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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

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Rules & Statutes

Other Authorities

NATURE OF PROCEEDINGS

After two years of litigation, seven days of trial, and post-trial briefing and argument, the Court of Chancery issued a 97-page reasoned opinion. In it, the Court of Chancery found for Plaintiff-Appellant California Safe Soil, LLC ("CSS") on two of its eight counts against the Individual Defendants-Appellants, determining that they (and the Corporate Defendants who are in chapter 7 liquidation) misappropriated a combination trade secret process for converting food waste into fertilizer or animal feed and rejecting the remaining fraud, tortious interference, conspiracy, and other claims.

Liability on the trade secret claims was hotly contested. CSS argued that its base process, even without the step of adding its patented commercial enzymes (the "CSS Process"), was a combination trade secret. Individual Defendants argued it was not because the base process was generic, widely known, and generally shared by CSS with the public, including through posted factory videos and public tours. Without reaching whether any specific aspect of the CSS Process constituted a trade secret (as CSS also argued), the Court of Chancery found the process itself was sufficiently specific and undisclosed to constitute a combination trade secret.

The Court of Chancery awarded $1.6 million in damages based on the "established royalty" derived from parties' own License Agreement covering the exact intellectual property ("IP") at issue in this case. It rejected CSS's claims for several tens and even hundreds of millions of dollars in damages, including based on a hypothetically-negotiated reasonable royalty theory CSS's own expert had expressly rejected before trial and minimum royalties for an "exclusive" license that was terminated under the License Agreement before any misappropriation. CSS appeals the Court of Chancery's damages award.

SUMMARY OF ARGUMENT

CSS appeals the Court of Chancery's detailed and heavily supported damages award, which is subject to review for abuse of discretion (or, arguably as to certain limited aspects, clear error).

1. Denied. The Court of Chancery did not abuse its discretion by declining to award damages based on a speculative hypothetically-negotiated reasonable royalty rather than the available established royalty based on the parties' own actual License Agreement that covered the exact IP at issue (much less to base that rejected hypothetical reasonable royalty on demonstrably false ten-year projections that post-dated the purported hypothetical negotiation, rather than on actual net sales as the parties expressly agreed in their License Agreement). Op. at 73-80, 88-91. CSS does not even attempt to show how the Court of Chancery's use of the established royalty methodology, which is supported by long precedent, was an abuse of discretion. Moreover, CSS's arguments—amounting to the contention that the Court of Chancery should have picked CSS's preferred methodology instead—are themselves contrary to the Court of Chancery's factual findings, the caselaw (including cases cited by CSS itself), and CSS's own prior position.

2. Denied. The Court of Chancery did not abuse its discretion by determining an established royalty based on the terms under the License Agreement for a nonexclusive, rather than exclusive, license because: (i) "the best evidence of the

CSS Process's standalone value is a nonexclusive royalty stripped of any exclusivity premium," and (ii) CSS did not lose any exclusivity premiums "due to any wrongful conduct by KDC" because the parties terminated exclusivity (and the corresponding payments for it) under the terms of the License Agreement before any misappropriation occurred and, "as of December 2019, CSS was free to license its process to other business partners." Op. at 81-82.

3. Denied. The Court of Chancery did not abuse its discretion by declining to award exemplary damages and attorney's fees. The Court of Chancery did not "misapprehend[ ]" or "misconceive[ ]" the malice standard and thus "improperly constrain[ ] its own discretion," as CSS claims (OB at 4, 42). Instead, after enunciating the well-settled standard and definition of "malice," the Court considered all of the evidence and testimony, analyzed relevant caselaw, and found that "CSS made no similar showing of ill will, vindictiveness, or the intent to harm CSS." Op. at 96.

This Court should affirm.

STATEMENT OF FACTS

A. CSS Buys Technology Out of Bankruptcy (2011)

In 2011, non-party Organic Recovery went bankrupt, and newly formed CSS purchased Organic Recovery's technology out of bankruptcy. Op. at 4-5.

B. CSS Courts the Kamines (2011)

In late 2011, during a financing round, CSS's founder and CEO Dan Morash approached Individual Defendant Hal Kamine. Op. at 5. Mr. Morash was interested in "[t]he Kamines' [c]apital and [e]xpertise." Op. at 5. Specifically, he "sought out Hal because of his track record of investing in green technology, skill in bringing in investors, and experience in project management." Op. at 5. Mr. Morash provided detailed information to Hal Kamine on CSS's business, including plant schematics, equipment lists, financials and descriptions of CSS's food recycling process, all without a confidentiality agreement. Op. at 5; B176-83.

C. The Kamines Invest and Assist CSS, and CSS Posts Videos and Gives Public Tours of Its New Pilot Plant (2012-2015)

In February 2012, Individual Defendants Hal, Matt, and Justin Kamine made their first investments in CSS—Hal $200,000, and Justin and Matt $100,000 each—making them among the largest CSS equity holders. Op. at 5-6; B201; B221. Later in 2012, CSS opened "a small pilot plant" in West Sacramento, California (the "Pilot Plant") to further develop its technology. Op. at 6-7.

Over the next few years, the Kamines attended CSS board meetings, "pitched CSS to upwards of one hundred potential investors," "assisted CSS in pitching its business to various grocery store chains and other companies," and recommended equipment modifications. Op. at 6; B780.

During that same time, CSS opened the doors of its Pilot Plant to the public. Op. at 15, 42-43. For example, in 2014, CSS posted a Company Overview video online that showed its Pilot Plant, unit operations, and equipment. Op. at 15 n. 81 (citing B235; B237; B833-34). In July 2014, Ed Lewis, a UC Davis Professor who worked closely with CSS, posted similar details to YouTube. B236. In 2015, Mr. Morash allowed a Costco representative to tour the Pilot Plant without an NDA, even though Hal Kamine expressed suspicion Costco might be providing information to CSS's direct competitor WISErg. Op. at 15 n. 82 (citing B238-41; B0116-17; B242-43. And Toyota also made a film with CSS (posted on YouTube in 2016), interviewing Mr. Morash about the CSS Process and videoing the Pilot Plant's inner workings. Op. at 15 n. 81 (citing B248-49; B250).

D. KDC is Formed to Enter into a License Agreement and CSS Builds a New Facility, which It Also Opens to the Public

In 2015, seeking to expand, "[o]nce again, CSS turned to the Individual Defendants, seeking Hal's experience in project development and in scaling up industrial processes." Op. at 8. The Kamines created KDC Agribusiness LLC ("KDC") and, on December 11, 2015, CSS and KDC executed the License

Agreement with CSS. Op. at 8-9. The License Agreement provided KDC with a license for CSS's IP "within the United States, excluding California, where CSS's existing Pilot Plant was located, and part of Arizona." Op. at 9. CSS retained all rights to the remainder of the United States and the rest of the world. A0187.

