in the seminal patent case *Georgia-Pacific Corp. v. U.S. Plywood Corp*.[396] One factor considers actual royalties the owner received for licensing the technology; the other fourteen factors look to "the licensor's established policy and marketing program to maintain his patent monopoly," "[t]he duration of the patent and term of the license," "the nature of the patented invention," "the extent to which the infringer has made use of the invention," and the "opinion testimony of qualified experts," among other factors.[397] Courts have long recognized that "[d]etermining a reasonable royalty from a hypothetical negotiation is not easy; the process is truly artificial."[398] Others have described it as "a difficult

[393] *Vermont Microsystems, Inc. v. Autodesk, Inc.*, 88 F.3d 142, 151 (2d Cir. 1996).

[394] *Mobil Oil.*, 915 F. Supp. at 1341.

[395] *Bouchat v. Balt. Ravens Ltd. P'ship*, 2012 WL 6738321, at *4 n.7 (D. Md. Dec. 27, 2012).

[396] 318 F. Supp. 1116 (S.D.N.Y. 1970), *modified sub nom. Georgia-Pac. Corp. v. U.S. Plywood-Champion Papers, Inc.*, 446 F.2d 295 (2d Cir. 1971).

[397] *Id.* at 1120.

[398] *Am. Med. Sys., Inc. v. Med. Eng'g Corp.*, 794 F. Supp. 1370, 1394 (E.D. Wis. 1992), *rev'd in part on other grounds,* 6 F.3d 1523 (Fed. Cir. 1993).

judicial chore, seeming often to involve more the talents of a conjurer than those of a judge."[399]

Here, trial showed the License Agreement ended, so no actual royalties were owed for the Defendants' misappropriation; CSS has not been damaged in the form of actual lost royalties. Rather, CSS was damaged because Defendants continued to use the CSS Process after the License Agreement was terminated. The License Agreement provides evidence of how the parties valued the trade secret Defendants took, and therefore can be used to set an established royalty. The License Agreement granted KDC the right to use CSS intellectual property, which covers the CSS Process, for an agreed-upon price, and was in place until the moment of misappropriation. CSS's expert economist Carla Mulhern agreed the License Agreement provides credible evidence of what CSS and KDC agreed the CSS Process was worth.[400] As "what was agreed upon as compensation," the set royalty

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[399] *Fromson v. W. Litho Plate & Supply Co.*, 853 F.2d 1568, 1574 (Fed. Cir. 1988), *overruled on other grounds by Knorr-Bremse Systeme Fuer Nutzfahrzeuge GmbH v. Dana Corp.*, 383 F.3d 1337 (Fed. Cir. 2004); *Panduit Corp. v. Stahlin Bros. Fibre Works*, 575 F.2d 1152, 1159 (6th Cir. 1978) ("Determination of a 'reasonable royalty' after infringement, like many devices in the law, rests on a legal fiction. Created in an effort to 'compensate' when profits are not provable, the 'reasonable royalty' device conjures a 'willing' licensor and licensee, who like Ghosts of Christmas Past, are dimly seen as 'negotiating' a 'license.' There is, of course, no actual willingness on either side, and no license to do anything, the infringer being normally enjoined, as is [the defendant], from further manufacture, use, or sale of the patented product.").

[400] JX 1108 at 24.

in the License Agreement provides the appropriate measure to calculate damages.[401] It is the best evidence of how CSS valued the CSS Process and how much KDC was willing to pay to use it.[402] It saves the parties and the Court from the artificial and hypothetical measure of a reasonable royalty.[403]

The License Agreement also sets the damages award against the defaulted Corporate Defendants. They are liable for both trade secret misappropriation and breach of the License Agreement, among other claims.[404] Courts have granted lost royalty damages in cases involving related breaches of contract and trade secret misappropriation. For example, in *Thomas v. Hughes*, the United States Court of Appeals for the Fifth Circuit affirmed one combined award of damages for breach of contract and trade secret misappropriation made up of unpaid royalties under the breached licensing agreement.[405] The Court explained that using "the value that the parties had previously assigned" had "allowed 'damages [to] be ascertained with

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[401] *Vitro Corp.*, 292 F.2d at 683.

[402] *Id.* The Individual Defendants agreed the License Agreement offered the best measure of damages. PTAB 112.

[403] *Phillips Petroleum Co. v. Rexene Corp.*, 1997 WL 781856, at *21 n.8 (D. Del. Sept. 4, 1997) ("Because the Court concludes that Phillips had an established royalty of one cent per pound (escalated) and that this rate constitutes a reasonable royalty, it will not perform a hypothetical negotiation analysis.").

