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Case Number 78,2025

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

Original Reply Date: May 23, 2025
Amended Reply Date: May 27, 2025

Case Below:

Court of Chancery of the State of Delaware, C.A. No. 2021-0498-MTZ

AMENDED REPLY BRIEF OF APPELLANT CALIFORNIA SAFE SOIL, LLC

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INTRODUCTION

The narrow issues on appeal are whether the Court of Chancery awarded CSS legally proper damages for trade secret misappropriation in accordance with relevant statutes and whether the Court of Chancery applied the correct legal standard in declining to award exemplary damages and attorneys' fees. The Individual Defendants do not challenge the Court of Chancery's finding that the CSS Process was a combination trade secret that each of the Individual Defendants misappropriated, and they do not challenge the Court of Chancery's verdict against them.

The Individual Defendants fail to rebut the dispositive legal arguments in CSS's opening brief:

First, the Individual Defendants spend pages defending a proposition that is not in dispute—that a court should look to the parties' agreed-upon royalty *rate* in calculating a reasonable royalty measure of damages. At the same time, they do not even attempt to address precedent making clear that the royalty *base* should be forward-looking and impose any uncertainty on the misappropriator. The Court of Chancery's decision to apply the parties' agreed-upon royalty rate to actual sales, rather than KDC's own projections, violated those principles.

Second, in defending the Court of Chancery's decision not to at least award CSS minimum annual royalties, the Individual Defendants ignore key language in the License Agreement that made the payment of minimum royalties necessary for

KDC to have *any* license, not just an *exclusive* one. They also ignore the Individual Defendants' use of CSS trade secrets beyond Fairless Hills, which necessarily required the payment of minimum royalties.

And, ***finally***, the Individual Defendants misapprehend CSS's challenge to the Court of Chancery's decision not to award exemplary damages or attorney fees. CSS does not challenge the Court of Chancery's factual findings. Instead, the issue on appeal is whether the Court of Chancery applied a substantively incorrect standard to assess whether the Individual Defendants acted with malice. Instead of engaging the legal standard, the Individual Defendants again rely on irrelevant assertions of fact.

STATEMENT OF FACTS

The Individual Defendants' factual recitation is largely irrelevant to this appeal.[1] For instance, because the Individual Defendants do not challenge the Court of Chancery's finding that CSS adequately protected its trade secrets and that the Individual Defendants committed misappropriation, it is irrelevant whether liability was "hotly contested." (Answering Br. ("AB") at 1.) The Individual Defendants' insinuations that CSS publicly disclosed its trade secrets are similarly beside the point. (*See id*. at 1, 5-7.)

Particularly irrelevant are factual assertions that appear calculated to show that CSS somehow acted in bad faith. (*See, e.g.*, *id.* at 8 (claiming that CSS tried to "capture" a process supposedly developed by KDC), 9 (claiming that CSS developed a "Plan B"), 10 (making irrelevant inferences about CSS's "motivations").) Those assertions have nothing to do with the damages award on appeal and ignore that the Defendants are the only parties found liable for any misconduct—both through their misappropriation and in this litigation. (*See* Op. at 3 n.7, 56-61.) Indeed, the Court of Chancery found that, at trial, "Hal [and] Matthew [Kamine] and Barry [Starkman]

[1] The Individual Defendants are not challenging the Court of Chancery's findings or its verdict. Accordingly, the Court should give no weight to any factual assertions by the Individual Defendants that are inconsistent with the Court of Chancery's findings.

were caught in lies both significant and immaterial" and that the Individual Defendants' industry expert "fell apart on cross-examination" resulting in "trial testimony rife with impeachments and untruths." (*Id.* at 3 n.7, 97.)