Pursuant to the License Agreement, KDC invested $1 million into CSS to help CSS build a new larger commercial facility in McLellan, California, which CSS completed in 2016. Op. at 13-14. As with the Pilot Plant, CSS made little effort to keep the innerworkings of the new plant secret, again posting videos of the facility, giving public tours, and holding a "public ribbon cutting ceremony," where "[a]ttendees toured the plant and viewed CSS's equipment in place without signing an NDA." Op. at 15. In 2019, Mr. Morash invited a filmmaker "to come see our plant" at McClellan "to film our process" for an upcoming documentary that was later published. Op. at 15 n. 80 (citing B251-54; B255-58).

E. The Parties Continue to Fail to Monetize the IP (2015-2019)

Even with the new investment and help from Defendants, the IP still made no money. Defendants tried to sell liquid fertilizer from the enzymatic process (i.e., using CSS's patented enzymes) for several years but ***were never able to sell a single unit***. B799-80; B808; Op. at 20. Defendants also tried for years to create and sell other products from the enzymatic process, including dry fertilizer, pet food ingredients, and pet food palatants (coating), but ***were never able to sell a single***

unit of any product produced using CSS's patented enzymes. B799; B808-11; Op. at 20-21.

In 2018, after studies the Kamines commissioned showed feed made using the enzymatic process were making chickens sick, KDC "began to explore a process that would not require adding enzymes, while retaining the flexibility to add them." Op. at 20. As of 2019, KDC had developed several "improvements" and "modifications" to the "base CSS process." Op. at 20. Indeed, "[b]ecause 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." Op. at 20.

"Hal first informed Morash about KDC's plan to explore a nonenzymatic process in the summer of 2018." Op. at 20. At the same time, KDC told CSS that, because "KDC believed a nonenzymatic process did not fit the definition of a Licensed Process," it would not owe royalties for the non-enzymatic process under the License Agreement. Op. at 23; B784. In response, CSS secretly (but unsuccessfully) tried to capture KDC's non-enzymatic process by filing a new patent application whose claims did not expressly require adding enzymes. B775.

Meanwhile, under the License Agreement, "KDC was required to 'pay CSS royalties equal to twenty percent (20%) of Net Sales' . . . on a running monthly basis." Op. at 12, 85, 87. If it wanted "to maintain an exclusive license," however, KDC also had to pay CSS "minimum royalties," which were "credited against monthly running royalties [and] on a set schedule that stepped up each year." Op. at 12, 81 n.410. "KDC owed $0 in 2016 and $100,000 in 2017; by 2020, it would owe $5,000,000 in minimum royalties," with the amount increasing 20% each year after that. Op. at 12.

On December 30, 2019, with the enzymatic process still not commercially viable and after failed efforts to negotiate amendments to the License Agreement with CSS for lower royalties, KDC sent a letter notifying CSS that it was terminating the minimum royalty payments (and the exclusivity that went with them) pursuant to the terms of the License Agreement. Op. at 22; B786. Far from a surprise, CSS already had developed a "Plan B" for this scenario. B263. On December 31, 2019, "CSS responded by converting KDC's exclusive license to a nonexclusive license for any existing Licensed Facilities." Op. at 22.

CSS's letter also stated that "CSS was unaware of any existing Licensed Facilities." Op. at 22. Several months earlier, however, in August 2019, KDC had begun operating a laboratory at Fairless Hills, where its engineers made both enzyme and non-enzyme products. Op. at 22-23. CSS knew about the Fairless Hills lab and even shipped enzymes and other processing materials there in late 2019. B814-15; B259; B261. Accordingly, "[i]n January 2020, Hal responded that Fairless Hills was under construction and operating, and so it was a Licensed Facility." Op. at 22. He further explained that "KDC Ag has produced numerous variations of the Licensed Products" at Fairless Hills. Op. at 22-23. Indeed, by that time, as the letter explained, KDC already had leased Fairless Hills, received township approval, worked with the DEP for a year on applications, picked up a construction permit, and built and begun to operate a laboratory at Fairless Hills that produced Licensed Product. Op. at 22-23 (citing A0232).

More than four months later, on May 12, 2020, CSS responded by letter, disputing that Fairless Hills was a Licensed Facility and demanding access to KDC's facilities and documents. A0241. Contemporaneous internal CSS emails revealed its motivations: "They have something useful - a fully developed site. If we owned it, it would fit Phase II of our plan," which included competing against KDC in the feed market. B283-84; B264-65.

On May 26, 2020, KDC responded by letter stating that it had since determined "not to use a Licensed Process to create Licensed Products at any of its facilities thereby rendering the License Agreement inapplicable to KDC Ag's business and operations" (because "KDC believed a nonenzymatic process did not fit the definition of a Licensed Process"). Op. at 23; A0318. This simply reflected a new decision to no longer use CSS's enzymes to produce products.

F. KDC Opens a Pilot Plant and then the Full-Scale Fairless Hills Facility (2020-2023)

In September 2020, KDC leased an existing food processing facility in North Dakota as a pilot plant to research and develop its non-enzymatic process. Op. at 30. Implementing what it had learned from its pilot plant, KDC completed construction of the large-scale Fairless Hills facility. Op. at 30.

At the large-scale facility, KDC produced chicken feed using its non-enzymatic process. Op. at 32. KDC created Do Good Foods LLC and Do Good Foods Chicken LLC (together, "DGC") and, in early 2022, began supplying its chicken feed to Allen Harim, which used it to grow chickens to sell back to DGC. Op. at 32-33. DGC sold the chickens into food distribution chains with "specialty" claims on the labels made possible from the "recycling" process. Op. at 32-33; B313; B805; B822; B826. It also sold approximately 31,432 pounds of feed to Michael Foods as a small "trial" or "pilot" test at $3.40/lb. Op. at 33; B285; B286; B806; B820; B828. Michael Foods promptly informed KDC that price was too high and never purchased any more feed from KDC. B291; B806; B821.

G. KDC Enters Bankruptcy and then Liquidation (2023)

KDC and DGC continued to operate into 2023 but struggled financially. Op. at 23. In early 2023, Nuveen, LLC (which owned the bonds from the Fairless Hills financing), required KDC to enter a forbearance agreement, giving Nuveen control over KDC. B379. With KDC out of money, Nuveen would only offer KDC additional funds through debtor-in-possession ("DIP") financing, forcing KDC to enter Chapter 11 in June 2023. B791; B795-97; B341.