[404] CSS's request for damages in its post-trial briefing was focused on trade secret misappropriation. *See generally* PTOB; JX 1108.

[405] 27 F.4th 995, 1010 (5th Cir. 2022).

precision' more exacting here than in the mine run of cases."[406]

Using the License Agreement as the best evidence to price the CSS Process in an established royalty is a distinct exercise from using it to calculate actual lost royalties. Running royalties hinged on the production of a License Product, defined as fertilizer, animal feed, or blend product made using an "aerobic, enzymatic digestion" process.[407] A nonexclusive license charging running royalties was only available to KDC when it had a facility, built or under construction, that made Licensed Product. KDC contends it shifted away from an enzymatic process by the time Fairless Hills opened. But KDC misappropriated the CSS Process for its nonenzymatic product process as well. Using the License Agreement to set an established royalty prices that entire process, not the royalties KDC would have actually owed. Because I am using the License Agreement to value the entire CSS Process, I need not reach whether KDC's nonenzymatic process was a Licensed Product.

a. Exclusivity

Using the License Agreement to set an established royalty first requires choosing its terms for an exclusive or nonexclusive license. To maintain exclusivity, KDC had to pay minimum royalties; it did not owe those minimums for a

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[406] *Id.* (quoting *Sw. Energy Prod. Co. v. Berry-Helfand*, 491 S.W.3d 699, 711 (Tex. 2016)).
[407] JX 69 § 3.3(c); *id.* at 3.

nonexclusive license.[408] Those minimums were $5,000,000 in 2020, $6,000,000 in 2021, $7,200,000 in 2022, and $7,920,000 in 2023.[409] Not surprisingly, CSS seeks damages based on an exclusive license; the Individual Defendants posit nonexclusivity is appropriate. I find a nonexclusive license is appropriate here, for two reasons.

First, the best evidence of the CSS Process's standalone value is a nonexclusive royalty stripped of any exclusivity premium.[410] The minimum royalty for an exclusive license pays for KDC's right to exclusivity and compensates CSS for its lost opportunity to sell additional licenses. The nonexclusive terms price the CSS Process without that right and opportunity.

Second, CSS did not lose exclusive license royalties due to any wrongful conduct by KDC, so it is not entitled to a damages award including an exclusivity premium. "The purpose of tort damages is to compensate the plaintiff for the harm

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[408] JX 69 § 3.3(b).

[409] The 2023 number excludes December because the Corporate Defendants entered Chapter 7 bankruptcy on November 30, 2023.

[410] To the extent CSS argues KDC "was required to pay minimum royalties in order to maintain any license (exclusive or non-exclusive) until it had a Licensed Facility under construction," I disagree. PTOB 65. KDC only owed minimum royalties if it maintained an exclusive license. As CSS explained in its opening brief, "[t]o maintain the exclusive license, Section 3.3(b) requires KDC Ag to pay minimum annual royalties. If KDC Ag failed to pay minimum royalties when due, then CSS had the right to convert the exclusive license to a non-exclusive license, but only for Licensed Facilities then existing or under construction. If no such facilities were in existence or under construction when payments stopped, KDC Ag would no longer have any license at all." *Id.* at 12.

that the defendant's tortious conduct proximately caused."[411] CSS did not suffer the harm of the loss of an exclusive license. As of December 2019, CSS was free to license its process to other business partners. And KDC's tortious conduct did not cause that harm. KDC had the right to stop paying minimum royalties under the License Agreement.[412] KDC's misappropriation denied CSS only the value of KDC's use of the CSS Process: it did not preclude CSS from licensing its technology to others.[413]

b. Calculations

The License Agreement granted KDC the right to use the CSS Process first to construct and finance facilities, then to make and sell product.[414] Tracking those uses, the License Agreement sets two buckets of royalties KDC owed CSS: milestone payments keyed to financing and construction, and a running royalty keyed to product.[415] In the established royalty exercise, these two payments price KDC's use of the CSS Process in financing and constructing Fairless Hills, and then

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411 *LCT Cap., LLC v. NGL Energy P'rs LP*, 249 A.3d 77, 94 (Del. 2021).

412 JX 69 § 3.3(c).

413 To the extent Mulhern posited that KDC's conduct damaged CSS by delaying its ability to enter into another licensing deal with a third party, *see* JX 1108 at 16, that theory was dropped at trial. *See generally* PTOB (making no argument about damages due to delay in entering other agreements); PTRB (same); *see also* PTAB 107 (noting that CSS abandoned its delay damages at trial).