The Individual Defendants also assert a distinction between what they describe as CSS's "enzymatic" process and their supposedly different "non-enzymatic" process. (AB at 7-9.) In fact, "[t]he CSS Process uses 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." (Op. at 8.) At trial, the Individual Defendants sought to avoid liability by insisting that the process used at the Fairless Hills Facility differed from the CSS Process because it did not rely on added commercial enzymes. (*See id.* at 62.) The Court of Chancery rejected that argument, recognizing that "the CSS Process was the starting point of the KDC process. The addition or removal or [*sic*] enzymes to one step of the CSS Process, and modifications to account for that flexibility, does not change that fact." (*Id*. at 63.) To the extent the Individual Defendants still rely on that flawed argument, *see below* at 20, it should be rejected.

The Individual Defendants also make several irrelevant factual assertions in the name of "level setting":

First, the Individual Defendants claim that CSS's IP was unprofitable, (AB at 12), but they ignore their own strategic decision to drive the Corporate Defendants

into bankruptcy. (*See* Opening Br. ("OB") at 10-12.) The Individual Defendants cannot explain their counsel's insistence to the bankruptcy court that "[t]his is an amazing company, a great concept" if the CSS Process was really worthless. (*See id.* at 12; A1484:14-15.)

Second, it is irrelevant that CSS did not bring a claim for patent infringement. (*See* AB at 12.) It is undisputed that CSS's trade secrets are protectable apart from its patents; that the License Agreement allocated most of the value of CSS's IP to its trade secrets (*see* A191 § 3.3(d) (reducing royalty obligations by only 25% absent a valid patent claim)); and that CSS's reasonable royalty model adjusted for the value of CSS's patents, (OB at 14 n.2, 23-24.)

Third, it is irrelevant whether CSS's trade secrets have been destroyed. (*See* AB at 13.) The Individual Defendants do not and cannot dispute that CSS is entitled to compensatory damages although its trade secrets may still have some value. The Individual Defendants also ignore that CSS's request for compensatory damages was non-duplicative with its request for injunctive relief. (*See* B163-65, B169-71.)

ARGUMENT

I. THE COURT OF CHANCERY ERRED BY NOT AWARDING CSS A FORWARD-LOOKING REASONABLE ROYALTY.

A. The Court of Chancery's "established royalty" was inconsistent with damages under statute.

The Court of Chancery erred in calculating an "established royalty" by misapplying the legal standard governing trade secret damages. The deference afforded to a trial court in awarding damages does not extend to legal errors. That is why "the formula used" in calculating damages "is a question of law" even if the "calculation of the amount of damages is a factual determination." *Vt. Microsystems, Inc. v. Autodesk, Inc.*, 138 F.3d 449, 452 (2d Cir. 1998).[2] Accordingly, "[w]hether 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). The Individual Defendants attempt to distinguish *Schock*'s reference to an *equitable* remedy. (AB at 18.) However, the Court of Chancery *is* a court of equity, and even if its remedy were characterized as legal, that would if anything entitle it to *less* deference. *See, e.g.*, *In re Peierls Charitable Lead Unitrust*, 77 A.3d 232, 235 (Del. 2013) ("We review cases involving the Court of Chancery's exercise of its equitable powers for

[2] The Individual Defendants attempt to distinguish *Vermont Microsystems* because in that case, the trial court erred by awarding a double recovery. (*See* AB at 18.) That does not undermine the Court's teaching about the applicable standard of review, even if that case involved a different type of error.

abuse of discretion. In doing so, we review its legal conclusions de novo.") The Individual Defendants miss the Court's point in *Schock*, which was to distinguish the *de novo* review applicable to the legal standard from "[d]eterminations of fact and application of those facts to the correct legal standards" that are reviewed for abuse of discretion. *Schock*, 732 A.2d at 232.

Here, the Court of Chancery committed legal error because its damages calculation was inconsistent with the methodologies available to it under law. Damages for trade secret misappropriation may be measured by the plaintiff's actual loss; the defendant's unjust enrichment; or a "reasonable royalty." *See* 18 U.S.C. § 1836(b)(3)(B); 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. There is no separate category for an "established royalty." CSS advanced no theory of unjust enrichment, so the Court of Chancery was required to award either actual loss or a reasonable royalty. However, the Court of Chancery did neither. The Court of Chancery found that CSS had not suffered actual loss, (*see* Op. at 78), and its "established royalty" was not a proper reasonable royalty because it was not forward-looking from the time of misappropriation. (*see* OB at 18-30.)