After providing limited DIP financing, by mid-September "Nuveen wrote off the debt of the project and had [KDC] immediately close the facility" and "la[y] off the 70 to 80 employees." B791-92; B805. To try to salvage the business, the Individual Defendants identified Bright Feeds as a low-cost supplier of chicken feed that enabled the same "specialty" claims on the chicken labels, and Allen Harim accepted the substitute. Op. at 33; B792; B803-06; B605; B805; B822; B826. With no new sources of financing available, however, KDC was forced to convert to chapter 7 in November 2023. Op. at 35; B793.

H. Level Setting

Three additional sets of facts provide critical context for the damages analysis in this case. *First,* CSS's IP has never yielded a dime of profit for anyone — not for CSS in its more than twelve-year existence or KDC (including DGC) in its eight-year existence. B633-35; B772; B825; A2072. Both companies likewise have never met projections. CSS: B669; B835; B824; A2044. That is despite years of effort by the Individual Defendants, whom CSS describes as "successful entrepreneurs" with a "substantial track record." B094; B771.

Second, there are no claims in this case of infringement of CSS's patents, which are the center of its business model. Op. at 8, 11; B812; B836.

Third, at trial, CSS presented no evidence of any value destruction relating to its IP. B821. On the contrary, confirming that it still viewed the IP as worthy of protection, CSS repeatedly requested that the courtroom be sealed during testimony about its purported trade secrets to preserve their supposed value. *E.g.*, B773.

I. Procedural History and the Opinion Below (2021-2024)

CSS filed this lawsuit in 2021. Op. at 33. It amended its complaint three times. Op. at 34. The Court of Chancery found for CSS on two of its eight counts against the Individual Defendants. Op. at 34, 36.

Specifically, on the trade secret claims, the Court of Chancery found that "KDC's process at Fairless Hills was derived from the CSS Process" because KDC used the CSS "base process" as a starting point. Op. at 31, 30-32, 57, 63-64. In finding that CSS had identified its process as a trade secret with sufficient specificity at the time of disclosure, the Court of Chancery relied on the fact that "the License Agreement's definition of 'Trade Secrets' contemplated CSS's 'technologies, processes and formulae' and its 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.'" Op. at 51.

The Court of Chancery further found that although "CSS was not perfect in protecting parts of the CSS Process," the secrecy of "[t]he CSS Process as a whole was reasonably protected." Op. at 49-50. It explained that, "although some components of CSS's process are public, it cannot be fully replicated from public sources." Op. at 41. Thus, "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 it not being generally known.'" Op. at 43.

The Court rejected CSS's other claims against the Individual Defendants, including its fraud claim, finding that "CSS has not met its burden of proof" to show fraud (Op. at 67); tortious interference claim, finding that that "CSS cites no convincing evidence, and I see none" that the Kamines "acted outside their scope of employment" (Op. at 71); and conspiracy claim, finding that to the extent it is tied to tortious interference, "it must fail as well" (Op. at 66 n. 355). CSS does not appeal those holdings.

The Court of Chancery awarded CSS approximately $1.6 million in compensatory damages based on an established royalty set using the License Agreement between the parties that covered the same IP at issue in the case. Op. at 82-87. The Court found the License Agreement was "the best evidence of how CSS valued the CSS Process and how much KDC was willing to pay to use it." Op. at 79. This approach was directly in line with long precedent. The Court found Defendants jointly and severally liable (Op. at 91), meaning the burden of any damages award falls entirely to the Individual Defendants personally. The Court rejected CSS's claim for exemplary damages and attorneys' fees. Op. at 95-97.

ARGUMENT

I. THE COURT OF CHANCERY APPROPRIATELY SELECTED AND APPLIED THE ESTABLISHED ROYALTY METHODOLOGY TO CALCULATE DAMAGES

A. Question Presented

Whether the Court of Chancery abused its discretion by awarding CSS damages based on an established royalty derived from the parties' own actual License Agreement that covered the exact IP at issue, rather than a speculative hypothetically-negotiated reasonable royalty (based on demonstrably false ten-year projections that post-dated the purported hypothetical negotiation rather than actual sales (as the parties expressly agreed in their License Agreement)). Op. at 73-80, 88-91.

B. Scope of Review

The Delaware Supreme Court reviews a damages award for abuse of discretion. *See Int'l Telecharge v. Bomarko, Inc.*, 766 A.2d 437, 440 (Del. 2000) ("This Court reviews for an abuse of discretion an award of damages by the Court of Chancery."); *Ams. Mining Corp. v. Theriault*, 51 A.3d 1213, 1251-52 (Del. 2012). That same standard applies in the context of damages for trade secret misappropriation, where "'each case is controlled by its own peculiar facts and circumstances.'" Op. at 73 (citation omitted); *see also* Op. at 73 (citing cases and discussing discretion necessary for determining trade secret misappropriation damages); *see also*, *e.g., Softel, Inc. v. Dragon Med. & Sci. Commc'ns, Inc.*, 118

F.3d 955, 970 (2d Cir. 1997) (affirming damages award for trade secret misappropriation and emphasizing "the deference owed by an appellate court to a trial court's factual findings" and the fact that "in few areas of the law is this rule so generously applied as it is in the field of damages."). "'When an act of judicial discretion is under review, the reviewing court may not substitute its own notions of what is right for those of the trial judge, if [her] judgment was based upon conscience and reason, as opposed to capriciousness or arbitrariness.'" *Dover Historical Soc. v. City of Dover Planning Comm'n,* 902 A.2d 1084, 1089 (Del. 2006) (quoting *Chavin v. Cope,* 243 A.2d 694, 695 (Del. 1968)).

The Court of Chancery's determination to use the "established royalty" based on the License Agreement is thus subject to review for abuse of discretion. *Supra* at 17-18; *see also Sunoco P'rs Mktg. & Terminals L.P. v. U.S. Venture, Inc.*, 32 F.4th 1161, 1180 (Fed. Cir. 2022) (affirming damages award for infringement and noting "[t]he amount of damages determined by a district court is a question of fact that is reviewed for clear error on appeal, while the method used by a district court in reaching that [damages] determination is reviewed for an abuse of discretion."); *cf. Johnson v. Trigg*, 28 F.3d 639, 643 (7th Cir. 1994) ("[T]here is deferential review[ ] and plenary review, and . . . the verbal distinctions within the deferential category (clear error, substantial deference, abuse of discretion) have little consequence in practice.") (citations omitted).

CSS baldly claims this Court should review the Court of Chancery's analysis *de novo* because *de novo* review applies to "whether or not an *equitable remedy* exists or is correctly applied." OB at 18 (quoting *Schock v. Nash*, 732 A.2d 217, 232 (Del. 1999)) (emphasis added). But CSS seeks review here of the Court of Chancery's compensatory damages award. *Schock* is inapposite.