414 JX 69 § 2.1.

415 *Id.* § 3.2, 3.3(a).

in selling product.

The License Agreement's milestone payments set the established royalty for KDC's use of the CSS Process in financing Fairless Hills.[416] The License Agreement required KDC to "pay CSS a . . . milestone payment of $250,000 within 30 days after closing of financing to fully fund construction of each 'Train.'"[417] KDC was required to pay that Milestone for its first twelve Trains.[418] A "Train" was defined as "a single Licensed Product production line using approximately 5,000 tons/year of Residuals."[419] The parties dispute how many Trains KDC should pay for based on the bond financing. Both their positions have flaws.

According to CSS, because KDC obtained enough financing to process 60,000 tons of product, Defendants must pay for twelve Trains. KDC received funding for Fairless Hills to process 60,000 tons of food waste a year,[420] and the License Agreement defined "Train" as a production line processing about 5,000 tons a year.[421] CSS presses the funded tonnage divides into twelve Trains. CSS's flaw

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[416] *Id.* § 3.2. KDC's bond offering was in May 2020, and the bond closing "occurred on or before September 22." PTO ¶¶ 43–44. And construction for Fairless Hills began in or around June that same year, after it is undisputed that the License Agreement had ended.

[417] JX 69 § 3.2.

[418] *Id.*

[419] *Id.*

[420] JX 759 at 6.

[421] JX 69 § 3.2.

is its focus on tonnage. The License Agreement's definition of "Train" as processing about 5,000 tons a year does not mean a production line can only process 5,000 tons a year. At one point, CSS was processing 11,000 tons a year with one processing line.[422] KDC touted the Fairless Hills lines as more automated, more efficient, and running on a 24/7 basis.[423] I am unconvinced that the number of Trains funded can be reached by dividing 60,000 tons by 5,000.

The Individual Defendants argue that because KDC only ever constructed two production lines, the number of Trains is two.[424] That argument's flaw is the focus on the number of Trains actually constructed. The License Agreement defines "Train" by the number of Trains KDC received funding to construct, not production lines that were actually built.[425]

The preponderance of the evidence shows KDC received funding for three Trains. The E3 Report KDC submitted in seeking funding stated that Fairless Hills "will have three operating lines instead of one at California."[426] DPS testified the plan was for Fairless Hills to have three to four manufacturing lines.[427] The

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[422] JX 759 at 27.

[423] *Id.* at 27–28.

[424] Barry Tr. at 1157; Matthew Tr. at 527–28.

[425] JX 69 § 3.2.

[426] JX 759 at 91; *see also* Matthew Tr. at 663.

[427] Heil Tr. at 737; *see also* JX 610 at 2 (noting Fairless Hills will have three lines).

milestone payments for three Trains is $750,000.

Once KDC built Fairless Hills, the License Agreement sets an established royalty for use of the CSS Process in selling product. The License Agreement required KDC to pay a running royalty of 20% of its net sales of any Licensed Product, by KDC or its affiliates, on a monthly basis.[428] For its Qualified First Customer, KDC had to pay only 10% of its net sales.[429] KDC had two main sources of sales.

First, KDC entered into a purchase and distribution agreement with Michael Foods in 2022 in which Michael Foods agreed to pay $3.40 per pound of chicken feed.[430] KDC sold 31,432 pounds to Michael Foods,[431] which amounts to $106,869 in total net sales, and $21,374 in lost royalties at a 20% rate.

Second, KDC had a long-term agreement with Allen Harim. KDC's affiliate DGC provided Allen Harim with approximately 2.5 million pounds of KDC feed from 2021 through 2023.[432] DGC provided feed to Allen Harim as part of their broader agreement for Allen Harim to raise and sell back chickens to KDC. That agreement did not establish any price for the chicken feed, perhaps to avoid the

[428] JX 69 § 3.3(a).

[429] JX 361 at 2–3.

[430] JX 1168 § 3.2.

[431] JX 1486 at 9, 23; JX 1166; JX 1167; Matthew Tr. at 542–43.

[432] JX 1486 at 23, 10–11.

License Agreement's running royalties.[433] The Individual Defendants' expert, Clarke Nelson, valued that feed at $0.12 per pound. Nelson used the price KDC paid Bright Feeds as a substitute after the Corporate Defendants ceased operations.[434] I see no reason to use the value of what Defendants were willing to pay for another company's feed, which was made from bakery meal and not based off the CSS Process, and which the Individual Defendants have not shown was similar in value. As CSS's expert pointed out, the Individual Defendants ignore the obvious metric for valuing what its chicken feed was worth: the price Michael Foods was willing to pay for KDC's product.[435]

The Individual Defendants contend a 10% royalty rate should be applied to Allen Harim sales because it was KDC's "Qualified First Customer" under the amended License Agreement. "Qualified First Customer" was defined as "KDC's first long term off-take client for Licensed Product used for animal feed."[436] KDC and Allen Harim entered into their co-pack agreement in August 2021, and KDC sent Allen Harim chicken feed until it ceased operations in 2023. I am unaware of any earlier long-term arrangements with another customer that could fit this

[433] *See generally* JX 889.