Accordingly, the question is not whether to employ a "reasonable royalty" or an "established royalty" but instead whether the parties' established royalty *rate* should be applied to a royalty *base* consisting of actual sales or sales as projected at

the time of misappropriation. (*See* OB at 20-27.) Two legal principles drive that determination: first, the wrongdoer should bear the "burden of uncertainty"; and second, a reasonable royalty "by design is forward-looking from the time . . . the defendant's misappropriation begins." (*See id.* at 20, 22.) The Individual Defendants fail to address those determinative questions.

The Individual Defendants do not dispute that courts "encourage the use of financial projections" to fashion a forward-looking reasonable royalty. (*Id*. at 21.) The Individual Defendants concede that a forward-looking reasonable royalty is the appropriate measure of damages where a defendant's own misconduct caused its business to fail. (*Id*. at 22-23.) The Individual Defendants do not dispute that where a business has failed because of the misappropriator's conduct, actual sales are an inappropriate royalty base. (*See id*.) It follows that the only way to make CSS whole and award a statutorily proper measure of damages was through a reasonable royalty using the Defendants' projected sales as the royalty base.

The Individual Defendants misplace their reliance on *Sunoco P'rs Mktg. & Terminals L.P. v. U.S. Venture, Inc.*, 32 F.4th 1161, 1180 (Fed. Cir. 2002) in arguing that a damages award is reviewable only for clear error or abuse of discretion. (AB at 17.) The opinion in *Sunoco* contains relatively little analysis of the district court's reasonable royalty calculation. Moreover, *Sunoco* did not overrule the Federal Cir-

cuit's earlier precedent explaining that when appealing a damages award, "[t]he appellant must show that the district court's 'determination was based on an *erroneous conclusion of law*, clearly erroneous factual findings, or a clear error of judgment amounting to an abuse of discretion.'" *Stryker Corp. v. Intermedics Orthopedics, Inc.*, 96 F.3d 1409, 1413 (Fed. Cir. 1996) (emphasis added, quoting *Rite-Hite Corp. v. Kelley Co.*, 56 F.3d 1538, 1543 (Fed. Cir. 1995)). A trial court's legal error is not insulated from *de novo* review just because it occurs in the context of a damages award.

To the contrary, a trial court abuses its discretion where it "exercise[s] its discretion based upon an error of law[.]" *Aqua Shield v. Inter Pool Cover Team*, 774 F.3d 766, 770 (Fed. Cir. 2014). Here, the Court of Chancery committed legal error in not calculating a forward-looking reasonable royalty. The Court of Chancery's reasonable royalty award should be reversed even under an abuse of discretion standard. *See id.* at 770-73 (trial court abused its discretion in a royalty calculation that improperly focused on an infringer's actual profits instead of the parties' expectations at the time of a hypothetical negotiation.)

Finally, as described below and in CSS's Opening Brief, a proper reasonable royalty would have accounted for KDC's obligation to pay minimum royalties. (*See* OB at 31 n.6.); *see below* at 15-16. For that additional reason, the Court of Chancery's "established royalty" calculation was legally erroneous.

B. There is no dispute that a reasonable royalty should consider the parties' actual agreement, and that is what CSS's expert did.

The Individual Defendants spend pages defending an uncontroversial proposition—that in calculating a royalty, a court should utilize the parties' actual agreement where available. (*See* AB at 19-22.) Specifically, it is undisputed that using the parties' actual negotiating history and agreements in identifying a royalty *rate* reduces uncertainty in calculating a reasonable royalty.