CSS also cites a Second Circuit decision for the proposition that "'the formula used'" in calculating damages "'is a question of law'" that warrants *de novo* review. OB 18 (quoting *Vermont Microsystems v. Autodesk, Inc.*, 138 F.3d 449, 452 (2d Cir. 1998)). That case too is inapposite. In *Vermont Microsystems*, the court reversed a decision by a magistrate judge who, in determining a hypothetical "reasonable royalty" in a patent infringement case, awarded a "double recovery" to a plaintiff by awarding both actual loss *and* unjust enrichment for the same losses (without offset). 138 F.3d at 451-52. The Court went on to note that "it would border on the ridiculous to find that an infringer would agree to pay an amount in excess of the misappropriated property's actual value as a deterrent to further acts of infringement." *Id*. at 452. Well-settled caselaw (*supra* at 16-17) makes clear that the abuse of discretion standard applies here. Under any standard, the Court of Chancery's damages award should be affirmed.

C. Merits of the Argument

CSS challenges the Court of Chancery's choice of damages methodology, arguing that, rather than using the "established royalty" based on the parties' own License Agreement covering the IP at issue, the Court instead should have used a hypothetically-negotiated "reasonable royalty" that, moreover, should have relied on demonstrably false post-hypothetical negotiation ten-year projections rather than actual sales (as expressly provided for in the License Agreement). OB at 18-30. The Court of Chancery committed no error, much less reversible error.

1. The Court of Chancery's use of the available established royalty to determine damages was appropriate

After noting the flexibility afforded Courts in determining trade secret misappropriation damages (Op. at 73), the Court of Chancery used the well-accepted "established royalty" method to value the misappropriated CSS process (Op. at 80; *see also* Op. at 74-76). There can be no dispute that "'[a]ctual or established royalties [are] 'excellent and objective evidence' of compensatory damages.'" Op. at 76 n. 392 (citation omitted). "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.'" Op. at 75 (quoting William C. Rooklidge et al., *Compensatory Damages Issues in Patent Infringement Cases*, at 9 (2017)); *see also* Op. at 75-86 (citing cases). "In that circumstance, the royalty required by the agreement ordinarily will be treated as an established royalty." Op. at 75 n. 389 (quoting Rooklidge, at 9).

An established royalty "offers the court 'the value the parties themselves assigned to the appropriated information.'" Op. at 75-76 (quoting *Biodynamic Techs., Inc. v. Chattanooga Corp.*, 658 F. Supp. 266, 270 (S.D. Fla. 1987)); *see also* Op. at 75-76 nn. 386-90 (citing cases). Thus, as the Court of Chancery explained, where, as here, "the parties have entered into or negotiated a royalty agreement" covering the IP at issue, damages become subject to "exact measurement" and "that course should be followed." Op. at 75 (quoting *Biodynamic Techs.*, 658 F. Supp. at 270); *see also* Op. at 75-76 nn. 386, 387, 390 (citing cases), 79-80 (citing cases); *see Ford Motor Co. v. Versata Software, Inc.,* 2018 WL 10733561, at *8–9 (E.D. Mich. July 9, 2018) (citing Sixth Circuit cases affirming damages awards and noting "established royalty," when available, is the "'best evidence' of the value of misappropriated trade secrets—and thus the best measure of the damages owed to a plaintiff in a misappropriation case"); Michael A. Rosenhouse, *Proper Measure and Elements of Damage for Misappropriation of a Trade Secret,* 11 A.L.R.4th 12 § 2(a) ("In determining the proper measure of damages for misappropriation of a trade secret, the first inquiry of the courts generally has been whether there is any factual basis, such as a royalty agreement . . ., from which one might legitimately determine the value which the parties themselves actually assigned to the misappropriated information. Where such circumstances exist, the courts usually have drawn upon them in order to measure the plaintiff's damages.").

The Court of Chancery comprehensively analyzed this and other precedent and concluded that the License Agreement between the parties, covering the IP at issue, and in place until the moment of misappropriation, is "the best evidence of how CSS valued the CSS Process and how much KDC was willing to pay to use it" and thus "can be used to set an established royalty." Op. at 78-79. "As 'what was agreed upon compensation,' the set royalty in the License Agreement provides the appropriate measure to calculate damages" in this case. Op. at 78-79. Indeed, CSS's *own expert* "agreed the License Agreement provides credible evidence of what CSS and KDC agreed the CSS process was worth." Op. at 78.

The Court of Chancery therefore found that CSS was owed both milestone payments for the financing of "trains" in the manufacturing facility and royalties for the actual "net sales" of product, as the parties had expressly agreed in the License Agreement. Op. at 12, 82-87; *see also supra* at 9; A0187; *Biodynamic Techs.,* 658 F. Supp. 270 ("established royalty" per "amount expressly stated" in license agreement in principle was "5% of the net sales of the product sold by the Defendant"); *Design Innovation, Inc. v. Fisher-Price, Inc*., 463 F. Supp. 2d 177, 184 (D. Conn. 2006) ("imposing [the] royalty rate on [the defendant's] sales of the products which…misappropriated [the plaintiff's] concept" accurately measures damages). The Court of Chancery added the sums together and concluded that the total damages owed to CSS was $1,625,502.36. Op. at 82-87.

Far from an abuse of discretion, the Court of Chancery's selection of this (indeed, preferred) methodology was a straightforward application of settled law to the facts of this case. CSS does nothing to challenge that. On these grounds alone, the established royalty determined by the Court of Chancery should be affirmed.

2. The Court of Chancery properly rejected CSS's theory of damages based on a reasonable royalty deviating from the terms of the license agreement

Setting aside that CSS makes no attempt to challenge the Court of Chancery's determination on its own terms, CSS's argument that the Court of Chancery should have employed its rejected reasonable royalty instead of the available established royalty is unsupportable on its face.

First, as the Court of Chancery explained in rejecting it, applying CSS's proposed reasonable royalty here would be contrary to the Court's factual findings, long precedent, and CSS's own prior position. Op. at 75-76, 78-79, 88-89. CSS repeatedly explains that the reasonable royalty it advocates for is one "determined by a '*hypothetical negotiation*' between the trade secret owner and the trade secret user" and thus is meant to "calculate what the parties *would have agreed to* as a fair price for licensing [the IP at issue]." OB at 20-21 (emphasis added). That damages theory was new at trial. Op. at 88. CSS and its expert previously had argued that "the appropriate remedy for CSS was lost royalties under the License Agreement." Op. at 88. Then, "only a month before trial," they changed course and sought "a reasonable royalty amounting to $40,658,000, a 2,400% increase over what would have been required under the License Agreement." Op. at 88.