[434] JX 1486 at 8–10; JX 1164.

[435] JX 1483 at 10.

[436] JX 361 at 1.

definition,[437] and CSS does not put forth any persuasive evidence that Allen Harim would not qualify as KDC's Qualified First Customer.[438] I will apply the 10% rate, which leads to an amount of $854,127.60. In sum, KDC's running royalties are as follows:

	Michael Foods	Allen Harim
Pounds of Feed Sold	31,432	2,512,140
Price/Estimated Price	$3.40	$3.40
Net Sales	$106,868.8	$8,541,276
Royalty Rate	20%	10%
Established Royalty (Net sales x Rate)	$21,374.76	$854,127.60
Total	$875,502.36	

Combined with the milestone payments, CSS's total established royalty amounts to $1,625,502.36.

CSS requests pre- and post-trial interest. Delaware courts routinely award such interest, using the "legal rate" as the default rate.[439] "Seeing no reason to depart from this practice, I grant [CSS] pre-judgment interest on its compensatory damages

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[437] Mulhern stated in her expert report that she was unaware of any Qualified First Customers existing. JX 982 at 36 n.165; *see also* JX 1482 at 11–12.

[438] The amendment also stated that KDC "shall immediately notify CSS at the time KDC enters into a definitive agreement with a Qualified First Customer." JX 361 at 3. KDC did not notify CSS it considered Allen Harim a Qualified First Customer. This is unsurprising, as KDC entered into the agreement after the License Agreement ended. Using the License Agreement as best evidence of the price of KDC's use of the CSS Process, CSS was deprived only of a 10% royalty based on KDC's Qualified First customer. *See Vitro Corp.*, 292 F.2d at 682–83 (using royalty rates agreed upon only in principle to calculate damages).

[439] *Great Am. Opportunities*, 2010 WL 338219, at *30.

. . . compounded quarterly, at the legal rate. Additionally, I award postjudgment interest on the full amount of the judgment, including that part comprised of prejudgment interest."[440]

c. CSS's Request For A Reasonable Royalty

This established royalty award is substantially lower than what CSS requested at trial. CSS seeks a reasonable royalty amounting to $40,658,000, a 2,400% increase over what would have been required under the License Agreement. CSS did not start there: in November 2022, Mulhern opined the appropriate remedy for CSS was lost royalties under the License Agreement.[441] Mulhern ventured into a reasonable royalty only a month before trial: in January 2024, after the Corporate Defendants ceased operations, CSS submitted a supplemental damages report from Mulhern opining that reasonable royalties were appropriate.[442] At trial, CSS pressed reasonable royalties, with lost royalties requested only in the alternative. CSS's trial

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[440] *Id.*

[441] JX 983.

[442] JX 1108 at 20 ("With respect to the misappropriation of trade secrets claims, I understand that a successful plaintiff is entitled to actual damages, unjust enrichment damages, or both, to the extent there is no double-counting. I further understand that an alternative form of compensation for misappropriation of trade secrets claims is a 'reasonable royalty.'"). The Individual Defendants moved to strike Mulhern's additional report. D.I. 395. In light of the Corporate Defendants' changed circumstances between Mulhern's initial report in 2022 and trial, I denied that motion in February. D.I. 410.

position is legally and factually unsupported.

First, as explained, there is no basis to venture into the speculative realm of a hypothetical reasonable royalty when the License Agreement offers a contemporaneous, negotiated, and consummated price for KDC's use of the CSS Process. Mulhern appears to agree. As acknowledged at trial, she had never opined that a reasonable royalty is different than an established royalty specified in the license agreement between the parties.[443] At her deposition, and as confirmed at trial, Mulhern testified that a reasonable royalty analysis was not required if an established rate existed.[444]

Second, Mulhern's reasonable royalty deviates from the License Agreement due to several assumptions that are improperly inconsistent with the trial record. A reasonable royalty is meant to "determine the amount the licensor and licensee would have agreed to just prior to the infringement."[445] "[T]he extent of the deviation of existing license fees from a reasonable royalty must be determined solely on the basis of the submitted evidence and upon an evaluation of the factors that could affect the reasonable royalty rate, not upon mere conjecture."[446]

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[443] Mulhern Tr. at 1617.