Here, CSS's damages model did apply the parties' established, agreed-upon royalty rate. Mulhern followed the License Agreement wherever possible in determining a reasonable royalty, most importantly, by applying the License Agreement's established royalty rate to a royalty base consisting of net sales. (*See* OB at 13-15, 27.) By contrast, absent an existing agreement, a reasonable royalty analysis involves more uncertainty. That was the point of Mulhern's deposition testimony[3] that "there is no need to . . . seek additional evidence of a reasonable royalty" when an agreement between the parties exists. (*See* AB at 23.) That was also the Fifth Circuit's point in *University Computing*, explaining that a court must consider a variety

[3] The Individual Defendants improperly include Mulhern's entire deposition transcript in the appendix. (*See* B686-770.) However, Mulhern's deposition was not introduced in its entirety at trial and did not become part of the trial record. It is therefore not part of the record on appeal. *See* Sup. Ct. R. 9(a); Sup. Ct. R. 14(e); *Del. Elec. Co-op., Inc. v. Duphily*, 703 A.2d 1202, 1206 (Del. 1997); *Tolliver v. Qlarant Quality Solutions, Inc.*, 297 A.3d 1084, 2023 WL 3577954, at *1 n.1 (Del. 2023) (TABLE).

of factors in determining a reasonable royalty where no established royalty exists. *See Univ. Computing v. Lykes-Youngstown Corp.*, 504 F.2d 518, 537 (5th Cir. 1974).

Nevertheless, the Individual Defendants insist that the Court of Chancery's "established royalty" is more reliable than Mulhern's reasonable royalty. (*See* AB at 23-27.) However, because Mulhern utilized the parties' established royalty rate, her model did not involve the uncertainty that sometimes characterizes a reasonable royalty.[4] The Court of Chancery was therefore wrong to characterize a hypothetical reasonable royalty as "speculative." (*See* Op. at 89; *see also* AB at 24.) Such concerns are misplaced here, where Mulhern's reasonable royalty calculation was based on the parties' agreed-to royalty rate and KDC's own projections. (*See* OB at 8-9, 13-15, 27.)

Again, the issue is not whether to use a "reasonable royalty" versus an "established royalty" because Mulhern *did* calculate an established royalty using the parties' agreed-to royalty rate. Neither the Individual Defendants nor the Court of Chancery identifies any authority holding an established royalty rate must be applied to a royalty base consisting of actual sales. (*See* AB at 20-22 (citing cases).) Not only is

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[4] The Individual Defendants complain that Mulhern submitted an amended expert report before trial. (*See* AB at 22-23.) That was necessitated by the Corporate Defendants' bankruptcy, and the Court of Chancery denied the Individual Defendants' motion to strike Mulhern's amended report. (Op. at 88 n.442.) The Individual Defendants do not challenge that ruling or argue that the Court of Chancery abused its discretion in allowing Mulhern's testimony at trial.

such an approach not required, it is legal error (and in all events, an abuse of discretion) where, as here, actual sales were driven down by the Individual Defendants' misconduct. Indeed, using actual sales to calculate a reasonable royalty was a *less* reliable measure of the parties' expectations than using the Individual Defendants' projections.

The Individual Defendants argue they would not have agreed to make a lump sum royalty payment at the time of a hypothetical negotiation. (AB at 25-26.) However, the Individual Defendants do not dispute that regardless of the methodology for calculating a royalty, it would have been necessary to convert it to a lump sum payment for the purposes of awarding damages. (*See* OB at 27.) The Individual Defendants also ignore that a hypothetical licensing framework *assumes* the existence of a willing buyer and seller. (*See id.* at 27-28.)

Finally, the Individual Defendants criticize Mulhern's use of subsequent revenue projections in light of the Corporate Defendants' bankruptcy. (*See* AB at 27-28.) However, Mulhern considered the subsequent projections as late as May and June 2023—near-contemporaneous with the Corporate Defendants' bankruptcy. (*See* A1690; A1755-68; A1974:6-11; A1994:4-13.) Moreover, the Individual Defendants insisted even *after* filing for bankruptcy that their business was extremely valuable. (*See* OB at 12.) The Individual Defendants are not entitled to pay lower

damages because they made a strategic decision to place the Corporate Defendants into bankruptcy to avoid a trial in Delaware state court.