Even worse, CSS's expert also previously testified (as confirmed at trial) that a hypothetical reasonable royalty "was not necessary[ ] [b]ecause in this case there is an established royalty for the technology at issue," adding that she had never "opined that a reasonable royalty is something different than that specified in the license agreement between the parties" and that "in the case of an established royalty, which is the royalty that results from the agreement between the parties – [ ] I think that provides probative evidence of the value of the technology -- there is no need to -- to make modifications or to seek additional evidence of a reasonable royalty." B691; A2031-34; Op. at 88-89 (CSS's expert "had never opined that a reasonable royalty is different than an established royalty specified in the license agreement between the parties and "[a]t her deposition, and as confirmed at trial, Mulhern testified that a reasonable royalty analysis was not required if an established rate existed").

The Court of Chancery found that estimating a reasonable royalty is not appropriate in this case given that an "established royalty" exists through an actual License Agreement that resulted from an actual negotiation by the same parties covering the IP at issue, and further noted that both parties' experts had agreed. Op. at 89 & 89 n. 444; *see also* Op. at 79 n. 403; *supra* § I.C.1 & at 24. In contrast to an established royalty, a reasonable royalty is necessarily "speculative" "guesswork." Op. at 74-76 (citing *Lucent Techs., Inc. v. Gateway, Inc.*, 580 F.3d 1301, 1335 (Fed. Cir. 2009)).

In *Universal Computing*, a case on which CSS repeatedly relies (OB at 18-19, 20, 23), the court made this point expressly: "'As pointed out in many cases...in a case *where no established royalty is shown* it is for the Court to determine a reasonable royalty....'" *Univ. Computing v. Lykes-Youngstown Corp.*, 504 F.2d 518, 537 (5th Cir. 1974) (first ellipses in original; citation omitted; emphasis added) (cited in Op. at 75 n. 386); *accord Unisplay, S.A. v. Am. Elec. Sign Co., Inc.*, 69 F.3d 512, 517 (Fed. Cir. 1995) ("The [patent infringement] statute contemplates that when a patentee is unable to prove entitlement to lost profits *or an established royalty rate*, it is entitled to 'reasonable royalty' damages based upon a hypothetical negotiation between the patentee and the infringer when the infringement began.") (emphasis added). Established precedent and CSS's own expert and authority all doom its argument.

Second, CSS further hinges this aspect of its appeal on the argument that, as part of CSS's rejected reasonable royalty methodology, the Court of Chancery should have awarded CSS royalties based on ten-year projections made after the purported hypothetical negotiations, as opposed to based on actual sales, as the parties expressly agreed in the License Agreement. OB at 18-19; Op. at 90-91. The Court of Chancery properly rejected this additional necessary component of CSS's argument.

As the Court of Chancery found, even on its own terms, CSS's proposed reasonable royalty "deviates from the License Agreement due to several assumptions that are improperly inconsistent with the trial record." Op. at 89. Those included CSS's expert's assumptions that "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." Op. at 90 & 90 n. 448. The Court found this "conjecture" was not only unsupported, but directly contradicted by the record. Op. at 89, 90-91.

Indeed, even under a hypothetical reasonable royalty, the "analysis requires a court to hypothesize, not to speculate" and "the damages inquiry must concentrate on compensation for the economic harm caused by infringement of the claimed invention." *ResQNet.com, Inc. v. Lansa, Inc.*, 594 F.3d 860, 869 (Fed. Cir. 2010) (vacating reasonable royalty damages award); *see also* Op. at 89. Thus, "expert testimony opining on a reasonable royalty must 'sufficiently [tie the expert testimony on damages] to the facts of the case." *Exmark Mfg. Co. v. Briggs & Stratton Power Prods. Grp.*, 879 F.3d 1332, 1349 (Fed. Cir. 2018) (brackets in original) (vacating damages award); *accord MLC Intell. Prop., LLC v. Micron Tech., Inc.*, 10 F.4th 1358, 1368 (Fed. Cir. 2021) (reasonable royalty rate must be "sufficiently tethered to the evidence presented"); *Unisplay,* 69 F.3d at 517 (same); *Robocast, Inc. v. Microsoft Corp.*, 2014 WL 350062, at *3 (D. Del. Jan. 29, 2014) (excluding reasonable "lump sum royalty" testimony based on "*ipse dixit*").

Here, CSS assumes the parties would have agreed as part of their hypothetical negotiation to pay up-front, life-of-the-contract royalties based on ten-year projections themselves made more than five months (and in some cases years) after the supposed hypothetical negotiation. Op. at 90 & n. 448; *see also* B158; B161; A2038; A1956. CSS's conclusion remains implausible, unsupported, and counterfactual.

The Court of Chancery held there was no basis to conclude that the parties would have agreed to pay ten years of projected royalties totaling "$40.7 million to $138 million" (as one up-front lump sum payment, no less) based on the projections. Op. at 90. The Court of Chancery found that the record in fact demonstrates just the opposite. Op. at 90-91.

As noted above, the License Agreement shows that when the parties actually negotiated "how CSS valued the CSS Process and how much KDC was willing to pay to use it" (Op. at 78-79), they did so not based on projections of future sales, but rather expressly on "*actual net sales*" calculated (and paid) "*in arrears*." A0187;

(emphasis added); *accord* Op. at 90 & nn. 448-50; A1998-99; A2069-70; B823. Moreover, "[t]he evidence shows KDC's predilection was to pay less, not more" and "had negotiated for lower royalties." Op. at 91. CSS's argument that the parties would have used the projections to value the CSS Process is facially implausible and "contrary to CSS's original position[ ] that the License Agreement reflects the value of what KDC took." Op. at 91; *see also* B823-26.

In addition, in looking to projections made after the hypothetical negotiations, CSS's expert expressly relies on the "Book of Wisdom" doctrine (A1690), but then ignores the additional "wisdom" that renders those projections demonstrably moot and unreliable. CSS's expert describes the Book of Wisdom as a "concept in intellectual property case law that allows consideration of events transpiring *after the date of the hypothetical negotiation*, but prior to trial." A1690 (emphasis added). But the Book of Wisdom may not be applied selectively. Instead, under it, "the Court must also assume, for purposes of the hypothetical negotiation, that all parties would have known *all relevant information*." *Mobil Oil Corp. v. Amoco Chems. Corp.*, 915 F. Supp. 1333, 1353 (D. Del. 1994) (emphasis added).

CSS's expert, however, ignores the most salient and critical "wisdom." Not only were the projections unreliable in the first place, but the facts, not challenged on appeal, show that they were based on products that were abandoned (liquid product line), not viable based on cost (dry product line), and proven failures (not a single unit of *any* of these products was ever sold). A2043-44; A2072; B800-02; B811; B830-32; B823-26. Moreover, by late 2023, the misappropriating companies had ceased business operations and entered into chapter 7 liquidation. All this subsequent "wisdom" must be considered under the doctrine and renders the projections moot.[1]

CSS would have this Court rule that the Court of Chancery should have ignored the License Agreement and the actual net sales it expressly calls for in favor of a speculative hypothetical reasonable royalty based on knowingly false assumptions that are "improperly inconsistent with the trial record" (Op. at 89) and which would award CSS with a windfall untethered to damages actually incurred. As the Court of Chancery noted, "CSS's original position, that the License Agreement reflects the value of what KDC took, carries the day." Op. at 91. CSS provides no basis to disturb the Court of Chancery's analysis.