[444] *Id.* at 1615–16. The Individual Defendants' expert also testified that an established royalty is proper here. Nelson Tr. at 2031.

[445] *Automated Merch. Sys. Inc. v. Crane Co.*, 279 F.R.D. 366, 371–72 (N.D.W. Va. 2011).

[446] *Trio Process Corp. v. L. Goldstein's Sons, Inc.*, 533 F.2d 126, 130 (3d Cir. 1976).

Mulhern's reasonable royalty analysis assumes Defendants would maintain an exclusive license with CSS, which would require minimum royalties.[447] That assumption is belied by the record. The License Agreement allowed for nonexclusivity, the Individual Defendants informed CSS it planned to stop minimum payments before the License Agreement terminated and misappropriation occurred, and by December 2019, CSS was not held back by an exclusivity agreement.

Mulhern also opined the Defendants would have agreed to pay an upfront lump sum between $40.7 million to $138 million, using projections post-dating the period of hypothetical negotiations.[448] I see no basis to conclude KDC or the Individual Defendants would have agreed to pay such a large lump sum.[449] The License Agreement did not require any such lump sum: it required a $1,000,000 investment in CSS in exchange for equity, running royalties on net sales,[450] and

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[447] JX 1108 at 28.

[448] *Id.* at 4, 6, 37; Mulhern Tr. at 1651 ("'[Q.] [T]he lump sum that you're talking about, your opinion is that the parties in the hypothetical -- the parties in the hypothetical negotiation would have agreed to calculate and pay this life of the contract NPV sum in full, up front, as of January 2020; right?' 'A. That's correct.' 'Q. And, again, that lump sum is between 40.7 million and could reasonably be 138.1 million in your opinion?' 'A. The later projections suggest a number as high as that. That's correct.'").

[449] *See Lucent Techs., Inc. v. Gateway, Inc.*, 580 F.3d 1301, 1335 (Fed. Cir. 2009) (rejecting jury award of lump sum reasonable royalty payment because it was "not supported by substantial evidence, but [wa]s based mainly on speculation or guesswork" and was "against the clear weight of the evidence").

[450] *See id.* at 1326 ("Significant differences exist between a running royalty license and a lump-sum license. In a standard running royalty license, the amount of money payable by the licensee to the patentee is tied directly to how often the licensed invention is later used

minimum annual royalties for an exclusive license set off by running royalties.[451] The evidence shows KDC's predilection was to pay less, not more: at the time of Mulhern's hypothetical negotiations, January 2020, KDC was still ramping up, Fairless Hills was unfunded,[452] and KDC and the Individual Defendants had negotiated for lower royalties in 2018 and 2019.[453]

CSS's original position, that the License Agreement reflects the value of what KDC took, carries the day. Its swing for the fences with a reasonable royalty fouls away.

2. Joint And Several Liability

The next question is how to apportion the established royalty award among Defendants.[454] This Court has held defendants "jointly and severally liable . . . for

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or incorporated into products by the licensee. A running royalty structure shifts many licensing risks to the licensor because he does not receive a guaranteed payment. Royalties are dependent on the level of sales or usage by the licensee, which the licensee can often control.").

[451] JX 69 §§ 3.1, 3.2, 3.3; JX 71a; Mulhern Tr. at 1651–52 (admitting no lump sum in License Agreement); Matthew Tr. at 553–54 (testifying that KDC and CSS never considered or negotiated an upfront lump sum payment when negotiating the License Agreement).

[452] *See* JX 754; *Lucent Techs.*, 580 F.3d at 1335 (rejecting lump sum reasonable royalty where "[t]he evidence does not sustain a finding that, at the time of infringement, Microsoft and Lucent would have agreed to a lump-sum royalty payment subsequently amounting to approximately 8% of Microsoft's revenues for the sale of Outlook (and necessarily a larger percentage of Outlook's profits)").

[453] JX 361; PTO ¶ 23; JX 585 at 3; JX 610 at 3.

[454] CSS split its damages request between the Individual Defendants and the Corporate Defendants. PTOB 87 (seeking $29.1 million from the Individual Defendants and $31.5

misappropriation of trade secrets."[455] "As joint-tortfeasors for the misappropriation of trade secrets, any liability . . . would be joint and several."[456] Indeed, "[t]here is no indication that joint and several liability does not apply to misappropriation of trade secrets."[457] And "[c]ommentators on trade secret law also suggest that, in general, liability for misappropriation claims is joint and several."[458] All Defendants owe the damages award jointly and severally.