II. THE COURT OF CHANCERY SHOULD AT LEAST HAVE AWARDED MINIMUM ROYALTIES.

The Individual Defendants misapprehend the Court of Chancery's error in not at least awarding CSS minimum royalties under the License Agreement. The Individual Defendants defend the Court of Chancery's decision not to award CSS minimum royalties as an "exclusivity premium." (AB at 3-4, 29-30.) However, minimum royalties are not just a "premium" that compensates CSS for exclusivity. Minimum royalties also represent payments that CSS was actually entitled to under the License Agreement in order for the Individual Defendants to make any use of the CSS Process. The Court of Chancery misinterpreted the License Agreement in holding otherwise.

A. The Court of Chancery's misinterpretation of the License Agreement was legal error.

The License Agreement required KDC to pay minimum royalties to have *any* license to use the CSS Process, and its failure to do so inflicted actual loss on CSS. (OB at 34-38.) The Court of Chancery's decision not to award minimum royalties to CSS was based upon an erroneous conclusion that minimum royalties were required only for exclusivity. (*See* Op. at 81 n.410.) The Court of Chancery made no factual findings supporting its reading of the License Agreement, summarily rejecting

CSS's argument in a footnote. (*See id*.) Accordingly, the Court of Chancery's decision not to award minimum royalties is an issue of contract interpretation subject to *de novo* review. (*See* OB at 31.)

The Individual Defendants cannot avoid *de novo* review by insisting that the Court of Chancery made a discretionary decision to award an "established royalty" instead of minimum royalties. (*See* AB at 29.) The Court of Chancery's misinterpretation of the License Agreement was legal error that infected the rest of its damages analysis. *See, e.g.*, *U.S. ex rel Maddux Supply Co. v. St. Paul Fire & Marine Ins. Co.*, 86 F.3d 332, 334 (4th Cir. 1996) ("[T]o the extent [damages] calculations were influenced by legal error, review is *de novo*.") Moreover, the Court of Chancery's "established royalty" calculation was legally wrong under relevant statutes because it neither provided CSS its actual damages nor constituted a forward-looking reasonable royalty.

Further, CSS was entitled to minimum royalties even under a reasonable royalty measure of damages. The Individual Defendants are wrong that "CSS challenges only the rejection of the $26.1 million of minimum royalties that was part of its alleged actual losses." (*See* AB at 31.) As CSS noted in its opening brief, "[m]inimum 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 the

higher of minimum royalties under the License Agreement or running royalties based on projected sales." (OB at 31 n.6.) Defendants do not dispute that reasoning. Moreover, in fashioning its established royalty, the Court of Chancery concluded that "the best evidence of the CSS Process's standalone value is a nonexclusive royalty stripped of any exclusivity premium." (*See* Op. at 81 & n.410.) But that conclusion was driven by its misinterpretation of Section 3.3 of the License Agreement. (*See id.*) Further, the Court of Chancery failed to address evidence establishing that exclusivity was a key part of KDC's business model. (*See* OB at 37.) As such, it was necessarily part of the value that the parties would have assigned to KDC's use of the CSS Process in negotiating a royalty at the time of misappropriation.

Accordingly, regardless whether it awarded a reasonable royalty or actual damages, the Court of Chancery was required to account for minimum royalties.

B. KDC was required to pay minimum royalties to have *any* license.

1. The Individual Defendants ignore key language in the License Agreement.

The Individual Defendants selectively quote the License Agreement to create the false impression that minimum royalties were only required to have an *exclusive* license. (*See* AB at 8-9, 32-33.) To be sure, minimum royalties were required to maintain exclusivity, but they also compensated CSS for the right to develop additional facilities using the CSS Process. Accordingly, minimum royalties were required for KDC to have *any* license under the circumstances here.