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[1] CSS's expert also testified that damages based on projections of sales post-injunction (which the parties agreed effectively was in place as of the late 2023 conversion to chapter 7) are inappropriate. A2072; A2014.

II. THE COURT OF CHANCERY APPROPRIATELY BASED ITS ESTABLISHED ROYALTY ON THE TERMS FOR THE NON-EXCLUSIVE LICENSE

A. Question Presented

Whether the Court of Chancery abused its discretion by awarding established royalty damages based on the Licensing Agreement's terms for the nonexclusive, rather than exclusive, license. Op. at 80-82.

B. Scope of Review

The Court of Chancery's determination that the non-exclusive license terms more accurately reflect the value of the misappropriated IP in this case is reviewed for abuse of discretion. *Supra* § I.B.

CSS argues that the Court of Chancery erred by declining to award CSS $26.1 million in minimum royalties required under the License Agreement to maintain an "exclusive" license, as part of CSS's alleged "actual loss[es]," based on an incorrect interpretation of the License Agreement and thus is subject to *de novo* review. OB at 31, 32, 33, 34. Not so. As an initial matter, the Court of Chancery expressly did not award "actual losses," (*infra* § II.C.1), but instead awarded damages based on the established royalty. That choice of methodology is subject to review for abuse of discretion. *Supra* § I.B. In addition, the Court of Chancery's determinations that (i) "the best evidence of the CSS Process's standalone value is a nonexclusive royalty stripped of any exclusivity premium," and (ii) CSS did not lose any exclusive license royalties due to any wrongful conduct by KDC" because they were properly terminated in 2019 and "as of December 2019, CSS was free to license its process to other business partners" (Op. at 81-82) are likewise subject to review for abuse of discretion. *Supra* § 1.B.

C. Merits of the Argument

In considering whether the established royalty here should be based on the License Agreement's "terms for an exclusive or nonexclusive license," the Court of Chancery determined: (i) "the best evidence of the CSS Process's standalone value is a nonexclusive royalty stripped of any exclusivity premium" (which gives KDC a "right to exclusivity" and "compensates CSS for its lost opportunity to sell additional licenses" due to that exclusivity); and (ii) CSS did not lose minimum royalties "due to any wrongful conduct by KDC" because the parties terminated exclusivity (and the corresponding payments for it) under the terms of the License Agreement before any misappropriation occurred and, "as of December 2019, CSS was free to license its process to other business partners." Op. at 81-82. CSS offers no credible basis to disturb the Court of Chancery's ruling. Its arguments on appeal fail for several independent reasons.

1. CSS mischaracterizes the Court of Chancery's Opinion

As an initial matter, CSS criticizes the Court of Chancery for not having included minimum royalties as part of its supposed determination of "actual losses." OB at 31, 32, 33, 34. But the Court of Chancery did not award actual losses. CSS's supposed confusion as to whether the Court of Chancery's "intention may have been to compensate CSS for its actual loss" (OB at 32) flies in the face of Court's clear and detailed damages analysis. Op. at 73-76 & 76 n. 391. The Vice Chancellor even outright states that "[u]sing 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*." Op. at 80 (emphasis added); *see also* Op. at 78.

Yet, as CSS fails to note, the minimum royalties it seeks on appeal are part of the "actual loss" methodology it proposed and the Court of Chancery rejected in favor of an established royalty. Op. at 72, 78, 80. CSS argued below for minimum royalties both under a reasonable royalty theory (seeking $129.8 million) and as actual lost royalties (seeking $26.1 million). B169-71; A1673-74; A2049. The Court of Chancery rejected both arguments and the damages methodologies underlying them. Op. at 90, 81-82.

On appeal, CSS challenges only the rejection of the $26.1 million of minimum royalties that was part of its alleged actual losses. OB at 31, 33, 34. CSS argues that the minimum royalties represent CSS's "actual loss" or "actual damages." OB at 31, 32, 33, 34. But, again, the Court of Chancery expressly rejected an actual loss methodology under the facts here. Op. at 78, 80; *see also* Op. at 74-75. CSS points to nothing suggesting that the Court's determination to use an established royalty was any error at all, much less reversible error. *Cf. Supra* § I.C.1. On that basis alone, CSS's argument fails.

2. The Court of Chancery correctly determined that the non-exclusive license was appropriate to value the trade secret at issue

Separately, the Court of Chancery's decision to rely on the non-exclusive license in determining the established royalty (Op. at 81-82) is well supported by the record. CSS argues that "[t]he 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." OB at 34 (emphasis in original). That argument fails for several independent reasons.

First, as the Court of Chancery noted in rejecting that argument below, citing language in CSS's own brief, KDC was not "required to pay minimum royalties to maintain any license." Op. at 81 n. 410. Instead, the minimum royalties were "[t]o maintain exclusivity" and could be (and were) terminated (before any misappropriation. Op. at 80-82. Specifically, under the License Agreement, "to maintain the exclusive license . . . KDC shall be required to pay the minimum annual royalties." A0190; *see also* Op. at 81 n. 410. But, in CSS's own words, "KDC Ag could elect to maintain a non-exclusive license under which it would 'pay CSS royalties equal to 20 [percent] of Net Sales of Licensed Products,' but would not be subject to any minimum royalties." A1672-73; *see also* B263 (CSS stating internally: "As a result, on 12.30.19, KDC Ag notified CSS it was exercising its right to terminate its Minimum Royalty payments, resulting in the termination of its exclusive license"); Op. at 12, 22, 80-82; A0191. The License Agreement further makes clear that "KDC shall not be liable for any Minimum Royalty that would have otherwise accrued on or after the date of such notice, or conversion to a nonexclusive license, as applicable." A0191; *see also* Op. at 12, 22, 80-81. Thus, "KDC only owed minimum royalties if it maintained an exclusive license." Op. at 81 n. 410.

Moreover, the same expert on whom CSS relies for the flawed premise that "Defendants *would have had to make* [the minimum royalty payments] to CSS under the License Agreement" (OB at 34 (emphasis added)) opined earlier in the case instead that "KDC Ag *would likely* have maintained its exclusive license with CSS" past 2019 and then calculated damages under a scenario where exclusivity and the corresponding minimum royalties were *terminated*. A0870-71; A0904 (emphasis added); A2049. At trial, CSS's expert tried to change course, opining instead that "KDC [] *would have been required* to maintain those minimum royalty payments" and *no longer* calculating a non-exclusive scenario. A1673; A1959; A2049-50.