3. Injunctive Relief

CSS also requests injunctive relief.[459] CSS requests an order that Defendants return or destroy all documents containing CSS information and be enjoined from using such information. And CSS requests an order enjoining the Individual Defendants from the use of CSS's trade secrets and any development, marketing, commercialization, sales efforts, or any other activity in food recycling, fertilizer, pet food, animal feed business, or any related business.[460] I grant CSS a more limited

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million from the Corporate Defendants). It is unclear to me whether CSS takes the position that the Individual Defendants and Corporate Defendants owed wholly separate amounts, or that the Individual Defendants were only liable for a subset of the award. I see no basis for either position in law or in fact. All Defendants caused one harm to CSS.

[455] *Beard Rsch.*, 8 A.3d at 621.

[456] *CC Invs. Corp. v. Raytheon Co.*, 2005 WL 81591, at *3 (D. Del. Jan. 7, 2005).

[457] *Alpha Pro Tech, Inc. v. VWR Int'l LLC*, 984 F. Supp. 2d 425, 458 (E.D. Pa. 2013).

[458] *Fishkin v. Susquehanna P'rs., G.P.*, 2007 WL 853769, at *3 (E.D. Pa. Mar. 19, 2007).

[459] 18 U.S.C. § 1836(b)(3).

[460] PTAB 73, 88.

injunction.

"To merit a permanent injunction, a plaintiff must show: (1) actual success on the merits; (2) irreparable harm, and (3) the harm resulting from a failure to issue an injunction outweighs the harm to the opposing party if the court issues the injunction."[461] CSS has plainly prevailed on the merits, having secured a default judgment against the Corporate Defendants and proven by a preponderance of the evidence that the Individual Defendants misappropriated the trade secret CSS Process.[462]

While the License Agreement supported a damages award for past misappropriation in the form of an established royalty, and while the Corporate Defendants are being liquidated by a Chapter 7 trustee, I believe the Individual Defendants still pose a risk of irreparable harm to CSS in the form of future use of its trade secrets. After securing access to the CSS Process, the Individual Defendants spent years taking increasingly larger steps away from CSS in an effort to use that information without paying for it: from turning towards a nonenzymatic process, to renegotiating the License Agreement, to ending the License Agreement on the premise they were not operating a Licensed Facility, to setting up the Do Good Foods

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[461] *Agilent*, 2010 WL 610725, at *31 (quoting *COPI of Del. v. Kelly*, 1996 WL 633302, at *4 (Del.Ch. Oct.25, 1996)).

[462] *See FNF Hldgs. LLC v. Ricketts*, 2024 WL 5090283, at *1 (D. Del. Dec. 12, 2024) (granting permanent injunction against default judgment parties in trade secret case).

business model that monetized CSS Process product without triggering royalties. Their lack of candor at trial, going so far as to testify that they had relevant food recycling experience and that KDC developed its process from scratch, suggests a continued predilection to using the CSS Process without attribution or compensation. It appears an injunction is necessary to stop the harm that would result to CSS from future unauthorized use of its process.

The Individual Defendants oppose CSS's request for an injunction only on the basis of scope.[463] They assert a sweeping injunction on their ability to develop, market, commercialize or conduct any other activity in food recycling and its related businesses is too broad. I agree. The balance of the equities favors CSS only for an injunction limited to its own information. The Individual Defendants are enjoined from the use of the CSS Process or any other confidential information the Defendants obtained from CSS. They must also return or destroy all information related to the CSS Process.[464]

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[463] PTAB 116 ("[I]n the event the Court finds that trade secrets were misappropriated, the Individual Defendants do not dispute that a formal injunction prohibiting further use would be appropriate."); *see Nucar*, 2005 WL 820706, at *14 (granting unopposed permanent injunction prohibiting further use of trade secret).

[464] *Agilent*, 2010 WL 610725, at *32 (entering "a permanent injunction requiring the defendants to . . . immediately return any and all [of plaintiff's] property which the defendants took from [the plaintiff]").

4. Exemplary Damages And Attorneys' Fees

Lastly, CSS requests exemplary damages and attorneys' fees and costs.[465] If a trade secret was "willfully and maliciously misappropriated," reasonable attorney's fees may be awarded to the prevailing party.[466] The Federal Act contemplates exemplary damages "if [a] trade secret is willfully and maliciously misappropriated" of an "amount not more than 2 times the amount of the damages awarded."[467] Here, exemplary damages may be granted up to $3,251,004.72.