The License Agreement provides that, if KDC failed to make a required minimum royalty payment:

> CSS shall have the right upon written notice to KDC to convert the license granted to KDC pursuant to Section 2.1 to non-exclusive, ***and the 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 thereof[.]***

(A191 § 3.3(c) (emphasis added).) Therefore, unless KDC had a Licensed Facility that was "existing" or "under construction" when it stopped making minimum royalty payments as of January 1, 2020, it had no license at all. And even if it had any such Licensed Facilities, its license to use CSS IP was limited to use within those Licensed Facilities—not future facilities that were not under construction. Consequently, if KDC Ag had no Licensed Facilities existing or under construction at that time, the only way that KDC Ag could have had any license would be to continue making minimum royalty payments. The Court of Chancery effectively ignored the highlighted portion of Section 3.3(c).

The Individual Defendants make no argument that Section 3.3(c) is ambiguous, and the License Agreement was fully integrated. (*See* A206 § 12.6.) The extrinsic evidence the Individual Defendants cite is therefore irrelevant to its interpretation. (*See* AB at 34-35); *see also Eagle Indus., Inc. v. DeVilbiss Health Care, Inc.*, 702 A.2d 1228, 1232 (Del. 1997). It also does not support the Individual Defendants' interpretation. That minimum royalties are necessary for exclusivity and that KDC

valued exclusivity, (*see* AB at 34-35), does not negate the License Agreement's clear provision that conversion to a non-exclusive license would only apply to Licensed Facilities then existing or under construction. If anything, such evidence only establishes the necessity of including minimum royalties in a reasonable royalty calculation. *See above* at 15-16.

Finally, the Individual Defendants' credibility attacks on CSS's damages expert are misplaced given their failure to challenge the Court of Chancery's decision to allow Mulhern to submit an amended report. (*See* AB at 34-35); *see above* at 11 n.4.

2. Without paying minimum royalties, the Individual Defendants had no license to design, build, or operate the Fairless Hills Facility or any other facility.

Section 3.3(c) unambiguously provides that the only license KDC could have had without paying minimum royalties was for Licensed Facilities "existing" or "under construction" on January 1, 2020. To have a license for *any other use* of the CSS Process, KDC was required to continue paying minimum royalties. To evade that obligation, the Individual Defendants claim that the Fairless Hills Facility "was at least 'under construction' as of January 1, 2020." (AB at 35.) That argument is unavailing:

First, the Fairless Hills Facility was not "existing" or "under construction" on January 1, 2020. The Court of Chancery observed that "KDC had built and was operating *a small laboratory* at the Fairless Hills Location." (*See* AB at 36 (citing Op. at 23) (emphasis added).) However, the Court of Chancery did not conclude that this qualified as a "Licensed Facility," and instead expressly found that "construction on the full-scale Fairless Hills facility did not start until June 2020." (Op. at 23.) In other words, a "small laboratory" is not the same as a Licensed Facility, and that laboratory was not even a "start" to construction. That is consistent with other findings by the Court of Chancery. (*See* Op. at 83 n.416 ("[C]onstruction for Fairless Hills began in or around June [2020]"); *id.* at 57 ("KDC broke ground on Fairless Hills by mid-2020").)

CSS did not "tacit[ly] admi[t]" that the Fairless Hills Facility was "under construction" in January 2020. (*See* AB at 37.) The Individual Defendants reference CSS's argument that KDC Ag "surrendered any license to CSS Intellectual Property and Confidential Information as of January 1, 2020" and was therefore in breach of the License Agreement because it was "using CSS Intellectual Property at the Fairless Hills Facility" and elsewhere. (*See id.*; B064.) However, the Fairless Hills Facility was not "under construction" just because KDC Ag was "using CSS Intellectual Property." For purposes of misappropriation, "use" is defined broadly, and includes using a trade secret as a starting point in developing a different process or for

research and development. (*See* Op. at 62-63.) *See also, e.g.*, *PPG Indus. v. Jiangsu Tie Mao Glass Co.*, 47 F.4th 156, 162 (3d Cir. 2022); *Oakwood Lab'ys, LLC v. Thanoo*, 999 F.3d 892, 909 (3d Cir. 2021). Accordingly, KDC's use of the CSS Process as of January 1, 2020, does not imply that it had an existing or under-construction Licensed Facility. Indeed, that is consistent with the Court of Chancery's finding that the Fairless Hills Facility was not even under construction until June 2020.