While it does create credibility issues, that flip-flopping cannot make the fatal prior testimony disappear.[2]

Further still, the Court of Chancery's determination that "[t]he minimum royalty for an exclusive license pays for KDC's right to exclusivity and compensates CSS for its lost opportunity to sell additional licenses" (Op. at 81) is also well supported by the evidence, including evidence cited by CSS's own expert making this very point. In setting forth the evidence she relied on to form her (initial) opinion that "[m]y review of the evidence indicates that, absent the alleged breach, KDC Ag *would likely* have maintained its exclusive license with CSS," CSS's expert focused on the "importance [KDC] placed on having *exclusive access* to CSS's IP." A0904 (emphasis added). She explained that "Hal Kamine testified that, when negotiating the license with CSS, KDC Ag specifically '*wanted exclusivity*', and *exclusivity* was a point that KDC Ag '*spent most of the [negotiation] time on*.'" *Id*. ¶ 65 (emphasis added). She noted Hal Kamine "testified that KDC Ag was motivated to retain their

[2] That was not CSS's expert's only reversal of course relating to purported damages from the termination of the exclusivity minimum royalty. She also abandoned *at trial* her prior damages theory that, notwithstanding the proper termination of the minimum royalty, Defendants delayed CSS's ability to enter a new licensing deal with a third party (Op. at 82 n. 413) after evidence surfaced that CSS had blamed its landlord for those same supposed delays in a separate lawsuit brought by CSS (A2024; A1680; B267). CSS's expert also changed course on the eve of trial concerning her prior testimony that a reasonable royalty would not be appropriate here given the existence of an established royalty (*supra* § I.C.2) and as to the value of exclusivity (*infra* 36).

exclusive license with CSS in order to negotiate with potential customers . . . *exclusively* and, *had KDC Ag not maintained its exclusive license with CSS by paying the required minimum royalties, 'all one of those companies had to do was contact CSS and become a licensee.*'" *Id*. ¶ 64 (emphasis added)). CSS's expert pointed to 2017 emails in which KDC pitched to a customer that "it '*controls* the technology for an *exclusive* sustainable feed . . . .'" *Id*. ¶ 64 (emphasis added). This testimony and evidence vanished from CSS's amended pre-trial brief and trial presentation. But it still supports the Court of Chancery's determination that the minimum royalty "pays" for exclusivity and the appropriate measure of the "CSS Process's standalone value" thus does not include the "exclusivity premium," which the parties terminated before any misappropriation, along with any exclusivity benefit for KDC and any "preclu[sion] [of] CSS from licensing its technology to others" for which the premium was consideration. Op. at 22, 81-82.

Second, a necessary premise of CSS's argument—that "'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," but did not have one as of January 1, 2020 (Op. at 81 n. 410; OB at 34-35)—is itself flawed. Fairless Hills was at least "under construction" as of January 1, 2020. Op. at 22-23. On December 31, 2019, CSS admitted it did not have sufficient information to determine whether KDC had a Licensed Facility. Op. at 22; A0231. In response, on January

6, 2020, "Hal [Kamine] responded that Fairless Hills was under construction and operating, and so it was a Licensed Facility. He stated that '[w]ith the necessary equipment installed, KDC Ag has produced numerous variations of the Licensed Products.'" Op. at 22-23. Indeed, as the letter explained, KDC already had leased Fairless Hills, received township approval for the facility, worked with the DEP for a year on applications, picked up the first construction permit, and built and begun to operate a laboratory at Fairless Hills that already had produced numerous Licensed Products. A0232.

Thus, the Court of Chancery found that "[a]s of that time, KDC had built and was operating a small laboratory at the Fairless Hills location. But construction on the full-scale Fairless Hills facility did not start until June 2020." Op. at 23. CSS interprets that to mean that the Court found that Fairless Hills was not "under construction" for purposes of the License Agreement as of that time. OB at 35. But the Opinion's plain words and the undisputed facts suggest the opposite.

CSS seems to rely on a May 26, 2020 letter from Hal Kamine to suggest KDC admitted Fairless Hills was not yet under construction. OB at 35. But the letter says no such thing. Under the License Agreement, "'Licensed Facility' was defined as 'any facility that uses *aerobic, enzymatic digestion* . . . to produce one or more Licensed Products.'" Op. at 11. As the Court of Chancery found, "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." Op. at 23. While at the time of the January 6, 2020 letter, Fairless Hills was producing products using an enzymatic process, the May 26, 2020 letter informed CSS that "*since our communications in early January*," KDC had decided "not to use a Licensed Process to create Licensed Products at any of its facilities thereby rendering the License Agreement inapplicable to KDC Ag's business and operations." Op. at 23; A0318; B787-88. This simply reflected a new decision to no longer use an enzymatic process. Op. at 23. Nothing in the May 26, 2020 letter remotely suggests that Fairless Hills was not operating and producing Licensed Product as a Licensed Facility *as of January 1, 2020*.

If any admission exists, it is CSS's tacit admission in its amended pre-trial brief that Fairless Hills was at least "under construction" as of January 1, 2020: "Because KDC Ag surrendered any license to CSS Intellectual Property and Confidential Information *as of January 1, 2020*, it [was] in breach of the License

Agreement *since that date by using CSS Intellectual Property at the Fairless Hills Facility*." B064.[3]

[3] CSS's further argument that it suffered "actual losses" after June 2020 (when CSS asserts Fairless Hills was first under construction) because KDC also was "required" to continue to pay minimum royalties in order to build additional speculative "future facilities" (OB at 36-38) fails for the same reasons set forth above. *Supra* at 34-37. It also is both speculative and contradicted by the record. Not only did the parties in fact terminate the minimum royalties in 2019, but (i) those "future facilities" were never financed or built (A2058-59; A1928; B826), and (ii) both earlier (May 2020) and subsequent (June 2023) KDC business plans to the one cited by CSS contemplated one-facility (Fairless Hills) models (and even Fairless Hills no longer made sense by 2023 given the discovery of the exponentially less expensive and still acceptable Bright Feed substitute feed) (A0305; B333-34; A2040; B824-25).

III. THE COURT OF CHANCERY APPROPRIATELY DECLINED TO AWARD EXEMPLARY DAMAGES AND ATTORNEY'S FEES

A. Question Presented

Whether the Court of Chancery abused its discretion by declining to award CSS exemplary damages or attorney's fees based on its finding—after a review of the legal standard, relevant caselaw, and the evidence—that "CSS made no similar showing of ill will, vindictiveness, or the intent to harm CSS" and the evidence did not justify "the extraordinary steps of awarding exemplary damages or shifting fees." Op. at 96-97.