"[T]he issue of whether a defendant has acted willfully and/or maliciously is a 'highly fact-specific question best left to the [fact-finder]."[468] "A plaintiff claiming willful and malicious misappropriation must prove that the misappropriation was both willful *and* malicious."[469] "[W]illfulness is defined as 'an awareness, either actual or constructive, of one's conduct and a realization of its probable consequences.'"[470] And malice is defined as 'ill-will, hatred or intent to cause injury.'"[471] Malice is not lightly found. In *EDIX Media Group, Inc. v. Mahani*, this

[465] PTOB 87–88.

[466] 18 U.S.C. § 1836(b)(3)(D).

[467] *Id*. § 1836(b)(3)(C).

[468] *I-Mab Biopharma v. Inhibrx, Inc.*, 2024 WL 4437227, at *2 (D. Del. Oct. 1, 2024) (quoting *PetroChoice Hldgs., Inc. v. Orobono*, 2022 WL 138008, at *6 (E.D. Pa. Jan. 14, 2022)).

[469] *Agilent*, 2010 WL 610725, at *33 (emphasis in original).

[470] *Id.* (quoting *Nucar*, 2005 WL 820706, at *14).

[471] *Id.* (quoting *Nucar*, 2005 WL 820706, at *14).

Court determined the defendant acted with malice where he engaged in "a continual and underhanded campaign to discredit [the plaintiff]" and "refus[ed] to cease his activities even after agreeing to a stipulated restraining order entered by this Court."[472] In *Nucar Consulting, Inc. v. Doyle*, the Court found malice where the defendant, an ex-employee of the plaintiff, used the plaintiff's trade secret information to "aggressively solicit[]" plaintiff's prospective clients "with the intent to cause injury."[473] In *Storagecraft Tech. Corp. v. Kirby*, a case CSS relied upon, a federal district court found malice where the defendant admitted his conduct was "motivated by revenge" and he refused to produce certain emails despite court orders.[474]

CSS made no similar showing of ill will, vindictiveness, or the intent to harm CSS. CSS asserts the Individual Defendants acted with malice because of their dishonesty with CSS, conduct during litigation, and alleged lack of remorse for their actions.[475] As examples, CSS points to the Individual Defendants' attempts to wipe CSS from its materials, Matthew and Barry's visits to CSS right before the License

[472] 2006 WL 3742595, at *3 (Del. Ch. Dec. 12, 2006); *see also Huber*, 958 F.3d at 184–85 (affirming grant of punitive damages against defendant where he encouraged another defendant to harm plaintiff-employer and steer business away from plaintiff-employer).

[473] 2005 WL 820706, at *14.

[474] 2012 WL 4467519, at *6, 8 (D. Utah Sept. 27, 2012), *aff'd*, 744 F.3d 1183 (10th Cir. 2014).

[475] PTOB 82–85.

Agreement ended, and the Individual Defendants' continued use of the CSS Process. While this conduct is key to CSS's misappropriation case, CSS has not proven the Individual Defendants acted with ill-will, hatred, or a desire to harm CSS. This behavior is consistent with misappropriating the CSS Process to benefit KDC, not to additionally harm CSS.

As for the Individual Defendants' litigation conduct, their defense was comprehensive, succeeded in delaying the day of reckoning, and culminated in trial testimony rife with impeachments and untruths. While their tactics were oppressive and defensive, I do not believe they rise to the level of malice or bad faith necessary for this Court to take the extraordinary steps of awarding exemplary damages or shifting fees. I do not grant CSS its request for exemplary damages and attorneys' fees.

III. CONCLUSION

Judgment on Counts VII and VIII will be entered in favor of CSS, and on Counts V, XIV, XV, XVI, and IX, in favor of the Individual Defendants. Defendants owe CSS $1,625,502.36, plus pre- and postjudgment interest to be calculated by the parties. The parties are to submit a proposed stipulated final order and judgment within 7 days.

EXHIBIT B

EFiled: Jan 23 2025 12:31PM EST
Transaction ID 75499709
Case No. 2021-0498-MTZ

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

CALIFORNIA SAFE SOIL, LLC, a Delaware limited liability company, Plaintiff, v. KDC AGRIBUSINESS, LLC, et al., Defendants.	C.A. No. 2021-0498-MTZ
KDC AGRIBUSINESS LLC, Counter-Plaintiff, v. CALIFORNIA SAFE SOIL, LLC, Counter-Defendant.	