Not only was Fairless Hills not "under construction" when KDC stopped making royalty payments, it was also not a "Licensed Facility." KDC represented in May 2020 that the Fairless Hills Facility was *not* a Licensed Facility and that the License Agreement was "inapplicable to KDC Ag's business and operations." (A318; OB at 8, 35-36.) The Individual Defendants attribute that changed position to their decision to not employ a process using added commercial enzymes at the Fairless Hills Facility. (*See* AB at 37.) However, the Court of Chancery found no facts supporting that claim, which is also undermined by Hal Kamine's admission that his May 2020 letter reflected a "strategic choice" to prevent CSS from learning more about the Fairless Hills Facility. (OB at 8; A1914:14-19.) It is also inconsistent with unchallenged findings that there is no fundamental difference between a facility that uses added commercial enzymes and one that does not. *See above* at 4. Indeed, the Court of Chancery unequivocally found that, at least as of May 2020, KDC had no Licensed Facilities. (*See* Op. at 23.) To the extent this Court considers it dispositive

and unresolved whether the Fairless Hills Facility was a "Licensed Facility" as of January 1, 2020, it should, at a minimum, remand for findings on that issue.

Even if the Fairless Hills Facility were "existing" or "under construction" on January 1, 2020, and even if it were a "Licensed Facility," KDC would still have had to pay minimum royalties to design, build, or operate any other facility, including the North Dakota Facility and others across the country. (*See* OB at 36-37.)

The Individual Defendants concede that KDC "leased an existing food processing facility in North Dakota as a pilot plant to research and develop its non-enzymatic process." (AB at 11.) But the so-called non-enzymatic process was derived from the CSS Process. (Op. at 31-32, 56-58, 62-63.) Accordingly, to operate the North Dakota Facility without misappropriating, KDC required a license. The North Dakota Facility was leased in September 2020, well after KDC Ag stopped paying minimum royalties. (Op. at 22, 30.) The North Dakota Facility was indisputably not "existing" or "under construction" when KDC stopped paying minimum royalties, so it was not within the scope of any non-exclusive license granted at that time. The only way for KDC to legally operate the North Dakota facility was to pay minimum royalties, and its failure to do so inflicted actual loss on CSS.

Additionally, KDC used CSS trade secrets in designing and financing other facilities. (*See* OB at 36-37.) The Individual Defendants claim that KDC's other facilities "were never financed or built." (*See* AB at 38 n.3.) However, the record is

clear that KDC Ag made actual use of the CSS Process in development work on those facilities. For instance, issued bond financing for a facility to be constructed in Indiana. Those financing documents described the CSS Process and represented it as KDC's own. (A983, A992, A1033-35.) That constituted use of CSS's trade secrets that required a license to not constitute misappropriation. (*See* Op. at 61 ("The Individual Defendants' misappropriation is further reflected in their reliance on the CSS process in *seeking financing* to construct Fairless Hills.") (emphasis added)); *see, e.g.*, *Cudd Pressure Control, Inc. v. Roles*, 328 F. App'x 961, 966 (5th Cir. 2009) ("Use encompasses using a trade secret to procure financing.") KDC Ag was also developing a facility in North Carolina. KDC's engineers testified that they were authoring independent engineering reports for both the North Carolina and Indiana facilities. (A1936:18-1937:11.) That also constituted use of the CSS Process.

KDC's use of CSS trade secrets for other facilities was not hypothetical as the Individual Defendants claim, and it would not have been covered by any license granted when KDC stopped paying minimum royalties. KDC's only option to pursue that work without misappropriating was to continue paying minimum royalties.