B. Scope of Review

This Court reviews a trial court's decision whether to award exemplary damages or attorneys' fees for abuse of discretion. *See, e.g., Winkler v. Delaware State Fair, Inc.*, 1992 WL 53412, at *3 (Del. 1992) ("We conclude that the trial court did not abuse its discretion by refusing to instruct the jury on the issue of punitive damages" based on the evidence before it); *Dover Historical Soc.,* 902 A.2d at 1089 ("We review a denial of an application for counsel fees and costs for abuse of discretion.").

CSS attempts to subject the Court of Chancery's exercise of discretion to *de novo* review by claiming that the Vice Chancellor "misapprehend[ed] or "misconceiv[ed] the [malice] standard" and thus "improperly constrained its own discretion." OB at 4, 42; *see also* OB at 39, 40. CSS concedes that the Vice

Chancellor used the correct definition of malice, consistent with Delaware precedent. *Compare* OB 39-40 *with* Op. at 95-96. CSS simply disagrees with the Court of Chancery's factual findings that "CSS made no similar showing of ill will, vindictiveness, or the intent to harm CSS" and that the evidence did not justify exemplary damages or fee shifting. Op. at 96-97. These determinations are subject to abuse of discretion review.

C. Merits of the Argument

The Court of Chancery correctly noted that a Court "may" award exemplary damages and attorney's fees only "if a trade secret was 'willfully and maliciously misappropriated.'" Op. at 95 (quoting 18 U.S.C. §§ 1836(b)(3)(C)-(D)). CSS does not dispute that standard. OB at 39. Looking to settled law that CSS itself cites, the Court of Chancery explained that "malice is defined as 'ill-will, hatred, or intent to cause injury.'" Op. at 95 (quoting *Agilent Techs., Inc. v. Kirkland*, 2010 WL 610725, at *33 (Del. Ch. Feb. 18, 2010)); OB at 39, 42 (same).

CSS argues that the Court of Chancery "misconceiv[ed] the [malice] standard" and thus "improperly constrained its own discretion." OB at 42. The Court of Chancery did no such thing.

"'[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].'" Op. 95 (quoting *I-Mab Biopharma v. Inhibrx, Inc.*, 2024 WL 4437227, at *2 (D. Del. Oct. 1, 2024)).

After observing that "[m]alice is not lightly found," the Vice Chancellor examined cases relied on by CSS below in which courts found malice and distinguished them on the facts and conduct at issue. Op. at 95-96; *see also, e.g., Advanced Fluid Sys., Inc. v. Huber*, 295 F. Supp. 3d 467, 493–94 (M.D. Pa. 2018) (OB at 43) (finding malice where defendant intentionally "divert[ed] valuable contracts" from employer to competitor, "alter[ed] title blocks to obscure ownership and authorship of crucial engineering drawings," "wiped his AFS laptop of all evidence of wrongdoing," and "engaged in wholesale destruction of evidence").

CSS's accusation that the Court of Chancery misunderstood the definition of malice contravenes the plain words of the Vice Chancellor's bottom-line conclusions on this issue: "CSS made no similar showing of ill will, vindictiveness, or the intent to harm CSS" (Op. at 96) and, as to CSS's argument regarding litigation tactics specifically, those did not "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." Op. at 95-97. The Court's determination is amply supported by the record.[4]

[4] CSS's effort to discredit the Court of Chancery's reading of *Nucar Consulting, Inc. v. Doyle* (OB at 41) is confusing. The court in *Nucar* found that the defendant used a misappropriated client list "with the intent to cause injury to Nucar." 2005 WL 820706, at * 14 (Del. Ch. Apr. 5, 2005). CSS cites to an earlier footnote noting the defendant's "tactics" in using confidential information to try to solicit one specific customer "demonstrate a reckless disregard for existing trade secrets and proprietary information." That is inapposite and also contrary to the facts here, where the

The Corporate Defendants are in liquidation and the four Individual Defendants, none of whom ever have been sued before, all of whom have been deeply committed to environmental and other social causes, and one of whom has spent a long career building environmentally friendly businesses, faced personal bankruptcy as a result of this lawsuit. *E.g.*, Op. at 5-6; B798; B809; B792-93.

Despite years of substantial effort, Defendants were never able to sell a single unit of anything using CSS's patented enzymes. *Supra* at 7-8. When they began to explore a nonenzymatic process instead, they informed CSS of that plan. Op. at 20. Because, as the Court of Chancery found, "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," they told that to CSS as well. Op. at 23; B784-85. Indeed, lawyers were involved with and advising the Individual Defendants at every turn and a suite of executives (including a general counsel), independent professionals, and sophisticated lenders (and their counsel) were also involved in the very conduct at issue. *E.g.*, B783; B794; B784-89; B797; B001-03.[5]

Individual Defendants are not alleged to have disclosed CSS' trade secret to the public. *Supra* at 13.

[5] Those lawyers, who represented Defendants until just months before trial, never raised advice of counsel as a defense and, by the time the Individual Defendants retained new trial counsel, the Court held it was too late. B001-03.

Meanwhile, by Summer 2019, CSS already had a "Plan B" to address the possibility that KDC would stop paying minimum royalties (B263); secretly filed a "continuation application" (still currently rejected) to try to extract from Defendants royalties on non-enzymatic feed (B775-76); emailed internally that "[KDC has] something useful - a fully developed site. If we owned it, it would fit Phase II of our plan," and because "Hal [Kamine] is not long on cash," CSS may have an opportunity to force him to part with it (B283); then adopted Defendants' developed business plan to pursue new product areas and even attempted to purchase the Fairless Hills facility (and all of Corporate Defendants' other assets) out of bankruptcy for pennies on the dollar (B774; B262-66).

CSS does not challenge the Court of Chancery's findings that the "CSS has not met its burden of proof" to show that the Individual Defendants committed fraud (Op. at 67) or that CSS's tortious interference claim fails because "CSS cite[d] no convincing evidence, and I see none" that the Kamines "acted outside their scope of employment" (Op. at 71).

Nor did the Court of Chancery conclude, as CSS argues, that it lacked discretion to consider awarding attorney's fees based on "litigation misconduct" (OB at 44-45). Instead, the Vice Chancellor, who presided over the entire lawsuit (including under prior defense counsel), specifically weighed the facts and held that, "[w]hile 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." Op. at 97; *see also* Op. at 96 (discussing case involving contempt of court order). As explained above, and as the cases CSS itself cites make plain, that decision was well within the Court of Chancery's discretion.

CONCLUSION

For the foregoing reasons, the Individual Defendants respectfully request that the Court affirm the Court of Chancery's damages award.

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