[PROPOSED] FINAL ORDER AND JUDGMENT

WHEREAS, the operative complaint in this action, the Verified Third Amended Complaint (the "Complaint"), filed October 27, 2022 by California Safe Soil, LLC ("CSS"), brings sixteen counts against KDC Agribusiness LLC, KDC Agribusiness Fairless Hills LLC, KDC Agribusiness North Dakota, LLC, Do Good Foods LLC, Do Good Foods Managed Services LLC, Do Good Foods Facility Management LLC, and Do Good Chicken LLC (the "Corporate Defendants") and Harold Kamine, Matthew Kamine, Justin Kamine, and Barry Starkman (the "Individual Defendants");

WHEREAS, on October 28, 2022, KDC Ag, Kamine Safe Soil, Justin Kamine, and Matthew Kamine filed Verified Second Amended Counterclaims (the "Counterclaims") against CSS and Daniel Morash (the "Counterclaim Defendants"), which are the operative counterclaims in this action;

WHEREAS, trial in this action took place from February 28, 2024 through March 7, 2024;

WHEREAS, in January 2023 Corporate Defendant KDC Agribusiness North Dakota LLC filed a Certificate of Cancellation and on June 16, 2023, the remaining Corporate Defendants filed for bankruptcy, and the trustee elected not to defend their claims;

WHEREAS, on April 22, 2024, the Court granted default judgment against the Corporate Defendants;

WHEREAS, on January 10, 2025, the Court issued its post-trial Memorandum Opinion (the "Opinion");

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED THAT:

1. Judgment is entered in favor of CSS and against the Individual Defendants on Counts VII and VIII of the Complaint.

2. Judgment is entered in favor of CSS and against the respective Corporate Defendants named on Counts I–III, V–XIV, and XVI of the Complaint.

3. Judgment is entered in favor of CSS and against Corporate Defendants KDC Agribusiness LLC, Do Good Foods LLC, Do Good Foods Managed Services LLC, Do Good Foods Facility Management LLC, and Do Good Chicken LLC, on Count XV of the Complaint.

4. Judgment is entered in favor of CSS and against KDC Agribusiness LLC on Counts I and II of the Counterclaims.

5. Judgment is entered in favor of CSS and Daniel Morash and against KDC Agribusiness LLC, Kamine Safe Soil, Matthew Kamine, and Justin Kamine on Counts III and IV of the Counterclaims.

6. Judgment is entered in favor of the Individual Defendants and against CSS on Counts V, VI, XIV, XV, XVI, and IX of the Complaint.

7. Judgment is entered in favor of Corporate Defendant KDC Agribusiness LLC and against CSS on Count IV of the Complaint.

8. Judgment is entered in favor of Corporate Defendants KDC Agribusiness Fairless Hills LLC and KDC Agribusiness North Dakota, LLC and against CSS on Count XV of the Complaint.

9. CSS is awarded $1,625,502.36 in damages (the "Judgment Amount"), for which the Defendants are jointly and severally liable.

10. The Individual Defendants are enjoined from the use of the CSS Process, as that term is defined and described in the Opinion, or any other

confidential information obtained from CSS. The Individual Defendants must return or destroy all information related to the CSS Process within sixty (60) days of entry of this Final Order and Judgment.

11. CSS is awarded pre-judgment interest at the statutory rate, compounded quarterly. Pre-judgment interest has accrued through and including January 22, 2025 in the total amount of $354,787 and shall accrue at an additional $379 per day from January 23, 2025 through the date this judgment is entered by the Court.

12. CSS is awarded Post-judgment interest on any unpaid portion of the Judgment Amount and pre-judgment interest at the legal rate at the time this Judgment is entered, compounded quarterly, with such accrual beginning from the day following the Court's entry of this judgment through the date upon which the judgment is satisfied. The Defendants are jointly and severally liable for pre-judgment and post-judgment interest.

13. Rule 54 Costs are awarded to CSS. CSS has provided the Individual Defendants with a summary of Rule 54 costs totaling $46,034.80, which the Individual Defendants do not dispute. The Defendants are jointly and severally liable for costs.

14. Any relief requested that is not otherwise addressed in this Final Order and Judgment, including CSS's request for exemplary damages and attorneys' fees, is denied.

SO ORDERED this ___ day of _______________, 2025.

____
Vice Chancellor Morgan T. Zurn

This document constitutes a ruling of the court and should be treated as such.

Court:	DE Court of Chancery Civil Action
Judge:	Morgan Zurn
File & Serve Transaction ID:	75494694
Current Date:	Jan 23, 2025
Case Number:	2021-0498-MTZ
Case Name:	CONF ORD **-** California Safe Soil, LLC v. KDC Agribusiness, LLC, et al.
Court Authorizer:	Morgan Zurn

/s/ Judge Morgan Zurn