III. THE COURT OF CHANCERY SHOULD RECONSIDER EXEMPLARY DAMAGES AND ATTORNEY FEES UNDER THE CORRECT LEGAL STANDARD.

The Individual Defendants misconstrue CSS's challenge to the Court of Chancery's failure to award exemplary damages or attorney fees, wrongly insisting that "CSS concedes that the Vice Chancellor used the correct definition of malice[.]" (*See* AB at 39-40.) Although the Court of Chancery stated that malice is defined by "ill will, hatred or intent to cause injury," it understood that definition to be substantively more restrictive than it really is. (*See* Op. at 95; OB at 40-43.) Accordingly, CSS appeals the *legal standard* the Court of Chancery utilized, not its factual findings.

The Individual Defendants' attempt to avoid *de novo* review is unavailing. Whether a trial court applied the correct legal standard in awarding damages is a classic legal determination that is subject to *de novo* review. The authority cited by Individual Defendants is distinguishable. (*See* AB at 39.) (quoting *Winkler v. Delaware State Fair, Inc.*, 1992 WL 53412, at *3 (Del. 1992) and *Dover Historical Soc. v. City of Dover Planning Comm'n*, 902 A.2d 1084, 1089 (Del. 2006).) In *Winkler*, there was no issue regarding what the correct legal standard was, but instead whether that standard was satisfied. And *Dover Historical Society* expressly stated that "[w]here it is in issue, we review the . . . Court's formulation of the appropriate legal standard *de novo*." 902 A.2d at 1089. Here, CSS does not ask this Court to determine,

in the first instance, that attorneys' fees and exemplary damages should be awarded. Instead, CSS asks that the case be remanded so that the Court of Chancery can exercise its discretion under the correct legal standard.

The Individual Defendants' only engagement with the legal standard is an attempt to bolster the Court of Chancery's reliance on *Nucar Consulting, Inc. v. Doyle*, 2005 WL 820706, at *14 (Del. Ch. Apr. 5, 2005). (*See* AB at 41 n.4.) The Individual Defendants' insistence that *Nucar* is "inapposite" because "the Individual Defendants are not alleged to have disclosed CSS'[s] trade secret to the public" is unfounded. (*See* AB at 41 n.4.) What *Nucar* demonstrates is that a specific desire to inflict injury on the plaintiff is not the only type of bad conduct that may constitute malice.

Because the Court of Chancery should reconsider the Individual Defendants' conduct under the correct legal standard, their selective factual recitation is irrelevant. Indeed, the Individual Defendants assert facts not even in the record. In particular, the record does not establish that any of the Individual Defendants have actually "faced personal bankruptcy as a result of this lawsuit." (AB at 42.) There is no record evidence establishing the Individual Defendants' worth or that they have declared bankruptcy. The Individual Defendants also attempt to shift blame to their former counsel—but as they admit, the Court of Chancery excluded their advice of counsel defense as untimely, a decision that the Individual Defendants do not challenge. (*Id.*

at 42.) Other facts are simply irrelevant—for instance, even if the CSS Process was unprofitable, that did not give the Individual Defendants the right to misappropriate it. (*See id*. at 42-43.) Likewise, CSS's conduct is not at issue, and just because the Court of Chancery did not find the Individual Defendants liable for fraud or tortious interference does not excuse their misappropriation. (*See id.* at 43.) In fact, the Court of Chancery did conclude that Individual Defendants Hal and Matthew Kamine and Barry Starkman were dishonest in their testimony and "caught" in several "lies." (Op. at 3 n.7.)

Tellingly, the Individual Defendants still attempt to justify their conduct and shift blame onto CSS, their victim. This Court should remand so that the Court of Chancery can evaluate the Individual Defendant's conduct under the correct legal standard.

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: May 27, 2025

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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

CERTIFICATE OF SERVICE

I, Richard L. Renck, Esquire, do hereby certify that on the 27th day of May 2025, I caused a true and correct copy of the foregoing *Amended Reply Brief of Appellant* to be served via File & Serve*X*press, upon the following counsel of record:

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